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### **IMPORTANT NOTE**

**This paper was written in July 2009, BEFORE the parties negotiated an Amended Settlement Agreement in November 2009. All references to the Settlement Agreement in this paper are to the original Settlement Agreement.**

**An appendix (Appendix One) has been added to the end of this paper, setting out the key changes between the original Settlement Agreement and the Amended Settlement Agreement.**

## **THE GOOGLE BOOK SEARCH SETTLEMENT:**

### **IMPLICATIONS FOR AUSTRALIA**

KYLIE PAPPALARDO\*

#### **ABSTRACT**

In 2005, the Association of American Publishers (AAP) and the Authors Guild (AG) sued Google for ‘massive copyright infringement’ for the mass digitization of books for the Google Book Search Project. In 2008, the parties reached a settlement, pending court approval. If approved, the settlement could have far-reaching consequences for authors, libraries, educational institutions and the reading public. In this article, I provide an overview of the Google Book Search Settlement. Firstly, I explain the Google Book Search Project, the legal questions

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raised by the Project and the lawsuit brought against Google. Secondly, I examine the terms of the Settlement Agreement, including what rights were granted between the parties and what rights were granted to the general public. Finally, I consider the implications of the settlement for Australia. The Settlement Agreement, and consequently the broader scope of the Google Book Search Project, is currently limited to the United States. In this article I consider whether the Project could be extended to Australia at a later date, how Google might go about doing this, and the implications of such an extension under the *Copyright Act 1968* (Cth). I argue that without prior agreements with rightholders, our limited exceptions to copyright infringement mean that Google is unlikely to be able to extend the full scope of the Project to Australia without infringing copyright.

## I. INTRODUCTION

When Google announced its plans to digitize the world's collection of books (or as much as possible of the world's collection) via the Google Book Search Project, the announcement was met with widespread excitement. Commentators predicted the creation of a Library of Alexandria for the digital age.<sup>1</sup> But rightholders of copyright in the books being digitized were less than impressed. In late 2005, authors and publishers brought suit against Google, alleging massive copyright infringement.<sup>2</sup> In late 2008, the parties to the lawsuit reached a settlement, pending court approval. If approved, the settlement could have far-reaching consequences for authors, libraries, educational institutions and the reading public.

This article will provide an overview of the Google Book Search Settlement. The first part will explain the Google Book Search Project and will canvass the legal

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<sup>1</sup> See, for example, James Grimmelmann, 'The Google Book Search Settlement: Ends, Means and the Future of Books' (2009) *American Constitution Society for Law and Policy*, Issue Brief, 7 <<http://www.acslaw.org/node/13228>> at 9 July 2009; Robert Darnton, 'Google & the Future of Books' (2009) 56(2) *The New York Review of Books* (online) <<http://www.nybooks.com/articles/22281>> at 9 July 2009; Frank Pasquale, *Beyond Competition: Preparing for a Google Book Search Monopoly* (2009) Balkinization <<http://balkin.blogspot.com/2009/02/beyond-competition-preparing-for-google.html>> at 9 July 2009.

<sup>2</sup> See, for example, Sarah, *Book digitization projects: Google Print and all that* (2005) LawFont.com <<http://www.lawfont.com/2005/11/01/book-digitisation-projects-google-print-and-all-that/>> at 9 July 2009.

questions raised by the Project and the lawsuit brought against Google. It will also address the strength of the fair use arguments made by Google in defence of the Project.

The second part will examine the terms of the Settlement Agreement, including what rights were granted between the parties to the settlement and what rights were granted to the general public.

The third part will consider the implications of the Google settlement for Australia. In general, commentators have expressed a number of serious concerns about the terms of the Settlement Agreement, including privacy concerns about whether Google can (and will) monitor the reading habits of users;<sup>3</sup> antitrust issues surrounding Google and the creation of a new Book Rights Registry under the Settlement Agreement;<sup>4</sup> and concerns about what the settlement means for the continued accessibility of orphaned works.<sup>5</sup> These issues, though pertinent, will not be addressed in this article. Rather, this article will focus on the jurisdictional scope of the Settlement Agreement, which is currently limited to the United

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<sup>3</sup> See, for example, Siva Vaidhyanathan, *Some initial answers to my initial questions about Google Book Search and the settlement* (2008) The Googlization of Everything <[http://www.googlizationofeverything.com/2008/11/some\\_initial\\_answers\\_to\\_my\\_ini.php](http://www.googlizationofeverything.com/2008/11/some_initial_answers_to_my_ini.php)> at 9 July 2009; James Grimmelman, 'How To Fix The Google Book Search Settlement' (2009) 12(10) *Journal of Internet Law* 1, 12, 16; Ryan Singel, *Critics: Google Book Deal a Monopoly, Privacy Debacle* (2009) *Wired* <[http://www.wired.com/epicenter/2009/06/google\\_books/](http://www.wired.com/epicenter/2009/06/google_books/)> at 9 July 2009.

<sup>4</sup> See for example, James Grimmelman, above n3, 10, 13-15; Siva Vaidhyanathan, above n3. It was recently announced that the US Department of Justice has launched an antitrust inquiry into the Google Book Search Settlement: see, Nancy Gohring, IDG News Service, 'DOJ Officially Opens Investigation Into Google Book Search', *PC World*, 2 July 2009 <[http://www.pcworld.com/businesscenter/article/167830/doj\\_officially\\_opens\\_investigation\\_into\\_google\\_book\\_search.html](http://www.pcworld.com/businesscenter/article/167830/doj_officially_opens_investigation_into_google_book_search.html)> at 14 July 2009; John Paczkowski, *DOJ Confirms Antitrust Investigation Into Google Book Settlement* (2009) *Digital Daily* <<http://digitaldaily.allthingsd.com/20090702/doj-officially-opens-antitrust-investigation-into-google-book-settlement/>> at 14 July 2009; Miguel Helft, 'Justice Dept. Opens Antitrust Inquiry Into Google Books Deal', *New York Times* (New York), 28 April 2009 <<http://www.nytimes.com/2009/04/29/technology/internet/29google.html>>; Frank Pasquale, *Beyond Competition: Preparing for a Google Book Search Monopoly* (2009) *Balkinization* <<http://balkin.blogspot.com/2009/02/beyond-competition-preparing-for-google.html>> at 14 July 2009.

<sup>5</sup> See, for example, James Grimmelman, above n1, 8-9; Harry Lewis, *In Which We Seek To Intervene in the Google Books Settlement* (2009) *Blown to Bits* <<http://www.bitsbook.com/2009/04/in-which-we-seek-to-intervene-in-the-google-books-settlement/>> at 9 July 2009; Miguel Helft, 'Google's Plan for Out-of-Print Books is Challenged', *The New York Times* (New York), 4 April 2009 <<http://www.nytimes.com/2009/04/04/technology/internet/04books.html>> at 6 July 2009; Pamela Samuelson, 'Legally Speaking: The Dead Souls of the Google Booksearch Settlement' (forthcoming – July 2009) 52 *Communications of the ACM*, available at SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1387782](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387782).

States. This article will consider whether the settlement conditions and consequently the full scope of the Google Book Search Project could be extended to Australia at a later date,<sup>6</sup> how Google might go about doing this, and the copyright implications of such an extension as under the *Copyright Act 1968* (Cth).

## II. THE GOOGLE BOOK SEARCH PROJECT

### A. Overview of the Project

In 2004, Google launched the Google Print Project, which was subsequently renamed the Google Book Search Project in November 2005.<sup>7</sup> Google's humble goal was to make every book in the English language (and eventually in other languages) text-searchable online.<sup>8</sup>

The Google Print Project, as it was first envisaged, contained two 'limbs' – 'Google Publisher', which scanned books that publishers voluntarily offered to Google ('opt-in' for publishers),<sup>9</sup> and 'Google Library', where Google scanned books in certain libraries, with the consent of the libraries but not necessarily the consent of the publishers ('opt-out' for publishers).<sup>10</sup>

Under the Google Library program, Google intended to scan all the books held by five partner libraries into the Google Library database. The five libraries were

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<sup>6</sup> Considering that the United States and Australia have very different exceptions to copyright infringement (fair use cf. fair dealing).

<sup>7</sup> Lawrence Lessig, 'Is Google Book Search Fair Use?' (podcast posted as *Google Book Search: The Argument* on Lessig Blog, 14 January 2006) <[http://www.lessig.org/blog/2006/01/google\\_book\\_search\\_the\\_argumen.html](http://www.lessig.org/blog/2006/01/google_book_search_the_argumen.html)> accessed 9 July 2009; Sarah, above n2.

<sup>8</sup> James Gibson, 'Google's New Monopoly?', *The Washington Post* (Washington), 3 November 2008 <<http://www.washingtonpost.com/wp-dyn/content/article/2008/11/02/AR2008110201721.html>> at 9 July 2009; Sarah, above n2.

<sup>9</sup> This has also been called the Google Partner program. Publishers who participated in the Publisher program could choose to opt-in or opt-out with respect to specific works, and receive a percentage of the advertising revenue for only those works that they authorised Google to scan. Participating publishers could remove particular titles from the Publisher Program at any time; Sarah, above n2.

<sup>10</sup> Peter Suber, 'Does Google Library Violate Copyright?' (2005) 90 *SPARC Open Access Newsletter* <<http://www.earlham.edu/~peters/fos/newsletter/10-02-05.htm#google>> at 9 July 2009; Kate M. Manuel, *The Google Library Project: Is Digitization for Purposes of Online Indexing Fair Use Under Copyright Law?* Congressional Research Service (CRS) Report for Congress (2009) 2 <<http://opencrs.com/document/R40194/2009-02-05>> at 9 July 2009.

Harvard University, Stanford University, the University of Michigan, Oxford University and the New York Public Library. The Google Library program encompassed books under copyright as well as books in the public domain. Google's plan was to scan all books and then to grant access to the books differentially, depending on the copyright status of the book.

In a lecture uploaded online via podcast, Professor Lawrence Lessig of Stanford University explains that there were three categories applying to the 18 million books in the original Google Book Search Project: (1) in copyright and still in print – this comprised approximately 9% of the total; (2) public domain works – approximately 16% of the total; and (3) in copyright but out of print – the remaining 75%.<sup>11</sup> For public domain works, Google would allow full access for free. For works that were in copyright and in print, Google would provide as much access as the publisher or author would allow. For in copyright works, including works that were in copyright but out of print (sometimes called 'orphan works'),<sup>12</sup> Google would provide at least 'snippet' access.<sup>13</sup> This meant that a user could search for a word within a book and view that word in context – i.e. view that word and the words immediately surrounding that word. If a user attempted to search the same book repeatedly, they would be blocked from searching that text.<sup>14</sup> Lessig called this 'an index for the 21<sup>st</sup> century'.<sup>15</sup>

## B. *Lawsuit against Google*

On 20 September 2005, the Authors Guild (AG) brought a class action suit against Google in the United States District Court in the Southern District of New York.<sup>16</sup>

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<sup>11</sup> Lawrence Lessig, above n7.

<sup>12</sup> The term 'orphan works' has been used broadly in relation to the Google Book Search Project, often to refer to books that are in copyright but out of print (perhaps with the assumption that the rights holders of such work may be impossible or difficult to find). However, under law, the meaning is usually more confined. Usually, 'orphan works' means works that are in copyright but where the rights holder of the work is unknown or cannot be located after diligent searching.

<sup>13</sup> See, for example, Kate M. Manuel, above n10.

<sup>14</sup> Lawrence Lessig, above n7; Jonathan Band, 'The Google Print Library Project: A Copyright Analysis' (2005) *E-Commerce Law & Policy*, preprint online, 3–4 <[www.policybandwidth.com/doc/googleprint.pdf](http://www.policybandwidth.com/doc/googleprint.pdf)> at 9 July 2009.

<sup>15</sup> Lawrence Lessig, above n7.

<sup>16</sup> See Pamela Samuelson, above n5. Professor Samuelson writes, 'Many copyright professionals expected the *Authors Guild v. Google* case to be the most important fair use case of the 21<sup>st</sup> century.'

On 19 October 2005, the Association of American Publishers (AAP) filed a similar suit. Both lawsuits claimed ‘massive copyright infringement’ because Google had copied works without the permission of the copyright holders.<sup>17</sup> It was asserted that as a result, Google had ‘reduced the value of those works to the rights holders, caused lost profits, and damaged the goodwill and reputation of those rights holders.’<sup>18</sup>

In an article published in the *Washington Times* on 3 November 2005, Pat Schroeder, current president of the AAP and former member of Congress, and Bob Barr, former member of the House of Judiciary Committee, alleged that Google was ‘bent on unilaterally changing copyright law to their benefit and in turn denying publishers and authors the rights granted to them by the U.S. Constitution.’<sup>19</sup> They claimed that the lawsuits against Google were ‘needed to halt theft of intellectual property. To see it any other way is intellectually dishonest.’<sup>20</sup>

Yet it was becoming clear from the storm of public comment generated around this case that the AAP and the AG did not speak for all authors and publishers. In September 2005, Tim O’Reilly wrote in the *New York Times*:

As both an author and publisher, I find the Guild's position to be exactly backward...A search engine for books will be revolutionary in its benefits. Obscurity is a far greater threat to authors than copyright infringement, or even outright piracy...Google Library is intended to help readers discover copyrighted works, not to give copies away. It's a tremendous service to authors that will help them beat the dismal odds of publishing as usual.”<sup>21</sup>

### C. *The fair use arguments*

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<sup>17</sup> The lawsuits were initially restricted to Google’s copying of works in the University of Michigan’s collection: Sarah, above n2 (note that it is stated in this article that it was not explained in either complaint filed why the University of Michigan’s collections were specifically targeted in the complaint but the collections of the other participating libraries were not).

<sup>18</sup> Sarah, above n2.

<sup>19</sup> Pat Schroeder and Bob Barr, ‘Reining in Google’, *Washington Times* (Washington), 3 November 2005 <<http://www.washingtontimes.com/news/2005/nov/02/20051102-093349-7482r/>> at 9 July 2009.

<sup>20</sup> Ibid.

<sup>21</sup> Tim O’Reilly, ‘Search and Rescue’, *New York Times* (New York), 28 September 2005 <<http://www.nytimes.com/2005/09/28/opinion/28oreilly.html>> at 9 July 2009.

From the outset, Google argued that the Google Book Search Project did not engage in copyright infringement and was instead governed by the doctrine of fair use. All claims of copyright infringement in the US are subject to the doctrine of fair use, which James Grimmelmann describes as a test of social value weighed against any harm to the copyright owner.<sup>22</sup>

Section 107 of the United States Copyright Act 1976 provides a four factor test for fair use, requiring a court to consider:

§ 107. Limitations on exclusive rights: Fair use

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors under Section 107 must not be treated in isolation from each other but should all be considered together.<sup>23</sup>

The AAP and the AG argued that the Google Book Search Project was not a fair use because Google's use was a commercial use – Google would be profiting from advertisements placed alongside the digitized books online (relevant to the first factor). Further, systematic users could patch together significant portions of a book from the snippets provided by Google (relevant to the third and fourth factors). And lastly, the AAP and AG argued that Google's opt-out policy reversed the usual burden of notification from those who wanted to copy material under copyright (Google) to those who want to protect their copyright interests

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<sup>22</sup> James Grimmelmann, above n1, 3.

