

# Objections and Responses to the Google Books Settlement: A Report

The Public-Interest Book Search Initiative

New York Law School

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## Introduction to Version 2.0

This update adds information about the arguments for and against the proposed amended settlement based on the filings made with the court in January and February 2010. We have also taken advantage of the editing process to improve the organization and to fix a number of omissions and mistakes from version 1.0. We thank everyone who wrote us with suggestions for improvements, and hope that you will continue to help us improve this document for future versions. Please write to us at [booksearch@nyls.edu](mailto:booksearch@nyls.edu) with any corrections or suggestions

The biggest change in this version is the inclusion of the plaintiffs' and Google's responses to many of the objections. The relationship between objections and responses is not one-to-one, and we have tried to give a representative cross-section of responses, rather than repeating each response in connection with each objection. The interested reader is, as always, invited to consult the objections and responses directly; we have continued our practice of providing hyperlinks and page references.

Thank you again for your interest in this important issue.

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## Introduction

This report collects information about the objections raised to the original proposed settlement in the *Authors Guild v. Google* litigation. We identified 76 distinct issues, which we grouped into 11 categories. This report briefly summarizes each issue, provides an illustrative quotation from a filing with the court, and indicates any related changes in the amended settlement.

We have necessarily used discretion in deciding which issues to discuss and how to categorize them. We attempted to avoid overlap, and have sometimes combined as one “issue” related arguments, whether raised by the same party or by different parties. We also tried to omit issues that were described only in external commentary or that were described only briefly in filings. Our summaries are meant to be concise descriptions of the objections and responses, but are necessarily less detailed and precise than the originals.

This report is descriptive, not evaluative. Inclusion of an issue means only that at least one party made the full argument in a filing to the court. It does not represent any judgment about whether the objection accurately characterizes the settlement or the underlying facts. Nor does it represent any judgment about the legal merits of the objection. Our classification and ordering of the objections are meant as an aid to the reader, not substantive commentary. Our choice of representative quotations is not meant as an endorsement of any particular filer’s arguments. Similarly, inclusion of changes from the amended settlement does not represent a judgment about whether the changes address the relevant objection.

This report is not legal advice and is not meant to substitute for independent legal analysis. If you are interested in the effect of the settlement on your rights, you should consult with a lawyer.

Please write to us at [booksearch@nyls.edu](mailto:booksearch@nyls.edu) with any corrections or suggestions for future versions of this report. Thank you for your interest in this important issue.

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## I. Definitions

### I.1 Periodicals Excluded

**Objection:** The Proposed Settlement excludes periodicals, journals and reference materials, even where Google has already scanned them and should pay compensation for the scanning. *See* [American Psychological Association](#) at 6:

As indicated by the Book Rights Registry, Google digitized approximately 455 APA journals without permission. . . . Overall, approximately two thirds of the APA works digitized by Google without consent are not covered by the Proposed Settlement.

**Response:** Copyright owners whose works are excluded from the settlement are not precluded from bringing a separate suit against Google. *See* [Plaintiffs' Supplemental Memorandum](#) at 80:

First, no such prejudice exists because copyright owners of these excluded works preserve all rights they have against Google for scanning any of these materials if and as included in Books.

### I.2 Visual Material Excluded

**Objection:** The settlement defines “Insert” to exclude “pictorial works,” thereby depriving visual artists of the benefits of participation. *See* [American Society of Media Photographers et al.](#) at 4:

A partial settlement that selectively provides for compensation only to certain categories of copyright owners (*i.e.*, authors and publishers) and not for other types of copyright owners (*i.e.*, Visual Arts Rights Holders) is fundamentally unfair and arbitrary, and inevitably would place the excluded copyright owners in a compromised position. Approval of this Proposed Settlement would leave Visual Arts Rights Holders with no financial compensation and very little practical ability to pursue a remedy for a separate financial package after this class action is terminated.

**Response:** Class action law does not require the parties to include all types of copyrighted materials in the settlement. *See* [Plaintiffs' Supplemental Memorandum](#) at 80:

Second, the parties were under no obligation to negotiate a global settlement that would settle and extinguish the claims of rightsholders of every form of copyrightable work. *See In re Holocaust Victim Asset Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (even a broadly drafted ‘complaint in a class action lawsuit does not vest in putative class members a right to be part of the class ultimately certified by the District Court’).

### I.3 New Books Excluded

**Objection:** The settlement does not prevent Google from using works published after January 5, 2009. *See* [Canadian Standards Association](#) at 5:

In other words, if unchanged, the Proposed Settlement is destined to be most notable for what it did not accomplish or even attempt to accomplish, *i.e.* at the end of the day, Google never promises that it will not Digitize works published after

January 5, 2009. Thus, unless restrained by this Court, it is overwhelmingly likely that Google will Digitize such works, forcing a new class . . . to needlessly litigate these same issues again at great expense.