<sup>23</sup> See Kate M. Manuel, above n10, 5–9.



(the rightsholders).<sup>24</sup>

Google countered, arguing that the Book Search Project *was* fair use because Google indexing would help sell books, generating revenue for rightsholders, and although Google would also be making money, it does not violate the law to sell advertisements next to fair use snippets.<sup>25</sup> Google also contended that the AAP and AG's claim that snippets could be patched together did not preclude fair use – it was true of every kind of fair use that snippets could be patched together.<sup>26</sup> Finally, Google asserted that opt-out is the accepted standard for indexing web-content and the Google Book Search Project would have been virtually impossible to undertake otherwise.

The primary argument made by the AAP and AG in response was that *even if* the resulting access that Google provided to users of the scanned content – the 'snippet' display – was fair use, in order to make that use Google had to copy *entire* works, which was not fair use. Therefore, the project was engaging in uses that were not covered by the doctrine of fair use.

This argument follows from a Second Circuit case in 2000, *UMG Recordings, Inc. v MP3.com Inc.*<sup>27</sup> In that case, MP3.com Inc. had used a technology called 'beam it' to give users access to their personal CD collection wherever they happened to be on the network, such as their home, office or the home of a friend. The 'beam it' technology protected the collection by requiring a password for access. In order to make this service available, MP3.com Inc. copied around 50,000 CDs to its servers so that these CDs could be made available to users who owned the relevant CD in their personal collection. MP3.com Inc. argued that they were merely facilitating fair use by giving a person access to their CD collection wherever they were ('space-shifting').<sup>28</sup> However, the court had to determine who had authorised the original copies of the CDs made onto the MP3.com Inc. servers. The court held that no one had authorised the original copies and neither

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<sup>24</sup> See Peter Suber, above n10; see also Kate M. Manuel, above n10, 3.

<sup>25</sup> See Peter Suber, above n10; Kate M. Manuel, above n10, 3–4.

<sup>26</sup> *Ibid.*

<sup>27</sup> 92 FSupp 2d 349 (SDNY 2000).

<sup>28</sup> *UMG Recordings, Inc. v MP3.com Inc.* 92 FSupp 2d 349, 350-351 (SDNY 2000).

were these justified by fair use.<sup>29</sup> The court ordered damages against MP3.com Inc. in the amount of \$110 million.<sup>30</sup>

In the case of the Google Book Search Project, the same issue arises – who has authorised Google to make the original copy in scanning the book into their database to facilitate (fair-use) access authorised? If the principle from *UMG Recordings, Inc. v MP3.com Inc.* is applied, then the AG and the AAP have a strong argument that the Google Book Search Project is not protected by fair use.<sup>31</sup>

Google, on the other hand, argued in reliance on the 2003 Ninth Circuit case, *Kelly v Arriba Soft*,<sup>32</sup> which involved a search engine taking thumbnail images of copyrighted content on the internet and providing access to those images for search purposes. In that case, the court held that the making of thumbnail copies for the purpose of creating an index to copyrighted images available elsewhere was a fair use.<sup>33</sup> The court held that there had been a transformation of the original copyright work in that it had been reduced to a thumbnail so as to link back to the original work.<sup>34</sup> The thumbnail images were not substitutions for the original works as their quality was poor.<sup>35</sup> The court held that the thumbnails provided access to the original work in a way that protected and advanced the interests of the original copyright owner.<sup>36</sup>

It can be argued that the Google Book Search Project undertakes the same process as that in *Kelly v Arriba Soft* – Google produces a reduced image (in a sense) of the original book in the form of snippets. These snippets are a reduced quality transformation of the original work, which provides an opportunity to link back to the original work in a way that promotes the interests of the copyright owner. The Google Book Search Project does not offer a substitution for the original work, but

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<sup>29</sup> *UMG Recordings, Inc. v MP3.com Inc.* 92 FSupp 2d 349, 352-353 (SDNY 2000).

<sup>30</sup> Also see summaries provided by Lawrence Lessig, above n8 and Kate M. Manuel, above n10, 7.

<sup>31</sup> Lawrence Lessig, above n7.

<sup>32</sup> 336 F.3d 811.

<sup>33</sup> *Kelly v Arriba Soft* 336 F.3d 811, 815, 817 (Cal. 2003).

<sup>34</sup> *Kelly v Arriba Soft* 336 F.3d 811, 818- 819 (Cal. 2003).

<sup>35</sup> *Kelly v Arriba Soft* 336 F.3d 811, 818-819 (Cal. 2003).

<sup>36</sup> *Kelly v Arriba Soft* 336 F.3d 811, 821-822 (Cal. 2003); also see summaries provided by Lawrence Lessig, above n7 and Kate M. Manuel, above n10, 6.

rather an advanced index that refers back to the original copyright-protected work in a way that actually provides value to that original work.<sup>37</sup>

In the piece, ‘The Google Print Library Project: A Copyright Analysis’, Jonathan Band argued:

Everything the Ninth Circuit stated with respect to *Arriba* applies with equal force to the Print Library Project. Although Google operates the program for commercial purposes, it is not attempting to profit from the sale of a copy of any of the books scanned into its database, and thus its use is not highly exploitative...Neither the full text copies in the index, nor the few sentences displayed to users in response to queries, will supplant the original books. Rather, they will bring the books to the user’s attention...<sup>38</sup>

Band was joined by a number of copyright law heavyweights who openly stated their belief that Google had a strong fair use claim. These experts included Professor Lawrence Lessig of Stanford University,<sup>39</sup> Neil Netanel,<sup>40</sup> and Electronic Frontiers Foundation (EFF) staff attorney, Corynne McSherry.<sup>41</sup>

#### D. *Significance of the case*

The enormous interest generated around the Google Book Search Project was primarily the result of claims that the AAP and AG were attempting to ‘land-grab’ new areas of profit arising from the digital age that were the result of someone else’s (Google’s) effort and innovation.<sup>42</sup> Concerns were expressed that if AAP and AG were to prevail in their lawsuit, or if Google were to settle, then the consequence would be a stifling of the market and of innovation.<sup>43</sup> Lessig stated:

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<sup>37</sup> Lawrence Lessig, above n7. See also Jonathan Band, above n14, 3-4.

<sup>38</sup> Jonathan Band, above n14, 3-4. Although the suit against Google was brought in the Second Circuit rather than the Ninth Circuit, Band contends that the *Kelly v Arriba Soft* precedent had some weight in the Google case, as the court relied heavily on the Supreme Court’s decision in *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). See also Sarah, above n2.

<sup>39</sup> See Lawrence Lessig, above n7.

<sup>40</sup> See Neil Netanel, *Is the Pendulum Swinging on Fair Use?* (2008) Balkinization <<http://balkin.blogspot.com/2008/09/is-pendulum-swinging-on-fair-use.html>> and *Google Book Search Settlement* (2008) Balkinization <<http://balkin.blogspot.com/2008/10/google-book-search-settlement.html>> at 9 July 2009.

<sup>41</sup> Corynne McSherry quoted by Reyhan Harmanci, ‘Google, book trade groups settle lawsuits’, *San Francisco Chronicle* (San Francisco), 29 October 2008 <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/28/BU2413PJR1.DTL>> at 9 July 2009.

<sup>42</sup> See Lawrence Lessig, above n7.

<sup>43</sup> *Ibid.*

You might imagine what would it be like if in fact Google settled this case. For Google, of course, can afford to pay whatever the AG or the AAP would force them to pay to grant access to these works. But practically no one else can pay in the same way. And so if Google were to settle and set a precedent that to get access to these works and make them accessible in this way you need to pay first or you need to suffer the extraordinary burden of clearing permissions first, then what that would do would mean only the few would be permitted to innovate in this extraordinary new field.<sup>44</sup>

### III. THE SETTLEMENT

On 28 October 2008, Google, the AAP and the AG reached a Settlement Agreement, subject to court approval.<sup>45</sup> The Settlement Agreement, if approved, would bind all Class Members of the class action suit,<sup>46</sup> defined to mean all persons who as at 5 January 2009 own a ‘U.S. copyright interest’ in one or more books or inserts affected by the settlement.<sup>47</sup> In other words, the Settlement Agreement:

- only affects books or inserts published before 5 January 2009;<sup>48</sup>
- affects authors and publishers within the United States; and
- affects authors and publishers outside the United States, if their book was published in the US or if their book was not published in the US but the author or publisher’s country has copyright relations with the US because it is a member of the Berne Convention.<sup>49</sup>

Section 10.2 of the Settlement Agreement releases Google and associated libraries

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<sup>44</sup> Ibid.

<sup>45</sup> United States District Court Southern District of New York, *The Authors Guild Inc., Association of American Publishers Inc., et al (Plaintiffs) v. Google Inc. (Defendant)*, Case No. 05 CV 8136-JES, Settlement Agreement, 28 October 2008, <[http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement)> at 9 July 2009.

<sup>46</sup> Professor Samuelson writes, ‘U.S. law allows the filing of “class action” lawsuits whose named plaintiffs claim they represent a class of persons who have suffered the same kind of harm from the defendant’s wrongful conduct as long as there are common issues of fact and law that make it desirable to adjudicate the claims in one lawsuit instead of many.’: Pamela Samuelson, above n5.

<sup>47</sup> See Final Notice of Class Action Settlement, 5 <[http://www.googlebooksettlement.com/r/view\\_notice](http://www.googlebooksettlement.com/r/view_notice)> at 9 July 2009.

<sup>48</sup> Presumably, any books or inserts published after this date will only be included in the Google Book Search Project if submitted via the Google Publisher program.

<sup>49</sup> See Final Notice of Class Action Settlement, 5-6 <[http://www.googlebooksettlement.com/r/view\\_notice](http://www.googlebooksettlement.com/r/view_notice)> at 9 July 2009.

from all claims ‘that relate in any way to the commencement, prosecution, defense or settlement of the Action’. This is notwithstanding that despite reaching an agreement, Google continues to deny any wrongdoing, unlawful activity or copyright infringement on its part.<sup>50</sup>

On 17 November 2008, Judge John E. Sprizzo gave preliminary approval to the Settlement Agreement, authorised publication of the notice of settlement and set a final fairness hearing for 11 June 2009.<sup>51</sup> Originally, Class Members were given until 5 May 2009 to opt out of the settlement.<sup>52</sup> The nature of the class action suit meant that all persons who fell within the definition of ‘Class Member’ would be bound by the settlement unless they chose to opt out. The class in this particular action was so wide – the action affecting most authors and publishers everywhere – that in order to notify all class members of the proposed settlement and the procedural requirements for opting out, Google had to engage in the largest notification process ever undertaken.<sup>53</sup> In response to repeated requests from authors and others for more time to consider the implications of the settlement,<sup>54</sup> Justice Denny Chin of the US District Court for the Southern District of New York granted a four month extension in the settlement proceedings, taking the opt-out deadline to 4 September 2009 and rescheduling the final fairness hearing to 7

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<sup>50</sup> See United States District Court Southern District of New York, *The Authors Guild Inc., Association of American Publishers Inc., et al (Plaintiffs) v. Google Inc. (Defendant)*, Case No. 05 CV 8136-JES, Settlement Agreement, 28 October 2008, 1 <[http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement)> at 9 July 2009.

<sup>51</sup> *Preliminary Court Approval of Google Book Settlement; Final Approval Hearing Set* (2008) Disruptive Library Technology Jester <<http://dltj.org/article/gbs-settlement-preliminary-approval/>> at 9 July 2009; Court order available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/64/>; the fairness hearing will determine whether the Settlement is fair, adequate and reasonable, and at or after the fairness hearing the court will decide whether to approve the Settlement Agreement: see Final Notice of Class Action Settlement, 27-28 <[http://www.googlebooksettlement.com/r/view\\_notice](http://www.googlebooksettlement.com/r/view_notice)> at 9 July 2009.

<sup>52</sup> *Preliminary Court Approval of Google Book Settlement; Final Approval Hearing Set* (2008) Disruptive Library Technology Jester <<http://dltj.org/article/gbs-settlement-preliminary-approval/>> at 9 July 2009; Court order available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/64/>; Opting out would remove persons from the benefits of the settlement but would preserve their right to bring their own legal action against Google: see Final Notice of Class Action Settlement, 25 <[http://www.googlebooksettlement.com/r/view\\_notice](http://www.googlebooksettlement.com/r/view_notice)> at 9 July 2009; see also *Opt out of the Google Book Settlement* (2008) Google Books Settlement website <[http://www.googlebooksettlement.com/r/enter\\_opt\\_out/](http://www.googlebooksettlement.com/r/enter_opt_out/)> at 9 July 2009.

<sup>53</sup> See Meredith Filak, *Peter Brantley on the Google Books Settlement* (2009) Knowledge Ecology Notes <<http://www.keionline.org/blogs/2009/04/10/peter-brantley-google-books/>> 9 July 2009.

<sup>54</sup> See Fred von Lohmann, *Google Book Search Settlement: Recent Developments* (2009) Electronic Frontier Foundation Blog <<http://www EFF.org/deeplinks/2009/04/google-book-search->> at 9 July 2009; *Summary of Recent Google Book Search Settlement Activities* (2009) Disruptive Library Technology Jester <<http://dltj.org/article/gbs-summary/>> at 9 July 2009.

October 2009.<sup>55</sup>

The following part of this article explains the primary sections relating to rights, restrictions and conditions of the Settlement Agreement. It does not cover the 134-page Settlement Agreement in its entirety. Rather, it covers the sections of the Agreement that will have the most profound effect, in practice, on Google, the Rightsholders, libraries, universities and the general public.<sup>56</sup>

### A. *Payments to be made by Google*

Under the Agreement, Google is required to pay a minimum of US \$45 million into the Settlement Fund to pay the Class Members whose books or inserts have been digitized prior to the opt out deadline.<sup>57</sup> This money is to be distributed in the form of cash payments of at least:

- US \$60 per Principal Work;<sup>58</sup>
- US \$15 per Entire Insert;<sup>59</sup> and
- US \$5 per Partial Insert.<sup>60</sup>

To the extent that funds greater than US \$45 million are required in order to pay every Class Member, Google is to make additional payments to the Settlement Fund.<sup>61</sup>

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<sup>55</sup> Daniel Terdiman, 'Judge issues extension in Google Book Search settlement', *cnet News, Digital Media*, 28 April 2009, <[http://news.cnet.com/8301-1023\\_3-10229372-93.html](http://news.cnet.com/8301-1023_3-10229372-93.html)> at 9 July 2009; Fred von Lohmann, above n54; Google Book Settlement website <<http://www.googlebooksettlement.com/r/home>> at 9 July 2009.

<sup>56</sup> For another summary of the Settlement Agreement, see Jonathan Band, 'A Guide for the Perplexed: Libraries and the Google Library Project Settlement' (2008) *American Library Association (ALA) and Association of Research Libraries (ARL)* <<http://www.arl.org/pp/ppcopyright/google/>> at 9 July 2009.

<sup>57</sup> United States District Court Southern District of New York, *The Authors Guild Inc., Association of American Publishers Inc., et al (Plaintiffs) v. Google Inc. (Defendant)*, Case No. 05 CV 8136-JES, Settlement Agreement, 28 October 2008, Article II - Section 2.1 (b), Sections 5.1 (a) and (b) <[http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement)> at 9 July 2009.

<sup>58</sup> Principal Work is defined in Section 1.111 to mean a book's principal written work.

<sup>59</sup> Entire Insert is defined in Section 1.50 to mean 'an Insert that is an entire work, including forewords, afterwords, introductions, entire works included in anthologies, and entire poems, short stories, song lyrics or essays.' Insert is defined in Section 1.72.

<sup>60</sup> Partial Insert is defined in Section 1.100 to mean 'an Insert other than an Entire Insert'. Insert is defined in Section 1.72.

<sup>61</sup> Section 2.1(b); Section 5.1(b).

Additionally, Google is required to pay US \$34.5 million to establish and fund the initial operations of the Book Rights Registry.<sup>62</sup> The Registry will be responsible for locating and collecting information from Rightsholders,<sup>63</sup> identifying and coordinating payments to Rightsholders and otherwise representing the interests of Rightsholders under the Settlement Agreement.<sup>64</sup> Thereafter, Google must pay to the Registry 63%<sup>65</sup> of all revenues earned by Google through uses of books in Google Products and Services in the United States authorised under the Settlement Agreement. The Registry will distribute these funds to Rightsholders in accordance with a Plan of Allocation as set out in the Settlement Agreement.<sup>66</sup>

Finally, Google is required to pay the Plaintiff's attorney's fees and costs.<sup>67</sup>

## B. *Google's rights under the Settlement Agreement*

The Settlement Agreement authorises Google to, in the United States, sell subscriptions to the Institutional Subscription Database, sell individual books, place advertisements on online book pages, and make other commercial uses of books.<sup>68</sup>

### 1. *Right to digitize*

Section 3.1(a) gives Google a non-exclusive licence to digitize all books and inserts obtained by Google from any source, and allows Fully Participating and Cooperating Libraries to provide Google with books and inserts in hard copy to be digitized.<sup>69</sup>

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<sup>62</sup> Section 2.1 (c); Section 5.2.

<sup>63</sup> 'Rightsholder' is defined in section 1.132 to mean a member of the Settlement Class who does not opt out of the Settlement by the opt-out deadline.

<sup>64</sup> Section 2.1 (c). See also Article VI, in particular Section 6.1 (Functions of Registry).

<sup>65</sup> 70% less 10% for Google's operating costs.

<sup>66</sup> Section 2.1(a); Section 4.4; Section 4.5; Section 4.6.

<sup>67</sup> Section 2.1 (d) in accordance with Section 5.5. 'Plan of Allocation' is defined in Section 1.105 and set out in Attachment C to the Settlement Agreement.

<sup>68</sup> Section 2.1 (a). 'Institutional Subscription Database' is defined in Section 1.75 to be the meaning set forth in Section 4.1(a)(v) (discussed in this paper under the heading 'Institutional subscriptions (universities, schools and governments)'), 'Book' is defined at Section 1.16 and 'Online Book Page' is defined in Section 1.97.

<sup>69</sup> Fully Participating Library is defined in Section 1.58; Cooperating Library is defined in Section

## 2. *Rights to display*

Under Section 3.2 (a), Google and the Registry are to classify all books as either Display Books or No Display Books. Google will initially classify a book as No Display if it is determined to be commercially available as at the Notice Commencement Date, and Display if it is determined not to be commercially available as at the Notice Commencement Date.<sup>70</sup>

In relation to public domain books,<sup>71</sup> Section 3.2 (d)(v)(3) is a safe harbour provision that if Google has followed the designated procedure for determining whether a book is in the public domain (as set out in Attachment E (Public Domain) to the Settlement Agreement), then

Google may treat such book as if it is in the public domain under the Copyright Act in the United States for the purposes of this Settlement Agreement, and Google will have no liability or obligations (a) for any use of such book to the extent that such use would be authorized under this Settlement Agreement if such book were a Display Book or (b) for providing downloadable versions of such book.

Under Sections 3.3 (a) and (b) Google is permitted to make Display Uses and Non-Display Uses of all Display Books and inserts in Display Books.<sup>72</sup> Display Uses include:<sup>73</sup>

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1.36. Under the Settlement, Google may also make technical adaptations to (but not adapt or alter the content of) all books and inserts as reasonably necessary to preserve, maintain, manage and keep technologically current its copies of the books and inserts: Section 3.6.

<sup>70</sup> Section 3.2(b). Sections 3.2 (b) – (e) set out the process by which Google is to determine whether or not a book is commercially available, and how Google or a Rightsholder may change a book's classification. 'Commercially Available' is defined in Section 1.28 to mean, 'with respect to a Book, that the Rightsholder of such Book, or such Rightsholder's designated agent, is, at the time in question, offering the Book (other than as derived from a Library Scan) for sale new through one or more then-customary channels of trade in the United States.' 'Notice Commencement Date' is defined in Section 1.94 to mean the first date of the Class Notice Program, as agreed between the Plaintiffs and Google and approved by the Court. See also Article XII.

<sup>71</sup> Public Domain Book is defined in Section 1.116.

<sup>72</sup> Google is permitted to provide the Display Uses in a manner that accommodates users with Print Disabilities so that such users have a substantially similar user experience as users without Print Disabilities: Section 3.3(d). Print Disability is defined to mean any condition in which a user is unable to read or use standard printed material due to blindness, visual disability, physical limitations, organic dysfunction or dyslexia: Section 1.112.

<sup>73</sup> See Section 1.48.



- Snippet Display – uses that display up to three snippets (each snippet being about three to four lines of text) per search term per user;<sup>74</sup>
- Front Matter Display – the display of one or more of the title page, copyright page, table of contents, other pages that appear prior to the table of contents at the front of the book, and indexes of a book;<sup>75</sup>
- Access Uses – a use that may display copyright protected material from a book or insert as under an Institutional Subscription, Consumer Purchase or Public Access Service;<sup>76</sup> and
- Preview Uses – Google may offer a free Preview Use to allow users to sample a book prior to making a purchase decision, unless a Rightsholder of a book directs Google or the Registry not to allow Preview Use of that book.<sup>77</sup>

Subject to some exceptions,<sup>78</sup> the default Preview Use is Standard Preview.<sup>79</sup> Standard Preview means that Google may display, in addition to Front Matter Display, up to 20% of the pages of a book to a user but no more than five adjacent pages at a time, before or after which no fewer than two pages are blocked.<sup>80</sup> For fiction books, Google must block the final 5% of the book's pages or a minimum of the final fifteen pages of the book.<sup>81</sup> Unless approved by the Registry or the Rightsholder, Google cannot offer users copy/paste, print or annotation functionalities as part of Preview Uses.<sup>82</sup>

Non-Display Uses are uses that do not display expression from digital copies of

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<sup>74</sup> Section 1.147. Under Section 3.9 (Distribution Arrangements), where Google may make a Snippet Display of a book under the Settlement Agreement, Google may also allow third parties that have entered into agreements with Google to display snippets served by Google on their websites in response to user interactions on their websites and to cache temporarily snippets transmitted by Google for future display on their websites in response to user interactions on their websites.

<sup>75</sup> Section 1.57.

<sup>76</sup> Section 1.1. Institutional Subscription is defined in Section 1.74, Consumer Purchase is defined in Section 1.32 and Public Access Service is defined in Section 1.115. These services are explained below.

<sup>77</sup> Section 4.3(a).

<sup>78</sup> Set out in Section 4.3 (b).

<sup>79</sup> Section 4.3 (b)(i).

<sup>80</sup> Section 4.3 (b)(ii)(1).

<sup>81</sup> Section 4.3 (b)(ii)(1).

<sup>82</sup> Section 4.3 (b)(ii)(3). For the meaning of 'Expression' see Sections 1.51 and 1.114.

books or inserts to the public. The definition of Non-Display Uses provides:

By way of example, display of bibliographic information, full-text indexing without display of Expression (such as listing the number or location of search matches), geographic indexing of Books, algorithmic listings of key terms for chapters of Books, and internal research and development using Digital Copies are all Non-Display Uses.<sup>83</sup>

For No Display Books, Google is only permitted to make Non-Display Uses.<sup>84</sup>

### 3. *Right to place advertisements*

Google is permitted to display advertisements on Preview Use pages and other Online Book Pages ('Advertising Uses').<sup>85</sup> Online Book Pages are defined to mean any page in Google Products and Services dedicated to a single book, including any Preview Use page, any Snippet Display page, any page of a book displayed in Google Products and Services, and search results pages resulting from a search within a single book.<sup>86</sup>

### 4. *Right to Registry data*

Google has a right to Registry data under Section 6.5 of the Settlement Agreement.

## C. *Google's restrictions under the Settlement Agreement*

Section 3.10 sets out the specific prohibitions and limitations applying to Google's rights under the Agreement. In short, unless expressly permitted by the Settlement Agreement or expressly authorised by the Registry or the relevant Rightsholder, Google cannot:

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<sup>83</sup> Section 1.91.

<sup>84</sup> Section 3.4.

<sup>85</sup> Section 3.14.

<sup>86</sup> Section 1.97. Except as expressly limited, the Settlement Agreement is expressed to not otherwise limit Google's right to display advertising anywhere on Google Products and Services: Section 3.14.

- display any expression from books or inserts,<sup>87</sup> including in a manner that would constitute a derivative work;<sup>88</sup>
- display summaries or abstracts of, or compilations from books or inserts;<sup>89</sup>
- create hyperlinks to Preview Use Book pages from revenue generating products or services if the effect of those links in the aggregate is to detract from revenue under the Settlement Agreement that the Rightsholder would realize if the links did not exist, unless such products or services are search services or have the effect of making discovery of books easier, more efficient, more widespread or more useful;<sup>90</sup>
- intentionally alter the text of a book or insert when displayed to users;<sup>91</sup>
- add hyperlinks to any content within a page of a book or facilitate the sharing of book annotations;<sup>92</sup> or
- place on, behind or over the contents of a book or portion thereof any pop-up, pop-under, or any other types of advertisements or content of any kind.<sup>93</sup>

Interestingly, Section 3.8(b) of the Settlement Agreement provides that Google will be able to take advantage of any future legislative changes where Google would otherwise be at a competitive disadvantage in its use of books that are subject to the Settlement Agreement, *except that* no changes in the fair use doctrine as codified in Section 107 of the Copyright Act shall trigger Section 3.8(b). Whether legally effective or not, this section purports to limit Google's ability to engage in further uses that would be deemed a 'fair use' under amendments to the current legislation and which go beyond those uses allowed in the Settlement Agreement.

#### D. *Rightsholders' rights under the Settlement Agreement*

In addition to the payment scheme described above, Rightsholders have the

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<sup>87</sup> Section 3.10 (a).

<sup>88</sup> Section 3.10 (a).

<sup>89</sup> Section 3.10 (a).

<sup>90</sup> Section 3.10 (b).

<sup>91</sup> Section 3.10 (c)(i).

<sup>92</sup> Section 3.10 (c)(ii). Note that specific exceptions to this prohibition are set out in section 3.10 (c)(ii)(1)-(5).

<sup>93</sup> Section 3.10 (c)(iii).

following rights under the Settlement Agreement.

1. *Right to exclude*

Rightsholders have the right to remove their book from the Google Book Search Project under Section 3.5 (a)(i). However, this right is limited to removal requests made within 27 months of the Notice Commencement Date.<sup>94</sup> Thereafter, requests will be honoured only to the extent that the book has not yet been digitized. If the book has been digitized, the Rightsholder may request exclusion from particular Display Uses but not complete removal.<sup>95</sup>

Rightsholders of books may direct Google or the Registry to exclude their book or a portion of their book from any one or more Display Uses, Revenue Models or Book Annotation sharing features under Section 3.10 (c)(ii).<sup>96</sup> Rightsholders of inserts may direct that their insert or portion thereof be excluded from all (but not less than all) Display Uses.<sup>97</sup>

2. *Right to hosted version*

Upon request by a Rightsholder, Google will provide a hosted version of the Rightsholder's book for use in conjunction with the Rightsholder's website. Such hosted version will contain the 'look and feel' of the Rightsholder's website, with minimal Google branding.<sup>98</sup>

3. *Rights to select Preview Use*

Regardless of the default setting for Preview Use of a book, a Rightsholder will be able to choose from the following settings for Preview Use of any book.<sup>99</sup>

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<sup>94</sup> 'Notice Commencement Date' is defined in Section 1.94 to mean the first date of the Class Notice Program, as agreed between the Plaintiffs and Google and approved by the Court. See also Article XII.

<sup>95</sup> Section 3.5 (a)(iii).

<sup>96</sup> Section 3.5 (b)(i).

<sup>97</sup> Section 3.5 (b)(i).

<sup>98</sup> Section 3.11. The branding may be tailored by the Rightsholder upon the Rightsholder's further reasonable request.

<sup>99</sup> Section 4.3 (c).

- Fixed Preview – Google may display (in addition to the Front Matter Display) up to 10% of the pages of a book and such pages are fixed (i.e. not dependent on the user’s search terms);<sup>100</sup>
- Standard Preview;<sup>101</sup> or
- Continuous Preview – Google may display up to 10% of the pages of a book to a user without the adjacent page limitations of Standard Preview.<sup>102</sup>

### E. *Provisions relating to libraries*

Under the Settlement Agreement, a distinction is drawn between a Fully Participating Library<sup>103</sup> and a Cooperating Library.<sup>104</sup> A Fully Participating Library has more extensive rights to use digital copies of books.<sup>105</sup>

#### 1. *Fully Participating Library uses*

Section 7.2(a)(i) states that Google may provide a Fully Participating Library with a Library Digital Copy (LDC)<sup>106</sup> of the books in the library’s collection, but is not

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<sup>100</sup> See Section 4.3 (b) (iii); Note that Google will choose the pages displayed in Fixed Preview unless the Registry develops a mechanism to identify for Google particular pages selected by the Rightsholder, in which case the pages will be chosen by the Rightsholder.

<sup>101</sup> See above, ‘Rights to display’.

<sup>102</sup> See Section 4.3 (c)(iii).

<sup>103</sup> Section 1.58 defines ‘Fully Participating Library’ as a ‘library physically located within the United States and organized as or within a not-for-profit or government entity that (a) has signed or signs a Digitization Agreement with Google not later than two (2) years after the Effective Date (unless an extension of such time is approved by the Registry) and (b) enters into a Library-Registry (Fully Participating) Agreement.’