**Response:** Not directly addressed. *See* [Plaintiffs' Supplemental Memorandum](#) at 8-9:

Google's founders repeatedly have stated that digitization of all of the books in the world has long been the company's goal...Moreover, Google has the financial means, technology, library partners, business purpose and intent to accomplish its goal of digitizing the world's books...To date, five years into its massive digitization effort, Google has scanned over twelve million books, and it intends to continue its scanning into the future. Declaration of Daniel Clancy, Feb. 11, 2010 ("Clancy Decl.") ¶ 4.

## 1.4 Music and Lyrics Included

**Objection:** Although the settlement attempts to exclude sheet music, the definitions of "Book" and "Insert" leave open the possibility of substantial quantities of music and lyrics being included. *See* [EMI Music Publishing](#), p. 1:

Further, while we understand that the Settlement specifically excludes 'sheet music and other works that are used primarily for the playing of music,' both the definitions of 'Book' and 'Insert' include certain references to and definitions of music and lyrics that seem to, nevertheless, implicate the interests of music publishers such as EMI, and its songwriters.

**Amendments:** The amended settlement decreases the quantity of music that will be included. If a more than 20% (previously 35%) of the pages in a Book are more than 20% (previously 50%) music notation, it will be excluded. "Insert" now excludes musical notation entirely. *See* [Plaintiffs' Supplemental Memorandum](#) at 79:

Music notation and book illustrations are excluded from the definition of 'Insert.' The ASA excludes from the definition of Book works for which 20% of pages contain more than 20% music notation. The ASA excludes from the definition of Book works for which 20% of pages contain more than 20% music notation.

## 1.5 Microforms Included

**Objection:** The settlement includes microforms, which other entities have spent great time and effort creating, enabling Google to free-ride off of their work. *See* [ProQuest](#) at 12:

It is unfair to ProQuest and other similarly situated Class Members to be forced to forfeit a non-digital asset that it has assembled and invested at great expense.

**Amendments:** Amended settlement does not permit Google to Digitize microforms. *See* [Plaintiffs' Supplemental Memorandum](#) at 79 n.112:

The ASA also now precludes Google from digitizing from microform versions of Books and, as a result, the objection to that effect has been withdrawn.

**Resolution:** This objection has been withdrawn. *See* [ProQuest Withdrawal of Previous Objection](#).

## 1.6 Dissertations Included

**Objection:** The definition of “Book” includes dissertations, which are already being digitized and distributed. *See* [ProQuest](#) at 6:

Well over 2,500 institutions worldwide use ProQuest’s enhanced online service to discover and research these dissertations through highly detailed, digital versions of the dissertations, abstracts, and indices (“ProQuest Dissertations and Theses”). Anyone in the world with an Internet connection can already discover and obtain these dissertations through ProQuest’s existing web service, “Dissertations Express.”

**Amendments:** The definition of Commercial Availability has been modified.

**Resolution:** This objection has been withdrawn. *See* [ProQuest Withdrawal of Previous Objection](#) at 2:

The addition of an ombudsman and the new definition of ‘Commercial Availability’ constitute improvements which applied in good faith will reasonably address the issues previously raised by ProQuest. Indeed, Section 3.2(d)(i) is clearer and provides for greater predictability in the Amended Settlement.

## 1.7 Children’s Books Undefined

**Objection:** Although “children’s Book illustrations” are specifically included in the settlement as Inserts, the term is undefined. *See* [Matthew Canzoneri](#) at 1:

At Section 1.72 of the Settlement Agreement, the definition of ‘Insert’ specifically includes ‘children’s Book illustrations’ but there is no definition of either ‘children’s Book’ in the Settlement Agreement. This could cause considerable confusion in administering the settlement.

**Amendments:** The definition of Insert has been amended to remove the reference; children’s books are now treated identically with other books.

**Amended Settlement Objection:** This change can disadvantage some children’s book authors. *See* [Sarah Canzoneri](#) at 3:

In many children’s books, the story is told through both words and pictures and the interaction of the two is critical. Moreover, in children’s books, the words often appear in or printed over the illustrations. As a result—because Google scans full pages—even the words will not be shown if the illustrations cannot be shown.

## 1.8 Comic Book Status Unclear

**Objection:** The settlement does not make clear whether individual comic books, collections of comics, or graphic novels are meant to be included. *See* [DC Comics](#) at 7:

Moreover, the terms ‘Book,’ ‘Insert’ and ‘Periodical’ create uncertainties for various categories of material owned by DC Comics: individual comic books, original graphic novels and collected editions.