<sup>104</sup> A ‘Cooperating Library’ is defined in Section 1.36 to be ‘any library physically located in the United States and organized as or within a not-for-profit or government entity that (a) has signed or signs a Digitization Agreement with Google not later than two (2) years after the Effective Date (unless an extension of such time is approved by the Registry), (b) provides Books to Google for Digitization but agrees that Google will not provide to such library a Digital Copy of such Books unless otherwise authorized by the Rightsholder, (c) agrees to delete or permanently render unusable promptly any Digital Copies of Books previously provided by Google to such library or that such library receives from Google in the future, and (d) enters into a Library-Registry (Cooperating) Agreement.’

<sup>105</sup> Section 7.2 of the Settlement Agreement provides for the Fully Participating Library uses.

<sup>106</sup> Section 1.78 provides that ‘Library Digital Copy’ or ‘LDC’ means ‘the set (or portion thereof) of all Digital Copies of Books in a Fully Participating Library’s Collection, which Digital Copies are made by copying the Library Scan (or are otherwise made pursuant to Section 7.2(a) (Making of Library Digital Copies)), and which Google provides to the Fully Participating Library.’

to provide a digital copy of any book that is not held by that library.<sup>107</sup> Google may provide a Fully Participating Library with digital copies of books in the library's collection that Google did not digitize from the library's collection, provided that the library may receive an LDC of all the books in its collection only if:

- for a collection of 900,000 books or more, Google digitizes more than 300,000 books from that library's collection; or
- for a collection of fewer than 900,000 books, Google digitizes more than 30% of that collection.<sup>108</sup>

Each Fully Participating Library may make the following uses of its LDC:<sup>109</sup>

- make technical adaptations as reasonably necessary to preserve, maintain, manage and keep technologically current its LDC;<sup>110</sup>
- provide special access to users with a certified Print Disability, including access in the form of electronic text used in conjunction with screen enlargement, voice output or refreshable Braille displays;<sup>111</sup>
- create a print format replacement copy of a book that is damaged, destroyed, deteriorating, lost or stolen or if the existing format in which the book is stored has become obsolete, provided that the library has, after a reasonable effort, determined that an unused replacement copy cannot be obtained at a fair price;<sup>112</sup>
- allow Qualified Users to conduct Non-Consumptive Research on its LDC;<sup>113</sup> and
- if part of a Higher Education Institution, allow faculty members and

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<sup>107</sup> Section 7.2 (a)(ii).

<sup>108</sup> Section 7.2 (a)(ii).

<sup>109</sup> See also Section 7.2 (b)(iv) and (v). However, a Fully Participating Library may not directly or indirectly sell books or access to books and except as allowed under the Settlement Agreement may not directly or indirectly provide access that enables any person to read, print or download any Protected Expression from the LDC: Section 7.2 (c). 'Protected Expression' is one in which a person has a copyright interest under s106 of the Copyright Act, without giving effect to sections 107 through 122 of the Copyright Act: Section 1.114.

<sup>110</sup> Section 7.2 (b)(i).

<sup>111</sup> Section 7.2 (b)(ii).

<sup>112</sup> Section 7.2 (b)(iii).

<sup>113</sup> Section 7.2 (b)(vi). See below under 'Research Corpus' for further discussion of Non-Consumptive Research.

research staff to read, print, download or otherwise use up to five pages of any book from the LDC that is not commercially available, for the purposes of personal scholarly use (for each book, no more than once per person per term) and classroom use that is limited to the instructors and students in the class and for the term in which the class is offered. However, the library cannot allow use of a book pursuant to this section for personal scholarly use and classroom use if such use is available through the Institution Subscription.<sup>114</sup>

## 2. *Research Corpus*

The ‘Research Corpus’ is defined in Section 1.130 as a set of all digital copies of books made in connection with the Google Library Project. Under the Settlement Agreement, the Research Corpus may be created and used for research in which computational analysis is performed on one or more books (‘Non-Consumptive Research’), but not research in which a researcher reads or displays substantial portions of a book to understand the intellectual content presented within the book.<sup>115</sup>

Section 7.2(d)(ii) provides that the Research Corpus may be hosted at up to two Host Sites at any given time.<sup>116</sup> At the request of a Fully Participating Library or a Cooperating Library, Google may also become a (third) Host Site with the approval of the Registry.<sup>117</sup> The Host Sites may provide both on-site and remote access to Qualified Users to use the Research Corpus for Non-Consumptive Research purposes only and to reviewers and challengers of such Non-Consumptive Research.<sup>118</sup> Qualified Users are permitted to report the results of their Non-Consumptive Research in scholarly publications, which may constitute indirect commercial use,<sup>119</sup> but without the express permission of the Registry and Google, direct, for profit, commercial use of information extracted from books in

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<sup>114</sup> Section 7.2 (b)(vii).

<sup>115</sup> Section 1.90. For the significance of this section, see James Grimmelman, above n1, 5.

<sup>116</sup> A Host Site is an institution authorised under the Settlement Agreement to host the Research Corpus: Section 1.67.

<sup>117</sup> Section 7.2 (d)(ii).

<sup>118</sup> Section 7.2 (b)(iii). ‘Qualified User’ is defined in Section 1.121.

<sup>119</sup> Section 7.2 (b)(vii).

the Research Corpus is prohibited.<sup>120</sup>

### 3. *Required Library Services*

Under Section 7.2 (e), Google also has an obligation to provide Required Library Services to Fully Participating Libraries by no later than five years from the Effective Date.<sup>121</sup> These services are:

- for 85% of Library Scans other than Not Counted Library Works and Display Books, free search services online through Google Products and Services and a Library Link;<sup>122</sup> and
- for 85% of Library Scans other than Not Counted Library Works, No Display Books and Library Scans that are not authorised to be included in Institutional Subscriptions pursuant to the terms of the Settlement Agreement, free search services online through Google Products and Services, a Library Link, the Public Access Service and Institutional Subscriptions for Higher Education Institutions.

#### F. *Institutional subscriptions (universities, schools and government)*

‘Institutional Subscription’ means any service of a limited duration provided by Google to an institution for a fee that allows online access to and viewing of the full contents of the Institutional Subscription Database.<sup>123</sup> Under the Settlement Agreement, there are different categories of institutions, for which the pricing of an Institutional Subscription may differ. These categories are:

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<sup>120</sup> Section 7.2 (b)(viii).

<sup>121</sup> Effective Date is defined in Section 1.49.

<sup>122</sup> ‘Library Scan’ is defined in Section 1.81. ‘Not Counted Library Works’ are any Library Scans which Google has reasonable quality, legal or technical concerns that are not solely editorial-based concerns: Section 1.92. ‘Library Link’ means a link placed on pages in Google Book Search dedicated to a single Library Work that directs a user to existing online sources, which, free of charge to the user, assists such user in finding that Library Work in a library: Section 1.79. ‘Library Work’ is defined in Section 1.82.

<sup>123</sup> Section 1.74. ‘Institutional Subscription Database’ is defined in section 1.75 to have the meaning set forth in section 4.1(a)(v). Section 3.7 (a) provides that Google has an obligation to implement both the Institutional Subscriptions and Consumer Purchases services within five years after the Effective Date.



- Corporate;
- Higher Education Institutions, which will be sub-divided into sub-categories based on Carnegie Classifications for Institutions of Higher Education with the United States;<sup>124</sup>
- Schools;
- Government; and
- Public.<sup>125</sup>

The economic terms for Institutional Subscriptions will be governed by two objectives: (1) the realization of revenue at market rates for each book and licence on behalf of Rightholders; and (2) the realization of broad access to the books by the public, including institutions of higher education.<sup>126</sup>

Under the Settlement Agreement, Google and the Registry will use the following parameters to determine the cost of Institutional Subscriptions:

- pricing of similar products and services available from third parties;
- the scope of books available;
- the quality of the scan; and
- the features offered as part of the Institutional Subscription.<sup>127</sup>

The terms relating to Institutional Subscriptions provide that Google may identify Institutional Subscriptions for a small number of discipline-based collections of books that Google will offer as an alternative to the version of the Institutional Subscription that provides access to the entire collection. However, to provide an incentive for institutions to subscribe to the entire Institutional Subscription Database, Google must price the different versions of the Institution Subscriptions such that the price for access to the entire Institutional Subscription Database will

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<sup>124</sup> For more information on the Carnegie Classifications for Institutions of Higher Education with the United States, see Wikipedia Authors, 'Carnegie Classification of Institutions of Higher Education', *Wikipedia* (last updated 11 April 2009) <[http://en.wikipedia.org/wiki/Carnegie\\_Classification\\_of\\_Institutions\\_of\\_Higher\\_Education](http://en.wikipedia.org/wiki/Carnegie_Classification_of_Institutions_of_Higher_Education)> at 9 July 2009. 'Higher Education Institution' is defined in Section 1.66.

<sup>125</sup> Section 4.1 (a)(iv). Schools, Government and Public are not to have remote access without Registry approval.

<sup>126</sup> Section 4.1 (a)(i).

<sup>127</sup> Section 4.1 (a)(ii).

be less than the sum of the prices for access to the discipline-based collections.<sup>128</sup>

The basic features of the Institutional Subscriptions are:

- users will be able to view, copy/paste and print pages of a book, and in some cases may be able to make annotations;<sup>129</sup>
- a user will not be able to select, copy and paste more than four pages of the content of a Display Book with a single copy/paste command;
- printing will be on a page-by-page or a page range basis, but the user will not be able to select a page range that is greater than twenty pages with one print command; and
- Google will include a visible watermark on pages printed from the Institutional Subscription Database, which identifies the material as copyrighted, but such watermark will not obscure the content of the printed pages.<sup>130</sup>

Google has also secured within the Agreement a provision that the terms and conditions of the Institutional Subscriptions will not prohibit any uses of books or inserts that would otherwise be permitted under the Copyright Act without the need for express authorisation from the Rightsholder.<sup>131</sup>

### G. *Consumer Purchases*

Google may also offer Consumer Purchases, which are services that allow a user, for a fee, to access and view online the full contents of a Display Book.<sup>132</sup> This is

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<sup>128</sup> Section 4.1 (a)(v).

<sup>129</sup> A 'Book Annotation' is defined in Section 1.17 to mean 'user-generated text that is both (a) associated with the content on the page of a Book and (b) displayed on or over any web page on which a page of the Book appears.'

<sup>130</sup> Section 4.1 (d). The watermark also displays encrypted session identifying information provided by the subscribing institution during the user's session, which could be used to identify the authorized user that printed the material or the access point from which the material was printed.

<sup>131</sup> Section 4.1 (e).

<sup>132</sup> Section 1.32. Note that the book is only viewable online – it is not downloadable. However, Google's Deputy General Counsel for Products and Intellectual Property, Alexander Macgillivray, has assured interested parties that any books purchased via Consumer Purchase will be available to that buyer forever: Alexander Macgillivray, 'A Discussion Around the Google Book Search Settlement' (Speech and general discussion delivered at the Berkman Center for Internet & Society Luncheon Series, Harvard University, 21 July 2009).

a pay-per-book model, rather than a subscription to the entire corpus. However, a Consumer Purchase grants almost identical rights as provided in the basic features of an Institutional Subscription (see above).<sup>133</sup>

Rightsholders select how their books will be priced under Consumer Purchases. They may select one of two pricing options:

- Specified Price – the Rightsholder identifies the price for which he or she wants the book to be sold for Consumer Purchase; or
- Settlement Controlled Price – the Rightsholder permits the price to be determined by an algorithm that Google will design to find the optimal such price for each book and, accordingly, to maximize revenue for each Rightsholder.<sup>134</sup>

If a Rightsholder does not specifically direct that his or her book be sold at a Specified Price, then the default price will be the Settlement Controlled Price.<sup>135</sup> However, a Rightsholder can switch between the two pricing options at any time, upon seven days prior notice to Google or the Registry.<sup>136</sup>

#### H. *Public Access Service*

The Public Access Service is a service provided by Google to each public library and not-for-profit Higher Education Institution, which allows users to search and view the entire Institutional Subscription Database.<sup>137</sup>

The Public Access Service is offered at no charge,<sup>138</sup> and is provided as follows:

- for not-for-profit Higher Education Institutions that do not qualify as Associate's Colleges pursuant to the Carnegie Classification of Institutions

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<sup>133</sup> Section 4.2 (a).

<sup>134</sup> Section 4.2 (b)(i).

<sup>135</sup> Section 4.2 (b)(iii).

<sup>136</sup> Section 4.2 (b)(ii).

<sup>137</sup> Section 1.115.

<sup>138</sup> Note that there is also a Commercial Public Access Service, which may be made available to copy shops and other entities for an annual fee per concurrent user and a fee per printed page: Section 4.8 (b).

of Higher Education,<sup>139</sup> one computer terminal for every ten thousand full time equivalent students;

- for not-for-profit Higher Education Institutions that qualify as Associate's Colleges, one computer terminal for every four thousand full time equivalent students;<sup>140</sup> and
- for each public library, no more than one terminal per Library Building.<sup>141</sup>

Under the Agreement, Google must design the Public Access Service to allow users to print pages from Display Books for a per-page fee. The Registry will set a reasonable fee for this printing and fees will be collected by Google and paid to the Registry for distribution to Rightsholders.<sup>142</sup>

In addition to the Public Access Service offered on these terms, the Registry and Google may agree to make a further Public Access Service available to one or more public libraries or not-for-profit Higher Education Institutions either for free or for an annual fee.<sup>143</sup>

#### IV. IMPLICATIONS OF THE GOOGLE BOOK SEARCH SETTLEMENT

This part will consider the implications of the Google Book Search settlement for Australian users in particular. Namely, given that the Settlement Agreement is expressly limited to the United States,<sup>144</sup> under what circumstances or legal arrangements will Australian users be able to gain access to the full Google Book Search corpus? This section will first briefly canvass some of the public access concerns associated with the settlement generally. Then, the legal effects under

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<sup>139</sup> For more information on the Carnegie Classifications for Institutions of Higher Education with the United States, see Wikipedia Authors, 'Carnegie Classification of Institutions of Higher Education', *Wikipedia* (last updated 11 April 2009) <[http://en.wikipedia.org/wiki/Carnegie\\_Classification\\_of\\_Institutions\\_of\\_Higher\\_Education](http://en.wikipedia.org/wiki/Carnegie_Classification_of_Institutions_of_Higher_Education)> at 9 July 2009.

<sup>140</sup> James Grimmelmann interprets the Carnegie Classification requirement as applying to years at college, stating, 'Online access will be free at one terminal in each public library building and for every 10,000 students at four-year colleges (every 4,000 students at two-year colleges)'. James Grimmelmann, above n1, 5.

<sup>141</sup> Section 4.8 (a)(i).

<sup>142</sup> Section 4.8 (a)(ii).

<sup>143</sup> Section 4.8 (a)(iii).