**Amendments:** “[Periodical](#)” explicitly includes “comic book[s].” *See* [Plaintiffs’ Supplemental Memorandum](#) at 79:

The ASA also clarifies that comic books and compilations of Periodicals are Periodicals and therefore not Books.

## 2. Fairness to Rightsholders

### 2.1 Cash Payments Insufficient

**Objection:** The cash payments for works digitized before May 5, 2009 are too small in light of Google's likely liability for statutory damages. *See* [Darlene Marshall](#) at 2:

The compensation suggested by the settlement for damages for *past* copyright infringement is inadequate in light that if a defendant is found to have infringed a work registered with the Copyright Office, the minimum statutory damages award is \$750.00.

**Response:** The amount of the cash payment to Rightsholders represents a fair and reasonable compromise that takes into account the possibility that the plaintiffs might lose the case. *See* [Plaintiffs' Supplemental Memorandum](#) at 85-86:

The amount of the Cash Payments reflects a compromise among the parties. The compromise reflects the parties' valuation of the prospects of recovery and includes a discount to account for the possibility that plaintiffs might have lost the case, as well as the cost of recovery. . . . Moreover, because many of the works included in the ASA were not timely registered pursuant to Section 412, they would not have been entitled to statutory damages but only provable actual damages and defendant's profits, see 17 U.S.C. § 504(b), which might have been less than the amounts of the Cash Payments.

### 2.2 Revenue Split Insufficient

**Objection:** A 63/37 revenue split is unfairly favorable to Google. *See* [Ian Franckenstein](#) at 5:

One suspects that the basis of Google's 37% share of e-book sales is not based on any true cost analysis, but instead is based on the fact that books are traditionally sold through bookstores on a 40% mark up over wholesale price. Recently, one leading e-publishing site, Scribd, is paying rights holders 80% of e-sales, and even many members of the Publishers Association have or will be seeking such better deals directly with Google under its separate Partner program outside the purview of this Settlement.

**Amendments:** Rightsholders are explicitly allowed to negotiate different revenue splits.

**Response:** The revenue split is Google's normal split with business partners, is a fair division of profits, and is in line with the splits offered by comparable systems, such as Amazon's. Furthermore, Rightsholders can now negotiate an individual revenue split if they feel the standard split is unfair to them. *See* [Plaintiffs' Supplemental Memorandum](#) at 89-90:

The revenue split gives primary consideration to the value of the copyrighted works, but also rewards Google's marketing and technological contributions (and takes into account Google's future operating expenses). This split is the same split that Google offers to Rightsholders in its Partner Program. For Rightsholders, this royalty split also compares favorably to that offered by Amazon, which reportedly gives authors who provide their books to Amazon for sale only 35% of the book's sales revenues. It is also well within the range of other arrangements in the market.



Second, for in-print Books, the ASA provides that either the Rightsholder or Google can seek to negotiate a different revenue split and, if they are unable to come to agreement, either the Rightsholder or Google can choose not to include the Book in the Settlement's revenue models. ASA § 4.5(a)(iii).

### 2.3 Non-Copyright Claims Released

**Objection:** The settlement requires copyright owners to waive Lanham Act, right of publicity, tortious interference with contract, and other non-copyright claims. All of these claims are unrelated to Google's acts of infringement and waivers of them are not necessary for the various Revenue Models under the settlement. See [Arlo Guthrie et al.](#) at. 6:

This broad release raises substantial concerns for all authors, and particularly for those who have a large and popular body of in-print works and may have trademark rights in their names and titles. For instance, Catherine Ryan Hyde's novel *Pay it Forward* was adapted and released as a major Hollywood movie, and a film adaptation of another of her novels, *Electric God*, is currently in development. Hyde also has trademark rights in her non-profit Pay it Forward Foundation, which provides grants to schools, churches, and community groups for projects designed to provide learning opportunities for young adults.

**Response:** All releases, while not specifically listed in the complaint, are closely connected and related to the complaint. See [Plaintiffs' Supplemental Memorandum](#) at 70:

The ASA clearly addresses the facts and law that were and are at issue in this suit and were plainly set forth in the Complaint - whether Google's digitization and display of books copied in libraries and the distribution of digital copies to libraries without the authorization of copyright owners - infringes their copyright. See *Wal-Mart*, 396 F.3d at 107 n.13 (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (court "may release not only those claims alleged in the complaint . . . but also claims which 'could have been alleged by reason of or in connection with any mater or fact set forth or referred to in' the complaint" (quoting *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir. 1976))).