<sup>144</sup> Section 17.7(a)(i). For commentary, see Adam Hodgkin, *Google Book Search and the Tragedy of the Anti-Commons* (2009) Exact Editions <<http://exacteditions.blogspot.com/2009/02/google-book-search-and-tragedy-of-anti.html>> at 9 July 2009.

the *Copyright Act 1968* (Cth) of extending the Google Book Search Project to Australia will be discussed.

### A. Public access – general concerns

Since the announcement of the settlement, a debate has raged about whether this is a desirable outcome for public access to digitized books. Commentators have pointed out that the Google settlement will make accessing out-of-print works – formerly the domain of painstaking searches amongst dusty shelves in obscure libraries – easy and widespread.<sup>145</sup> It has also been noted that this settlement actually grants greater public access to books than would have been permitted under fair use. Indeed, Stanford University, the University of Michigan and the University of California have released statements in strong support of the settlement on this basis.<sup>146</sup> James Grimmelmann has noted that the public interest clauses in the Settlement Agreement were not necessary to resolve the dispute between the parties, and has commended Google and the AAP/AG for including them nonetheless.<sup>147</sup>

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<sup>145</sup> Nate Anderson, *Comment: The best bit of the Google book settlement* (2008) *Ars Technica* <<http://arstechnica.com/old/content/2008/11/comment.ars>> at 9 July 2009.

<sup>146</sup> See ‘Universities see promise in Google Book Search Settlement’, *Stanford Report* (California), 28 October 2008 <<http://news.stanford.edu/news/2008/october29/google-102908.html>> at 9 July 2009; ‘Major universities see promise in Google Book Search settlement’, *University of Michigan News Service* (Michigan), 28 October 2008, <<http://www.ns.umich.edu/htdocs/releases/story.php?id=6807>> at 9 July 2009. On 21 May 2009, it was announced that the University of Michigan had entered into a further agreement with Google (dated 20 May 2009) which would give the university broader rights to share digital copies of public domain works that Google has digitized from its collection with fellow academic institutions, libraries and other organisations for non-commercial purposes, and importantly, would allow the university to object if it thinks that the prices Google charges libraries for access to its digital collection are too high: see Ryan Singel, *UMich Gets Better Deal in Google’s Library of the Future Project* (with link to the PDF agreement) (2009) *Wired* <<http://www.wired.com/epicenter/2009/05/umich-gets-better-deal-in-googles-library-of-the-future-project/>> at 9 July 2009; *The University of Michigan and Google Amended Digitization Agreement* (with links to old agreement, new agreement and press release) (2009) UM Library <<http://www.lib.umich.edu/mdp/amendment.html>> at 9 July 2009.

<sup>147</sup> James Grimmelmann, above n3, 15. Andrew Albanese makes a similar statement in Andrew Albanese, *One for All? As Google Deal is Evaluated, Critics Question Single Library Terminal* (2008) *Library Journal* <[http://www.libraryjournal.com/article/CA6613723.html?&rid=reg\\_visitor\\_id&source=title](http://www.libraryjournal.com/article/CA6613723.html?&rid=reg_visitor_id&source=title)> at 9 July 2009. Google’s Deputy General Counsel for Products and Intellectual Property, Alexander Macgillivray, has stated that Google had their users in mind at all times when negotiating the Settlement Agreement, and that Google had been determined to produce a result that would enable the most access possible: see Alexander Macgillivray, above n132. Grimmelmann has argued, however, that Google’s data about which books are in and out of print and the Registry’s data about who owns copyright in each book are public goods that should be available for free and without legal and technical restrictions (especially since they are a by-product of the Google Book

Despite his earlier reservations about a settlement between Google and AAP/AG, Professor Lawrence Lessig initially responded to the Settlement Agreement with enthusiasm. On 29 October 2008, he wrote on his blog:

It is also good news that the settlement does not presume to answer the question about what “fair use” would have allowed. The AAP/AG are clear that they still don’t agree with Google’s views about “fair use”. But this agreement gives the public (and authors) more than what “fair use” would have permitted. That leaves “fair use” as it is, and gives the spread of knowledge more than it would have had.<sup>148</sup>

However, at the *Copyright Future: Copyright Freedom* conference in Canberra, Australia on 27-28 May 2009,<sup>149</sup> Professor Lessig stated that he had revised his view and now considers the settlement to be potentially disastrous. He expressed concern that the settlement will set in motion a way of thinking about gaining access to culture that moves us away from a library model and towards a model that requires us to *buy* access to our cultural works.<sup>150</sup> A digital *bookstore* of Alexandria, if you will. Lessig observed that this settlement was the result of a push by publishers to extend their hold in the market; he remarked that a publisher’s lifespan in the physical market in relation to a particular book is extremely short (perhaps a year or two at most), but in the digital space, the publisher’s lifespan suddenly becomes as long as the term of copyright protection (in the US and Australia, the life of the author plus 70 years).

Unlike its fellow institutions, Harvard University has declined to support the settlement largely due to concerns about public access.<sup>151</sup> Harvard University Librarian, Robert Darnton, has suggested that a single public access computer

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Search Project, not its goal): James Grimmelmann, above n3, 16-17.

<sup>148</sup> Lawrence Lessig, *On the Google Book Search agreement* (2008) Lessig Blog <[http://www.lessig.org/blog/2008/10/on\\_the\\_google\\_book\\_search\\_agre.html](http://www.lessig.org/blog/2008/10/on_the_google_book_search_agre.html)> at 9 July 2009.

<sup>149</sup> See Queensland University of Technology (QUT) and Australian Research Centre (ARC) Centre of Excellence for Creative Industries and Innovation (CCI) events <<http://cci.edu.au/events/copyright-future-copyright-freedom>> at 31 May 2009.

<sup>150</sup> Others have expressed similar sentiments: see Robert Darnton, above n1 and Richard K. Johnson, *BackTalk: Free (or Fee) to All?* (2008) Library Journal <<http://www.libraryjournal.com/article/CA6624784.html>> at 9 July 2009.

<sup>151</sup> See Peter Brantley, *A fire on the plain* (2009) Berkeley Library Blogs <<http://blogs.lib.berkeley.edu/shimenawa.php/2009/01/26/a-fire-on-the-plain>> at 9 July 2009; Laura G. Mirviss, ‘Harvard-Google Online Book Deal at Risk’, *The Harvard Crimson* (Boston) 30 October 2008 <<http://www.thecrimson.com/article.aspx?ref=524989>> at 9 July 2009.

terminal per public library building<sup>152</sup> constitutes inadequate public access to the Google Book Search collection.<sup>153</sup> Similarly, Richard K. Johnson has remarked, ‘So much for the promise of the digital age. This sounds more like the age of the CD-ROM.’<sup>154</sup>

Peter Brantley has noted the absurdity that arises where ‘a town of Philadelphia’s size might start out with as many public access terminals as a sprawling midwestern city of one-quarter the population yet as many public library branches, and a fraction of the diversity’.<sup>155</sup> He questions why the settlement does not offer public terminals on a tiered basis according to the economic strata of the region in which each library is located.<sup>156</sup>

### B. *Extension outside of United States*

Section 17.7 (a)(i) of the Settlement Agreement provides that the agreement does not authorise Google to digitize, copy or use any books or inserts outside of the United States. Given this restriction, an interesting question is whether and how the Google Book Search Project could be extended beyond the United States at a later date. This section of the article will consider how the Project could be extended to Australia.

Section 17.7 (a)(ii) applies to works that are not in the public domain under the Copyright Act in the United States but which are in the public domain in another jurisdiction. It provides that the Settlement Agreement neither authorises nor

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<sup>152</sup> Section 4.8 (a)(i) of the Settlement Agreement – see discussion under ‘Public Access Service’ above.

<sup>153</sup> See Peter Brantley, above n151; Laura G. Mirviss, above n151; see also Robert Darnton, above n1. The Open Content Alliance (OCA) has criticised the settlement on the same basis: *A Raw Deal for Libraries* (2008) Open Content Alliance (OCA) blog <<http://www.opencontentalliance.org/2008/12/06/a-raw-deal-for-libraries/>> at 9 July 2009 (see also in the comments to the blog post the response from Dan Clancy, engineering manager for Google Book Search).

<sup>154</sup> Richard K. Johnson, above n150.

<sup>155</sup> Peter Brantley, above n151. However, Brantley notes that, ‘it was impressed upon me that libraries were lucky to get as much as they did.’

<sup>156</sup> Brantley argues that in more well-off areas, citizens are more able to pay for subscription based access and are more likely to have internet access at home, but this is not the case in cities where much of the population falls beneath the poverty level: see Peter Brantley, *Waking up to Books in Richmond* (2008) Berkeley Library Blogs <<http://blogs.lib.berkeley.edu/shimenawa.php/2008/11/04/waking-up-to-books-in-richmond>> at 9 July 2009; Andrew Albanese, above n147.

prohibits Google from exploiting those works in that jurisdiction. The condition is that the relevant jurisdiction must not have a copyright term of less than the life of the author plus fifty years for literary works. Where the jurisdiction has a shorter copyright term, under the Settlement Agreement Google must not treat the books as in the public domain in that jurisdiction.<sup>157</sup> Presumably, this means that Google could exploit Australian public domain works in Australia.

Section 17.7 (a)(iii) states that Google agrees to notify the Registry if and when Google commences any use of books or (to Google's knowledge) inserts outside of the United States that displays Protected material other than material that is allowed to be displayed in Snippet Display. This subsection anticipates that Google may extend the Google Book Search Project outside of the United States at some stage.

'Protected material' is defined in section 1.114 to mean material as to which a person has a copyright interest under section 106 of the United States Copyright Act, without giving effect to sections 107 through 122 of the Copyright Act. Under section 104 of the United States Copyright Act of 1976, copyright will subsist in published works where (1) on the date of first publication, one or more of the authors is a national or domiciliary of the US or of a treaty party; or (2) the work is first published in the US or in a foreign nation that, on the date of first publication, is a treaty party.<sup>158</sup> Australia is a treaty party by virtue of its being a party to the Berne Convention, which Australia joined in its own right on 14 April 1928.<sup>159</sup> Thus, any work first published in Australia or first published by an Australian author in a country other than the United States on or after 14 April 1928 will be protected as a copyright work under the US Copyright Act.

Therefore, according to the terms of the Settlement Agreement, Google can

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<sup>157</sup> It is curious that the parties chose to include this clause in the Settlement Agreement and not simply leave the determination of whether Google could exploit certain works in certain jurisdictions to the copyright law of that jurisdiction. The only apparent motivation is to somehow place at a disadvantage those countries with a copyright term of less than the life of the author plus 50 years.

<sup>158</sup> 'Treaty party' is defined in section 101 of the US Copyright Act.

<sup>159</sup> Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, amended 28 September 1979 [1912] ATS 9 (entered into force 01 July 1912). The United Kingdom had previously acceded to the Convention on behalf of Australia on 13 November 1913.

<sup>159</sup> <<http://www.copyright.com.au/>> at 9 July 2009.



currently display in Australia as part of the Google Book Search Project, without limitation, works which are in the public domain in Australia and, in many cases, works which are in the public domain in the United States.<sup>160</sup> Google will not be prohibited under the Settlement Agreement from displaying works that are not 'Protected material' (in Australia, being works that were published in Australia or by an Australian author not in the United States prior to 14 April 1928), although it may be prevented by Australian copyright law. Google will also be able to display any books that have been contributed via the Publisher Program, in accordance with the licence provided by the publisher where the licence allows display in Australia. Finally, Google will most likely be able to offer Snippet Display for all books in the Google Book Search Project that have been approved for Snippet Display.<sup>161</sup> Given that Snippet Display will comprise a maximum of 12 lines of text per book with the majority of books being close to or over 100 pages, a Snippet Display is unlikely to constitute a substantial part of any book and thus unlikely to be infringing under Australia law.<sup>162</sup> Google will *not* be able to display in Australia any Preview Uses or Access Uses, including display under an Institutional Subscription, Consumer Purchase or Public Access Service. It is unclear whether Google may show Front Matter Display.

It is probable that there are a significant number of users in Australia who would like to gain access to Preview Uses and Access Uses. For Google to be able to expand its Project to these users, it would need to seek permission from the relevant rightsholders. In the United States, this would be a matter of approaching the Authors Guild, the Association of American Publishers and the major US publishing houses not represented by the AAP to seek a licence to extend access to

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<sup>160</sup> See Sections 17.7(b), 1.116 and 3.2(d)(v)(2)-(3) and Attachment E of the Settlement Agreement. As Australia and the United States have the same copyright term for literary works, a work which is in the public domain in the US because the copyright term has expired is also likely to be in the public domain in Australia. See also Article 7(8) of the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, amended 28 September 1979 [1912] ATS 9 (entered into force 01 July 1912).

<sup>161</sup> 'Snippet Display' is defined in section 1.147 of the Settlement Agreement to mean display of up to three snippets (each snippet being about three to four lines of text) per search per user. It seems that the Settlement Agreement authorises Snippet Display outside of the US, notwithstanding that this display would likely constitute an infringement under Australian copyright law, not being a use that would clearly be protected by one of the fair dealing exceptions.

<sup>162</sup> Although it should be kept in mind that substantially is assessed on the basis of the quality of the portion taken as well as the quantity of what is taken: *Hawkes & Son (London) Ltd v Paramount Film Service* [1934] Ch 593; *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 254 ALR 386; [2009] HCA 14 (22 April 2009).

Australia for the works held by those publishers and the AG and AAP members. In Australia, Google could pursue the same strategy and contact the Australian Publishers Association (APA) and other Australian publishers not represented by APA to seek their permissions. Google may seek agreement between these bodies and the Book Rights Registry (once established) to have the Registry continue to collect and distribute revenue derived from uses in Australia.

At the least, it would be necessary for Google to reach an agreement with the relevant rightsholders in order to provide Access Uses in Australia. This is because the Access Uses all comprise full access of a work either for free or for payment of a fee, which is not permitted under Australian copyright law in the absence of a licence. However, an interesting consideration is whether Google could provide Preview Uses in Australia without first reaching an agreement with the copyright owners.

The Standard Preview for Preview Uses under the Settlement Agreement is up to 20% of a work. In Australia, we might successfully petition for Standard Previews of up to 10% of a work, taking as our guide section 40(5) of the *Copyright Act 1968*. Section 40(5) provides that 10% of the number of words in a published literary work in electronic form will be considered a reasonable portion for the purpose of the fair dealing for research or study exception to copyright infringement. The 10% limit under section 40(5) is not a hard limit, but an amount of 10% or less is considered to be automatically reasonable for the purpose of the fair dealing for research or study exception. As such, a 10% limit on the Standard Preview would be a relatively wise choice for Google.

The first question to consider is whether Google would be primarily liable for making 10% Standard Preview Uses available in Australia without prior permission from the interested rightsholders. Section 31 of the *Copyright Act 1968* gives the copyright owner of a work the exclusive right to communicate the work to the public.<sup>163</sup> ‘Communicate’ is defined in the Act to mean ‘make

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<sup>163</sup> The right to communicate the work to the public was introduced into the *Copyright Act 1968* by the *Copyright Amendment (Digital Agenda) Act 2000*, which implemented the relevant provisions (in particular, Article 8) of the *WIPO Copyright Treaty*. For a brief history, see Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27(2) *Sydney Law*

available online or electronically transmit’ and ‘to the public’ is defined to mean ‘to the public within or outside Australia’.<sup>164</sup> It is an infringement to do in Australia or authorise the doing in Australia of any act comprised in the copyright of a work without the licence of the copyright owner.<sup>165</sup> In their article, ‘The New Right of Communication in Australia’, Andrew Christie and Eloise Dias highlight the function of the word ‘or’ in ‘make available or electronically transmit’ to create what is essentially two sub-rights to the right of communication. The authors argue that the act of communication can occur in one of two ways: as a making available online or as an electronic transmission.<sup>166</sup> When Google makes the Google Book Search service available online, it is clearly engaging in an act of communication. It is also transmitting the contents of books electronically, which is also an act of communication. Whether Google would be directly liable for copyright infringement, though, would turn on the question of whether it had engaged in this act *in Australia*.

Google is situated in the United States and is uploading the digitized books into their Book Search Project in the United States. The question becomes whether the act of communication occurs in the United States, where the books are included as part of the searchable database, or in Australia, where users are accessing the works. Christie and Dias have argued that the most logical jurisdictional assessment of the making available right is that it is exercised in the location where a member of the public may access the work – that is, at the location of each and every individual capable of accessing the Internet server where the material is hosted.<sup>167</sup> In contrast, the act of electronic transmission occurs at the location of the emission of the work. They argue that the concept of a

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<sup>164</sup> *Copyright Act 1968* (Cth) s10(1).

<sup>165</sup> *Copyright Act 1968* (Cth) s36.

<sup>166</sup> Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27(2) *Sydney Law Review* 237, 252.

<sup>167</sup> *Ibid.*, 250, 256. Christie and Dias make this assessment by considering that the *place* of making available should be connected with the *time* of making available and the *concept* of making available. The words of Article 8 of the *WIPO Copyright Treaty* indicate that the act of making available is one of enabling members of the public to access the work ‘from a place and at a time individually chosen by them’. Thus, the most logical location of the act of making available is the location of the downloading computer – this connects the place, time and concept of making available. The authors also refer to the case of *Dow Jones v Gutnick* (2002) 210 CLR 575, a case in which the High Court held that, for choice of law purposes, the tort of defamation could be seen to occur where the defamatory material was received by an audience.

transmission is the sending of a work on its way towards a recipient; the concept does not require that the proposed recipient actually receive the work.<sup>168</sup> If Christie and Dias are correct, this means that the act of making available would occur in Australia, where users can access the Google database, whereas the act of electronic transmission would likely occur in the United States (or at least, wherever the server hosting the Google Book Search Project is situated). This would make Google liable under Australian copyright law for the communication of copyright works, by making those works available to the Australian public. Prima facie, Google would not be able to rely on the fair dealing for research or study exception or the fair dealing for criticism or review exception, as it is not communicating the works for its own research, study, criticism or review but for the benefit of its users.<sup>169</sup>

However, if it can be shown that Google's users are using the service under the fair dealing exceptions for research or study or criticism or review, then Google may be able to argue that its service is simply a part of or an extension of the user's activities and as such Google is communicating the works for the purpose of research or study or criticism or review. In *CCH Canadian Ltd v Law Society of Upper Canada*,<sup>170</sup> the Supreme Court of Canada had to decide whether the Law Society of Upper Canada, which maintained the Great Library at Osgoode Hall in Toronto, had infringed copyright because it provided a request-based photocopy service for Law Society members, members of the judiciary and other authorised researchers. Under this 'custom photocopy service', legal materials were reproduced by library staff and delivered in person, by mail or by facsimile transmission to requesters. Publishers sued the Law Society, alleging copyright infringement. The Law Society denied liability on the basis that the copies were made for the purpose of research and were therefore covered by the fair dealing defence.<sup>171</sup> In finding for the Law Society, the Chief Justice (who delivered the judgment of the court) stated:

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<sup>168</sup> Andrew Christie and Eloise Dias, above n166, 256.

<sup>169</sup> See *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, where the court held that it was the purpose of the copier and not the purpose of the ultimate user of the copies that was relevant in establishing the fair dealing for the purpose of research or study exception.

<sup>170</sup> [2004] 1 S.C.R. 339.

<sup>171</sup> In Canada, the relevant fair dealing defence for the purpose of research or private study appears in section 29 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended.

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively...The fair dealing exception under s.29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts...Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process.<sup>172</sup>

Relevant to the court's finding was that the library had an access policy which stated that only single copies of materials would be provided for the purposes of research, review, private study and criticism as well as use in legal proceedings, and that any requests for copies in excess of 5% of the volume would be referred to the Reference Librarian and might be refused.<sup>173</sup> Additionally, the service was provided on a not for profit basis.<sup>174</sup> Also relevant was that there were no apparent alternatives to the custom photocopy service – the court considered it unreasonable to expect that patrons would always conduct their research onsite, particularly as 20% of the library's patrons lived outside the Toronto area.<sup>175</sup> The court held that the availability of a licence is not relevant to deciding whether a dealing has been fair<sup>176</sup> and that it was not incumbent upon the Law Society to adduce evidence that every patron uses the material provided in a fair dealing manner – reliance on a general practice would suffice.<sup>177</sup>

In Google's case, an argument could be made that providing access to Preview Uses is an extension of the fair dealing for research or study and the fair dealing for criticism or review. In applying the reasoning of *CCH Canadian Ltd v Law Society of Upper Canada*, Google could argue that it is providing a controlled service for the purposes of research, study, criticism and review and that access is limited to 10% of a work for this reason. It would assist Google to have a clear

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<sup>172</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 S.C.R. 339 at [48], [51], [64].

<sup>173</sup> *Ibid.*, [61], [66]-[68].

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, [69].

<sup>176</sup> *Ibid.*, [70].

<sup>177</sup> *Ibid.*, [63].

policy and notices to this effect. Furthermore, there are no simple alternatives to the Google Book Search service, particularly in the case of out-of-print and hard-to-find books. The Google Book Search Project would provide Australian users with access to works that they might not otherwise be able to obtain, at least not without substantial difficulty. Additionally, the Google Book Search Project will be directing users to where they can purchase copies of the works in full, which would arguably have a positive effect on the market of the copyright owner. As stated in the *CCH Canadian* case, the availability of licences is not relevant to a determination of fair dealing and Google should not be required to show that all of its users are acting under fair dealing to be successful in the defence.

However, a significant difference between the Law Society of Upper Canada and Google which might prevent Google in successfully arguing that it is operating under a fair dealing is that Google operates for profit and will be deriving revenue from the service. Google also has a far wider user-base than the Great Library at Osgoode Hall in Toronto and exercises less control over the service in that it does not use discretion in granting requests for access. It should also be remembered that a Canadian case has only persuasive authority in Australia and that Australian courts have traditionally construed fair dealing quite narrowly.<sup>178</sup> On these grounds, the fair dealing argument would be a difficult one for Google to make out. The most likely conclusion is that Google would be found to be infringing copyright if it is communicating the works in Australia.

Even if Google was not primarily liable for copyright infringement either because the communication did not occur in Australia or because Google was successful in a fair dealing argument, it may still be found secondarily liable for the infringement of its users. Due to the nature of the technology, accessing the snippets provided by Google involves a reproduction of the snippets under copyright law. In the United States, the risk of liability for this reproduction is minimal because even in the absence of the Settlement Agreement, users would be accessing the book snippets in accordance with the doctrine of fair use. In Australia, any dealing with the digitized books (including reproduction) that involves a substantial part of the book and which is not covered by one of the fair

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<sup>178</sup> See, for example, *TCN Channel Nine Pty Ltd v Network Ten Ltd* (2002) 55 IPR 112.

dealing exceptions would constitute an infringement on the part of the user. Google could accordingly be liable for the user's infringement if they are found to have authorised the infringements of end users.<sup>179</sup>

Section 36(1A) of the *Copyright Act 1968* states that when determining whether a person has authorised the doing of an act, the following matters must be taken into account:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*,<sup>180</sup> Sharman Networks were found to have authorised copyright infringement in sound recordings by providing the software for the Kazaa peer-to-peer file-sharing network. The relevant factors were that Sharman provided the facilities for infringement,<sup>181</sup> it knew that the Kazaa network was being used to share copyright files unlawfully,<sup>182</sup> and it took no steps to prevent or reduce the unlawful file-sharing,<sup>183</sup> even though it had some degree of control over its users.<sup>184</sup> In fact, Sharman had a financial interest in the file-sharing because it generated advertising revenue from it,<sup>185</sup> and so it actively encouraged users to increase their

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<sup>179</sup> *Copyright Act 1968* (Cth) s36(1). In *University of New South Wales v Moorhouse*, it was held that 'authorise' is to be construed according to its dictionary meaning of 'sanction, approve, countenance': *University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1 at 12 (Gibbs J) and 21 (Jacobs J). This was later confirmed in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, 90 (Wilcox J); [2005] FCA 1242 at [366] (Wilcox J).

<sup>180</sup> (2005) 220 ALR 1; [2005] FCA 1242.

<sup>181</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, 98; [2005] FCA 1242, [403] (Wilcox J).

<sup>182</sup> *Ibid*, 98; [406] (Wilcox J).

<sup>183</sup> *Ibid*, 99; [409] – [411] (Wilcox J).

<sup>184</sup> *Ibid*, 99-100; [411] and [414] (Wilcox J).

<sup>185</sup> *Ibid*, 98; [404] (Wilcox J).

file-sharing.<sup>186</sup> In a similar case, *Cooper v Universal Music Australia Pty Ltd*,<sup>187</sup> Cooper was held to have authorised infringement because he had operated a website (MP3s4FREE.com) where other parties could post hyperlinks directing users to remote websites where infringing sound recordings could be downloaded. Cooper was found liable mainly because he had the power to prevent the infringing conduct but did not,<sup>188</sup> he benefited financially from the infringing conduct due to advertising revenue,<sup>189</sup> and he took no steps to avoid the infringing conduct.<sup>190</sup>

On these authorities, there is a strong argument that Google would be found liable for authorising infringement of books in the Google Book Search Project by providing a Standard Preview Use in Australia. Google would be providing a service in which users can infringe copyright and would (presumably) be aware that infringement would likely occur in Australia. Google would be deriving at least some financial benefit from advertising surrounding the Google Book Search Project interface. And finally, it could be argued that Google had not taken any steps to prevent or avoid infringing conduct by its users.<sup>191</sup>

On the other hand, Google could attempt to distinguish itself from the facts of these cases on the basis of section 39B of the *Copyright Act 1968*. Section 39B

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<sup>186</sup> In particular, they used the slogan, ‘Join the Revolution’, creating a sense of ‘cool’ about illegal file-sharing. Ibid, see especially 27-28, 48, 50, 84, 98; paragraphs [81]-[83], [178], [190], [340], [405]-[407] (Wilcox J).

<sup>187</sup> (2006) 237 ALR 714; [2006] FCAFC 187.

<sup>188</sup> *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714, 720-723 (Branson J), 744-745 (Kenny J); [2006] FCAFC 187, [29]-[45] (Branson J), [148]-[149] (Kenny J). Interestingly, at [40], Branson J stated (in obiter), “Mr Cooper placed considerable weight on a suggested analogy between his website and Google. Two things may be said in this regard. First, Mr Cooper’s assumption that Google’s activities in Australia do not result in infringements of the Act is untested. *Perfect 10 Inc v Google Inc* (2006) 416 F Supp 2d 828 upon which Mr Cooper placed reliance is a decision under the law of the United States of America which includes the doctrine of “fair use”. Second, Google is a general purpose search engine rather than a website designed to facilitate the downloading of music files. The suggested analogy is unhelpful in the context of Mr Cooper’s appeal.” This is interesting because it would seem that Justice Branson would consider Google liable for authorization were it operating a website targeted at downloading music files rather than just a general purpose search-engine. Conceivably this reasoning would extend to Google’s operation of a specific purpose website designed to provide access to scanned copyright-protected books.

<sup>189</sup> Ibid, 724; [48] (Branson J).

<sup>190</sup> Ibid, 724 (Branson J), 745 (Kenny J); [49] (Branson J), [151] (Kenny J).

<sup>191</sup> Note that Google would not be liable for secondary infringement if its users did not first engage in acts of primary infringement. Google is also less likely to be found liable for authorisation if it undertakes steps to prevent or reduce copyright infringement by its users.



provides that:

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

This is sometimes referred to as the ‘mere conduit’ argument. For the purposes of section 39B, ‘carrier’ and ‘carriage service provider’ have the same meanings as in the *Telecommunications Act 1997* (Cth). This section is generally understood to apply to Internet Service Providers (ISPs),<sup>192</sup> but its application to other entities (in this case, Google) remains unclear. In circumstances where Google provides a 10% Preview Use service in Australia and is subsequently sued for secondary copyright infringement, there is potentially a legal argument to be made on the basis of section 39B. This argument would focus on the fact that Google had limited the Preview Use to 10% in an attempt to restrict the utility of the service to fair dealing for research or study. Indeed, the utility of the service is minimal for any person interested in reading an entire book or for most uses other than research uses. Yet it may be extremely useful for a researcher or student attempting to locate the appropriate source for their research. Google may even promote the expectation that this service is intended only for purposes associated with fair dealing, by posting appropriate notices on the Australian interface of the Google Book Search Project.<sup>193</sup>

Much will depend, however, on the scope of the fair dealing for research or study exception. For example, a student of literature who is accessing fiction works in the Google Book Search Project in order to complete a university assignment is likely to be able to raise the exception successfully. However, a member of the public who uses the service to access and search across fiction novels for the purpose of determining which book she would like to purchase and read in full is unlikely to be able to successfully raise the exception. This is notwithstanding

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<sup>192</sup> Although this is now in some doubt due to the recent proceedings brought against iiNet in the Federal Court of Australia (Case Number: NSD 1802 of 2008).

<sup>193</sup> Although these notices must actually be designed to inform users about the relevant copyright law and discourage copyright infringement, and should not be tokenistic. The effectiveness of copyright notices was considered in *University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1.

that her use of the service is not harmful to the copyright owner – on the contrary, her use is likely to bring revenue to the copyright owner. The strength of Google’s section 39B argument may depend on what proportion of the Australian population are using the service for research or study as understood in copyright law and what proportion are accessing the service for a personal use that does not fall within a strict definition of ‘research or study’ (e.g. to decide which books to purchase for personal reading). If there is a significantly greater number of people using the service for research or study, then Google may have a strong argument that it is providing a service that is useful for research or study and that it has done everything possible to minimise infringement. On this basis, it may be able to successfully raise section 39B to establish that it was a ‘mere conduit’ for the small percentage of users who are infringing copyright. If, however, there are a greater number of people using the service for other, infringing uses, there may be little that Google could do to demonstrate that it should not be held secondarily liable.

In any event, section 39B will only be useful if Google is defending itself against charges of secondary infringement. It will not assist if Google is found primarily liable for communicating the works. It is therefore likely that if Google were to provide the Google Book Search Project to Australian users in an extended capacity without first pursuing licensing options, Google would be liable for copyright infringement. The most sensible option would be for Google to negotiate with rightsholders to expand the Google Book Search Project to Australian audiences. This would provide certainty for Google and wider access to works for Australian users (if 20% Preview Uses and Access Uses are allowed).

Given that the general practice in publishing is for authors to assign their copyright to their publisher, Google may be able to gain licences for the majority of works by contacting the major publishers and publishers’ associations in Australia and the US. On this basis, one would hope that it would not be inhibitive difficult for Google to acquire permissions to extend a significant portion of the Project to Australia. Further, if the Project is successful in the United States it may mean that rightsholders will be enthusiastic about extending the Project to other jurisdictions. Unfortunately, the limited scope of Australia’s

fair dealing exceptions to copyright infringement mean that Google may have no choice but to engage in this potentially time-consuming and expensive process of gaining permissions from individual rightsholders for the use of their works in Australia. There is virtually no option to experiment with providing different access rights in Australia in the absence of a licence. This creates a somewhat stifling environment for innovators like Google.

## V. CONCLUSION

In 2005, the AAP and the AG sued Google for ‘massive copyright infringement’ because Google had been digitizing books on a large scale to make available in the Google Book Search Project. In 2008, the parties reached a settlement. If approved by the court, the settlement will allow Google to proceed with the Google Book Search Project, but only under tightly controlled conditions overseen by the Registry and provided that 63% of all revenues earned from the Project are distributed to rights holders. Commentators are divided over whether the settlement accords enough free access to the public – some happily acknowledge that the settlement provides more public access than would have been permitted under fair use, whereas others strongly criticize the rules governing the Public Access Service, which is restricted to one terminal per public library building and one terminal per several thousand full time equivalent students depending on the category of higher education institution. There are indeed significant concerns to be raised in relation to the settlement. There is no denying, however, that the Google Book Search Project is likely to change the way that we discover and access books in the future. The settlement itself is of a new order: establishing a benefit-sharing model for distribution of revenue rather than the strict set-fee per set-use of set-work model we see in statutory licences. All things considered, the Settlement Agreement tries hard to share the benefits of this endeavour across the board – to Google, to rightsholders, to libraries and educational institutions and to the general public in the United States. Whether we will be able to reap the benefits of access to this corpus in Australia, however, is a different story. It is almost unimaginable that Google, being Google, would not attempt to extend the reach of this Project as far as it possibly can. Yet without a prior arrangement with rightsholders, our limited exceptions to copyright infringement under the

*Copyright Act 1968* mean that Google would most likely be unable to extend the full scope of the Project to Australia without infringing copyright. Our lack of a fair use exception, or anything like it, creates a situation where experimentation and innovation can be stifled in Australia by an inflexible application of copyright law.

## Appendix One

### Summary of changes made in the Amended Settlement Agreement

**Note:**

- **Paragraph numbers in this summary refer to the paragraph numbers in the Amended Settlement Agreement not the Original Settlement Agreement**
- **If words are underlined in this summary, it indicates that the words have been added to the Amended Settlement Agreement**

#### Article I – Definitions

**1.12** Inserted: “Amended Settlement Agreement Date” means the date set forth at the end of the Amended Settlement Agreement, being 13 November 2009.

**1.19** Definition of “Book” amended to restrict scope:

1.19 (c)(1) if a “United States work” as defined in 17 U.S.C. 101, was registered with the United States Copyright Office, and  
 (2) if not a United States work, either (x) was registered with the United States Copyright Office or (y) had a place of publication in Canada, the United Kingdom or Australia, as evidenced by information printed in or on a hard copy of the work.

Also amended to exclude works in which more than 20% of the pages of text contain more than 20% music notation with or without lyrics interspersed. Formally, the definition of Books excluded works in which more than 35% of pages contained more than 50% music notation and lyrics interspersed.

Calendars are now also excluded from the definition of “Book”.

**1.31** Definition of “Commercially Available” amended to include “Canada, the United Kingdom or Australia” in the regions to which a Rightsholder may be offering a Book for sale into, in order for the Book to be deemed Commercially Available (formally the definition only accounted for purchasers within the United States).

**1.44** Inserted:

1.44 “Creative Commons License” means a Creative Commons license or similar contractual permission for use that is published by the Creative Commons Corporation at <http://www.creativecommons.org> (or successor website).

**1.75** Definition of “Insert” amended to exclude children’s book illustrations and musical notations.

**1.97** “Notice Commencement Date” is now January 5, 2009.

**Former 1.98** “Opt Out Deadline” deleted. **1.156** “Supplemental Opt-Out Deadline” inserted as “the deadline fixed by the Court to opt out of the Amended Settlement Agreement pursuant to Rule 23 of the Federal Rules of Civil Procedure.

**1.104** Comic book is now included in the definition of a “Periodical”.

**1.126** Definition of “Removed” amended:

“Removed” means, with respect to a Book that is removed pursuant to Section 3.5(a) (Right to Remove) and subject to Section 3.5(b)(vi) (Continuing Obligations), that, other than on back-up tapes or other electronic back-up storage media,

(a) if the request is made on or before April 5, 2011, Digital Copies of the Book are not accessible to Google or Fully Participating Libraries; and

(b) if the request is made after April 5, 2011, but on or before March 9, 2012, Digital Copies of the Book are not accessible to Google except that Google may use Digital Copies for the purpose of (i) providing Digital Copies, as authorized under this Amended Settlement Agreement, and making ongoing technological updates for Fully Participating Libraries and Host Sites and (ii) acting as a Host Site as authorized by Section 7.2(d)(ii) (Host Sites).

**1.142** Inserted: “Settlement Agreement” means “the original Settlement Agreement and all of its attachments, as filed with the Court on October 28, 2008.

**Article II – Settlement Benefits – Overview and Authorizations**

[Observation: The settlement amount of US \$45 million has not changed, notwithstanding that the settlement class is now smaller (settlement is restricted to Books published in the US, UK, Canada and Australia) – see **2.1(b)**.]

**2.2** Amended:

....This Amended Settlement Agreement neither authorizes nor prohibits, not releases any Claims with respect to, (i) the use of any work or material that is in the public domain under the Copyright Act in the United States, (ii) the use of books in hard copy ([deleted – including] such term does not include microform) format other than the creation and use of Digital Copies of Books and Inserts....

**Article III – Google Book Search – Rights, Benefits and Obligations**

**Section 3.1 (b)(ii)** now includes – “The inclusion of a work within the Books Database does not, in and of itself, mean that the work is a Book within the meaning of Section 1.19 (Book).”

**Section 3.2 (d)(i)** sets out the basis by which Google can determine whether a Book is Commercially Available or not. There are now greater restrictions on Google’s methods – the Amended Settlement Agreement requires Google to use commercially reasonable efforts to determine whether a Book is Commercially Available or not Commercially Available, using a methodology reasonably agreed to by Google and the Registry that is designed to minimize the overall error rate. This section now also provides that “when Google receives such information from Rightsholders or the Registry or Rightsholders otherwise assert that their Books are Commercially Available, such Books promptly shall be classified as Commercially Available”. Whereas before, if Google reasonably believed that such information (or assertion) was inaccurate, Google could change the classification of the Book, now Google is restricted to challenging the classification of the

Book pursuant to Article IX (Dispute Resolution). (See also changes in section <b>3.3(a)</b> ).
<b>Section 3.2 (d)(iii)</b> – slight language changes give greater power to Rightsholders – previously, if a Book was mistakenly determined to be not Commercially Available, and a Rightsholder <i>demonstrated</i> that the Book was Commercially Available, Google was to correct the determination within 30 days. Now, the Rightsholder need only <i>assert</i> , and Google must correct the determination <i>promptly</i> .
Inserted: <b>3.3(g)</b> :  <b>Display Use Attributes.</b> With respect to their Display Books, Google and the Rightsholders may negotiate and Rightsholders may authorize Google to modify or remove the restrictions that are placed on Google in Section 4.1(d) (Basic Features of Institutional Subscriptions) and 4.2(a) (Basic Features of Consumer Purchase), and comparable restrictions that may apply to additional Revenue Models that may be agreed pursuant to Section 4.7 (Additional Revenue Models).
<b>Section 3.5(a)(i)</b> amended to give Rightsholders powers to direct that their Book not be digitized, or if already digitized, that it be Removed. (In the original settlement agreement, they only had powers to direct that their Book be Removed). This section is also amended to impose stricter time limits on Google and Fully Participating Libraries (FPL) to implement a Rightsholder’s Removal direction – previously, Google was to implement within 30 days and FPL within 90 days, now both are directed to implement “as soon as reasonably practicable, but in any event no later than” 30 days and 90 days respectively.
<b>Section 3.5 (b)(iii)</b> refers to Section 4.2 “Additional Revenue Models”, which was formerly headed “New Revenue Models” – [Thoughts: does the change in term from “new” to “additional” imply that any other revenue models are only to operate on top of the existing revenue models and not instead of them?]
<b>Former 3.8 (a) Effect of Other Agreements</b> – omitted completely [Thoughts: likely as a result of the DOJ complaints]

#### **Article IV – Economic Terms for Google’s Use of Books**

<b>4.2 (a) (i)</b> inserted:  <b>Alternative License Terms.</b> In lieu of the basic features of Consumer Purchase set forth in Section 4.2(a) (Basic Features of Consumer Purchase), a Rightsholder may direct the Registry to make its Books available at no charge pursuant to one of several standard licenses or similar contractual permissions for use authorized by the Registry under which owners of works make their works available ( <i>e.g.</i> Creative Commons Licenses), in which case such Books may be made available without the restrictions of such Section.
<b>4.2 (b)(i)(1) “Specified Price”</b> - Inserted brackets: “In this option, the Rightsholder identifies the price ( <u>which may be as low as \$0.00</u> ) for which it wants its Book authorized for Consumer Purchase to be sold.”
<b>4.2 (c)(i)</b> – Inserted underlined:

**Pricing Bins.** For Books that will be sold at the Settlement Controlled Price, Google (deleted - and the Registry) will (deleted - agree upon) use a set of pre-defined prices (deleted - for Books) (“Pricing Bins”), and each Book will be priced at one of those prices. The initial Pricing Bins for Books will be: \$1.99, \$2.99, \$3.99, \$4.99, \$5.99, \$6.99, \$7.99, \$8.99, \$9.99, \$14.99, \$19.99 and \$29.99. Google (deleted - and the Registry) may (deleted - agree to) establish additional or different Pricing Bins between, below and above these prices at any time; provided, however that (a) the Unclaimed Works Fiduciary has the right to approve the use of such additional or different Pricing Bins for unclaimed Books and (b) the use of such additional or different Pricing Bins for a Registered Rightsholder’s Books is subject to thirty (30) days’ prior notice to such Rightsholder. At any time, the Rightsholder of a Book may specify a maximum and/or a minimum Pricing Bin for its Book and Google will implement such specification within seven (7) days after Google receives notice thereof...

**4.2 (c)(ii)(2)** – Google is given greater freedom in setting pricing algorithm:

**(2) Development of Pricing Algorithm and Changes to Pricing Bin Distribution.** Google will develop the Pricing Algorithm unilaterally, with no involvement of or control by the Registry or any Rightsholder; provided, however, that Google employees and contractors who may be Rightsholders are not precluded from performing their assigned duties with respect to development of the Pricing Algorithm. In developing the Pricing Algorithm, Google will analyze sales data to ensure the reasonableness of the Pricing Algorithm. The Pricing Algorithm shall base the Settlement Controlled Price of a Book, on an individual Book by Book basis, upon aggregate data collected with respect to Books that are similar to such Book and will be designed to operate in a manner that simulates how an individual Book would be priced by a Rightsholder of that Book acting in a manner to optimize revenues in respect of such Book in a competitive market, that is, assuming no change in the price of any other Book. Based on the Pricing Algorithm, Google may change the price of an individual Book over time in response to sales data and in order to collect additional data to establish the optimal price for such Book. The distribution of Books sold on the basis of Settlement Controlled Prices among the Pricing Bins may change over time as the prices of individual Books are adjusted based on the Pricing Algorithm.

**4.2 (c)(iii)** amended:

**(iii) Provision of Settlement Controlled Prices to Registry.** Google shall determine and provide to the Registry both the Settlement Controlled Price for all Settlement Controlled Price Books and what would be the Settlement Controlled Price for every Specified Price Book as if the Rightsholder of such Specified Price Book had selected the Settlement Controlled Price option. Such information is the Confidential Information of Google. Subject to Section 15.4 (Disclosures Required by Law), the Registry shall not disclose the Settlement Controlled Price for any Book to any Person other than the Rightsholders of such Book and, if the price of a Book is publicly available, the Registry shall not disclose whether that price is the Settlement Controlled Price.

**4.3 (g)** Inserted:

**(g) Unclaimed Books.** The Registry’s power to act with respect to the Preview Uses under this Section 4.2 (preview Uses) will be delegated to the Unclaimed Works Fiduciary.



[Observations: in the Amended Settlement Agreement, greater rights and powers seem to be given to individual rights holders and the Unclaimed Works Fiduciary and as a result, the Registry's powers seem to be lessened somewhat. This may be in response to the DOJ's investigation into whether the Registry had a monopoly power in contravention of antitrust laws.]

**4.5(a)(iii)** Inserted:

(iii) **Agreed Revenue Splits.** Notwithstanding clauses (i) and (ii) above, for any Revenue Model(s) for any Book(s) classified as Commercially Available, Google and the Rightsholder(s) of such Book(s) each has the right to request that the other negotiate a revenue split different from the Standard Revenue Split for Advertising and the Standard Revenue Split for Purchases (together, the "Standard Revenue Splits"). If Google or a Rightsholder requests that the revenue split be negotiated for any Revenue Model(s) and Google and the Rightsholder are unable to agree on a revenue split different from the Standard Revenue Splits for such Revenue Model(s), then such Standard Revenue Splits (or the then applicable previously negotiated and agreed revenue split, if any) shall apply to such Books for that Revenue Model(s); provided that Google may choose not to make such Books available through such Revenue Model(s) as permitted under Section 3.7(e) (Google's Exclusion of Books) and the Rightsholder may choose to exclude its Book(s) from such Revenue Model(s) pursuant to Section 3.5(b) (Right to Exclude from Display Uses and Revenue Models). If Google and such Rightsholder(s) agree to a revenue split, then beginning within sixty (60) days after the date of such agreement, any calculations in Section 4.5(b) (Discounting, Special Offers and Subsidies) and any payments in Section 4.6 (Payment Terms) shall be based on such agreed revenue split rather than the Standard Revenue Splits. Google or the Rightsholder(s) shall notify the Registry of any agreed revenue split, the date of agreement to such revenue split, and the Books to which it applies. The Registry may not disclose information about any agreed revenue split with any Rightsholder (other than any other Rightsholder(s) of the Book(s) to which such agreed revenue split applies) unless such information is otherwise publicly available. Once a Book is classified as not Commercially Available, the Standard Revenue Splits shall apply beginning no later than sixty (60) days after such reclassification, notwithstanding any prior agreed revenue split between Google and a Rightsholder.

**4.5 (b)(v)(2)** Inserted:

(2) **Resellers.** To the extent that Google makes Books available through Consumer Purchases pursuant to this Amended Settlement Agreement, Google will allow resellers to sell access to such Books to their end users. Google will be responsible for hosting and serving the Digital Copies of such Books, and will be responsible for the security of such Digital Copies in accordance with Article VIII (Security and Breach). Google will permit the reseller of a Book to retain a majority of Google's share of Net Purchase Revenues from Consumer Purchases through such reseller.

**4.7 Additional Revenue Models** – amended to: (a) restrict the Print on Demand service to non-Commercially Available Books; (b) remove the 'Custom Publishing' option (previously, this option allowed: "Per page pricing of Books, or portions thereof, for course materials, and other forms of custom publishing for the educational and professional markets") and the 'PDF Download' option, and replace these with a 'File Download' option: "This service would permit purchasers of Consumer Purchase for a

Book to download a copy of such Book in an appropriate file format such as PDF, EPUB or other format for use on electronic book reading devices, mobile phones, portable media players and other electronic devices”; and (c) delete the ‘Summaries, Abstracts and/or Compilations of Books’ option.

**4.8 Public Access Service** - amended (3): “in the case of each Public Library, [deleted - no more than] one terminal per Library Building; provided, however, that the Registry may authorize one or more additional terminals in any Library Building under such further conditions at it may establish, acting in its sole discretion and in furtherance of the interests of all Rightsholders.”

## **Article VI – Establishment and Charter of Registry**

Amended significantly to make the Registry more accountable, and to give greater powers to the Unclaimed Works Fiduciary:

**6.1 Functions.** Before the Effective Date, Plaintiffs will establish a registry that:

...  
(c) will [deleted – attempt], from its inception, use commercially reasonable efforts to locate Rightsholders of Books and Inserts,

...  
(f) will, upon request, monitor Google’s display and pricing of Books for Rightsholders located outside of the United States to ensure that they conform to the requirements of this Amended Settlement Agreement and to such Rightsholders’ instructions, and use commercially reasonable efforts to provide a means for such Rightsholders themselves to monitor and verify their claimed Books, and

...

**6.2 Charter.**

...

**(b) Organizational Structure.**

**(i) General.** The Registry will be organized on a basis that allows the Registry, among other things, to (i) represent the interests of Rightsholders in connection with this Amended Settlement Agreement, (ii) respond in a timely manner to requests by Google, Fully Participating Libraries and Cooperating Libraries, and (iii) to the extent permitted by law, license Rightsholders’ U.S. copyrights to third parties (in the case of unclaimed Books and Inserts, the Unclaimed Works Fiduciary may license to third parties the Copyright Interests of Rightsholders of unclaimed Books and Inserts to the extent permitted by law).

**(ii) Board of Directors.** The Registry will have equal representation of the Author Sub-Class and the Publisher Sub-Class on its Board of Directors, with each act of the Board requiring a majority of the directors, with such majority including at least one director who is a representative of the Author Sub-Class and one director who is a representative of the Publisher Sub-Class. The Board of Directors will have at least one representative of the Author Sub-Class from each of the following countries: the United States, Canada, the United Kingdom and Australia; and at least one representative of the Publisher Sub-Class from each of the following countries: the United States, Canada, the United Kingdom and Australia.

**(iii) Unclaimed Works Fiduciary.** The Charter will provide that the Registry’s

power to act with respect to the exploitation of unclaimed Books and Inserts under the Amended Settlement will be delegated to an independent fiduciary (the “Unclaimed Works Fiduciary”) as set forth in Sections 3.2(e)(i) (Change Requests by Rightsholders), 3.10 (Specific Prohibitions), 4.2(c)(i) (Pricing Bins), 4.3 (Preview Uses), 4.5(b)(ii) (Consumer Purchases), 4.7 (Additional Revenue Models), 6.2 (Charter), and 6.3 (Unclaimed Funds and Public Domain Funds) of the Amended Settlement Agreement and Sections 3.2 and 3.3 (Procedures for Changing Classification of a Book) of the Author-Publisher Procedures, and otherwise as the Board of Directors of the Registry deems appropriate. The Unclaimed Works Fiduciary will be a person or entity that is not a published book author or book publisher (or an officer, director or employee of a book publisher). The Unclaimed Works Fiduciary (and any successor) will be chosen by a supermajority vote of the Board of Directors of the Registry and will be subject to Court approval.

(iv) **Unclaimed Funds and Public Domain Funds.** The Charter will also direct the Registry to follow the guidelines in this Amended Settlement Agreement regarding Unclaimed Funds and Public Domain Funds described in Section 6.3 (Unclaimed Funds and Public Domain Funds). The Registry will use funds from the Settlement, as well as Unclaimed Funds as described in Section 6.3 (Unclaimed Funds and Public Domain Funds), to attempt to locate Rightsholders of unclaimed Books and Inserts.

...

### **6.3 Unclaimed Funds and Public Domain Funds.**

#### **(a) Unclaimed Funds.**

##### **(i) Unclaimed Funds for Unclaimed Books.**

(1) Subject to clauses (2) and (3) below, any revenues paid to the Registry and due to Rightsholders of Books that are unclaimed by such Rightsholders under this Amended Settlement Agreement (“Unclaimed Funds”) will be held by the Registry for the benefit of the Rightsholder(s) of such Books until such Rightsholders register and claim such Books.

(2) Beginning with the sixth year after the Effective Date, and every year thereafter, subject to the approval of the Unclaimed Works Fiduciary, the Registry may use up to twenty-five percent (25%) of Unclaimed Funds earned in any one year that have remained unclaimed for least five (5) years (such percentage to be allocated across all unclaimed Books in proportion to the Unclaimed Funds that they earned) for the purpose of attempting to locate the Rightsholders of unclaimed Books. The Board of Directors of the Registry, in consultation with the Unclaimed Works Fiduciary, will determine how to use such Unclaimed Funds to attempt to locate the Rightsholders of unclaimed Books, including the use, as appropriate, of national and international licensing and collecting societies, reproduction rights organizations, and associations of authors and publishers.

(3) Beginning ten (10) years after the Effective Date, any Unclaimed Funds shall be allocated proportionally to the United States, Canada, the United Kingdom and Australia, based, respectively, on the number of Books registered with the United States Copyright Office (for the United States) and the number of Books published in Canada, the United Kingdom and Australia. Subject to the approval of the Unclaimed Works Fiduciary as to the timing of such motions, the Registry may file

a motion or motions with the Court recommending how Unclaimed Funds held at least ten (10) years should be distributed to literacy-based charities in each such country that directly or indirectly benefit the Rightsholders and the reading public, after consultation with Google and, acting through the Designated Representative, the Fully Participating Libraries and the Cooperating Libraries. The charities will be entities that advance literacy, freedom of expression, and/or education and are (a) described in Section 501(c)(3) of the Internal Revenue Code (for Unclaimed Funds from Books registered with the United States Copyright Office), (b) organizations qualifying as “Charitable Organizations,” as defined in Section 149.1 of the Income Tax Act of Canada (for Books published in Canada), (c) any body recognized as a charity under the Charities Act 2006, Charities and Trustee Investment (Scotland) Act 2005 or Charities Act (Northern Ireland) 2008 or any legislation replacing or amending such acts (for Books published in the United Kingdom), or (d) charities that are exempt from income tax in Australia (for Books published in Australia) and, for avoidance of doubt, will not include the Authors Guild, Association of American Publishers or other trade organizations. Such motion or motions will be made with notice to and an opportunity to be heard by the attorneys general of all states in the United States, all Rightsholders whom the Registry will have been able to locate as of that time, and all Fully Participating Libraries and Cooperating Libraries. This Section 6.3(a)(i) (Unclaimed Funds for Unclaimed Books) is subject to Section 17.23 (Court’s Continuing Jurisdiction).

(ii) [deleted – Unclaimed] **Abandoned Funds** Any revenues due to Registered Rightsholders of claimed Books will be held by the Registry for the benefit of such Rightsholders until paid to such Rightsholders in accordance with this Amended Settlement Agreement; provided that, any such revenues that are abandoned in accordance with applicable law will be distributed to the appropriate governmental authority in accordance with applicable law.

Inserted **6.6(f): “No Personally Identifiable Information.** In no event will Google provide personally identifiable information about end users to the Registry other than as required by law or valid legal process.”

## **Article VII – Fully Participating Library and Cooperating Library Rights and Obligations**

Amended **7.2(a)(ii) – (iv):**

(ii) **Books Not Digitized From the Fully Participating Library’s Collection.** Google may provide a Fully Participating Library with Digital Copies of Books in the Fully Participating Library’s Collection that Google did not Digitize from the Fully Participating Library’s Collection; provided, however, that a Fully Participating Library may receive an LDC of all of the Books in its Collection only if, for a (deleted – Collection) Fully Participating Library with holdings of nine hundred thousand (900,000) (deleted – Books) volumes (i.e., books and not Periodicals or bound volumes of Periodicals) or more, Google Digitizes more than three hundred thousand (300,000) (deleted – Books) volumes from that Fully Participating Library’s (deleted – Collection) holdings, or, for a (deleted – Collection) Fully Participating Library with holdings of fewer than nine hundred thousand (900,000) (deleted – Books) volumes, Google Digitizes more than thirty percent (30%) of the (deleted – Books) volumes from that Fully Participating Library’s (deleted – Collection) holdings. Google will not provide a Fully Participating Library with a Digital Copy of any Book that is not held by that Fully Participating Library.

(iii) **Institutional Consortia.** For any Institutional Consortium that (1) exists as of the Amended Settlement Agreement Date, and (2) with which Google has a Digitization Agreement, Google may provide each Fully Participating Library that is a member of that Institutional Consortium with Digital Copies of Books in that Fully Participating Library's Collection that Google did not Digitize from that Fully Participating Library's Collection, provided, however, that a Fully Participating Library may receive an LDC of all of the Books in its Collection only if at least ten thousand (10,000) (deleted – Books) volumes (i.e., books and not Periodicals or bound volumes of Periodicals) were Digitized from such Fully Participating Library's (deleted – Collection) holdings, and (a) if the sum of the (deleted – Collections) holdings for all Fully Participating Libraries in the Institutional Consortium is two million (2,000,000) (deleted – Books) volumes or more, Google Digitizes more than six hundred fifty thousand (650,000) (deleted – Books) volumes from those Fully Participating Libraries' (deleted – Collections) holdings, or (b) if the sum of the (deleted – Collections) holdings for all Fully Participating Libraries in the Institutional Consortium is fewer than two million (2,000,000) (deleted – Books) volumes, Google Digitizes more than thirty percent (30%) of the (deleted – Books) holdings in aggregate from those Fully Participating Libraries' (deleted – Collections) holdings. Google will not provide such a Fully Participating Library with a Digital Copy of any Book that is not held by that Fully Participating Library.

(iv) (Deleted – Limitation) **Limitations.** Google shall not provide Digital Copies of Books Digitized in the United States to any Person other than a Fully Participating Library, except as authorized in this Amended Settlement Agreement, or with prior Registry or Rightsholder approval. This Amended Settlement Agreement neither authorizes nor prohibits, nor releases any Claims with respect to, any volumes that are Digitized by Google and provided to any Fully Participating Library except and solely to the extent that such volumes are Books or contain Inserts.

### **Article IX – Dispute Resolution**

Arbitration clauses seem generally to be fairer than in other agreements of this kind – **9.1** allows for the parties to a dispute to “elect to resolve such dispute in court or by other such dispute resolution procedure as they may agree” and **9.3(a)** allows for a Rightsholder or Claimant who is party to a dispute to request that “the arbitration be held by telephone or videoconference in order to save time, travel and other costs.”

### **Article X – Releases**

**10.2(b)** amended: “The Releases are subject to the following: (i) nothing in this Amended Settlement Agreement releases or adversely affects any Claims of any Amended Settlement Class members who opted out of the original Settlement Agreement by September 4, 2009 or who opt out of the Amended Settlement Agreement between the Amended Settlement Agreement Date and the Supplemental Opt-Out Deadline...”

### **Article XII – Class Notice Program**

Inserted **12.2:**

**12.2 Supplemental Notice** Class Counsel will submit to the Court a proposed Supplemental Notice of Class Action Settlement (“Supplemental Notice”) substantially in the form attached hereto as Attachment N (Supplemental Notice). Class Counsel will recommend to the Court that the Supplemental Notice

(translated into the same languages into which the original Notice was translated) be (a) emailed or sent by postal mail to all Persons who provided contact information on the Settlement Website or on a Claim Form, who opted out of the original Settlement Agreement, or who filed an objection, amicus position or other statement with the Court, (b) emailed or sent by postal mail to all authors' and publishers' groups and Reproduction Rights Organizations that assisted Plaintiffs in the dissemination of the original Notice, (c) placed on the Settlement Website, and (d) announced in and outside the United States, Canada, the United Kingdom and Australia with a press release issued by the Supplemental Notice provider. In addition, the Settlement Administrator will continue its informational toll-free telephone service. All Administrative Costs, including the costs of the Class Notice Program, shall be paid solely out of the Settlement Fund.

### **Article XIII – Settlement Administration Program**

Inserted **13.3:**

**13.3 Claiming Process and Website.** The Registry and, for so long as Google continues to provide operational support for the Registry, Google, will (i) assist Claimants in claiming Books pursuant to Section 13.1 (Registration and Completing Claim Forms) and (ii) maintain and improve the Settlement Website so as to facilitate the claiming of Books pursuant to Article XII (Class Notice Program). Google will also use reasonable commercial efforts to correct errors in the Books Database as Google discovers such errors or as they are identified to Google.

### **OMITTED: Article XVI – Right to Terminate Agreement**

[All deleted:]

Google, the Author Sub-Class, and the Publisher Sub-Class each will have the right but not the obligation to terminate this Settlement Agreement if the withdrawal conditions set forth in the Supplemental Agreement Regarding Right to Terminate between Plaintiffs and Google have been met. Any decision by Google, the Author Sub-Class or the Publisher Sub-Class to terminate this Settlement Agreement pursuant to this Article XVI (Right to Terminate Agreement) will be in accordance with the procedures set forth in the Supplemental Agreement Regarding Right to Terminate. The Supplemental Agreement Regarding Right to Terminate is confidential between Plaintiffs and Google, and will not be filed with the Court except as provided therein.