*Id.* at 109-110:

The only trademark claims released are those that arise from the specific actions enumerated above. Thus, for instance, if Google digitizes a Random House Book that includes a Random House trademark, Random House releases all claims that might otherwise be asserted for display of that trademark, after the Effective Date, but solely in connection with the specific actions otherwise authorized by the ASA. No other trademark claims are released, i.e., if Google displayed Random House's trademark on its home page or if Random House wishes to sue Google for uses of its trademark in connection with AdWords, Random House's right to bring trademark claims has not been released or otherwise impaired by the ASA.

### 2.4 Non-Display Use Claims Released

**Objection:** The settlement requires an open-ended waiver of claims relating to Non-Display Uses by Google. Some of these uses, however, may infringe copyright and be commercially valuable. See [Arlo Guthrie et al.](#) at. 8:

One obvious example of an undisclosed Non-Display Use might well be sales of book titles, key lines or portions of text, or authors' names in Google's AdWords program. Additional examples might include personalized advertising, which has been described as the 'holy grail' of the search industry. Google's CEO Eric Schmidt has acknowledged that using data such as this vast database of written works to 'get better at personalization' is key to Google's continued growth. The Agreement contains no restrictions on Google's ability to do just that through Non-Display Uses of authors' works, or even on the sale of information derived directly from these works.

**Response:** The parties were unable to negotiate restrictions on Google's ability to exploit Non-Display Uses, however, Rightsholders have the right to instruct Google to remove or turn off Non-Display Uses for a Book. In addition, some Non-Display Uses could be found to be fair use and therefore non-compensable. See [Plaintiffs' Supplemental Memorandum](#) at 91-92:

The ASA pertains to Google's use of the Class's works for the purpose in which those works were intended: to be read and to earn revenues from book sales. Plaintiffs bargained hard to obtain Google's agreement to negotiate revenue models in connection with Non-Display Uses. Boni Decl. ¶ 7. In the end, Google would not agree. Plaintiffs evaluated the Settlement and its significant benefits to the Class, particularly as it affects Rightsholders of out-of-print Books and concluded that it was not worth scuttling the Settlement over this provision.

*Id.* at 106:

To the extent they are fair uses, they would be non-compensable. In any event, valuing such uses would have been almost impossible.

## 2.5 Objectionable Advertising Possible

**Objection:** The settlement does not give copyright owners the opportunity to object to particular advertisements that appear on pages with their books, even when they find those advertisements to be offensive or contrary to the message of those books. See [Arlo Guthrie et al.](#) at 6:

Because it is so broad and untethered from the underlying dispute, the release effectively bars authors from preventing objectionable uses of their works and names in connection with GBS. For example, Google may allow advertisements to appear alongside works that are harmful to an author's reputation or contrary to their core philosophical or political principles; bury an author's own web site far down in search results in response to a search for that author's works; allow third-party websites to run Snippets against objectionable content on those sites; or make other objectionable uses of authors' works.

**Response:** Rightsholders can control whether or not advertisements, with their associated revenue, are visible alongside their works. See [Plaintiffs' Supplemental Memorandum](#) at 92:

Authors have the right at any time to turn off all ads next to their Book if they do not like the content of the ads. ASA § 3.5(b)(i).

## 2.6 Author-Publisher Procedures Favor Publishers

**Objection:** The Author-Publisher Procedures prescribe particular revenue splits between authors and publishers. Under governing precedent, however, most contracts reserve electronic rights to authors, so the splits unfairly give power and revenues to publishers. *See* [Edward Hasbrouck](#) at 7:

There's little reason for publishers to be involved at all in making decisions about electronic publication of most of these works. The vast majority of in-copyright books subject to the settlement (a) were published before e-books or the Internet were conceived of, and (b) are out of print. Authors never assigned publishers any electronic rights to most of these books.

**Response:** The procedures are an effort to be fair to authors, especially since many contracts were executed without contemplation of electronic access. In these instances, terms have been established that follow, as closely as possible, the likely normal bargain. *See* [Plaintiffs' Supplemental Memorandum](#) at 112-113:

Where both an author and a publisher are Rightsholders of a Book, each has the right to control whether the Book is displayed by Google under the ASA. . . . If the author wants to exclude a Book from a Revenue Model, but the publisher wants to include it, the Book will be excluded.

With respect to revenues . . . because many older author-publisher contracts do not make clear who owns the digital rights to a Book, the A-P Procedures include an allocation plan for unreverted out-of-print Books of 65%/35% (in the author's favor) for Books published before 1987 (because, in general, such contracts are silent with respect to ownership of electronic rights) and 50%/50% for Books published in and after 1987 (because, around that time, contracts included grants of electronic rights to the publisher and contain this split). . . .

Any Rightsholder can, if it has the electronic rights for the Book, enter into a direct arrangement with Google. In such case, the A-P Procedures will not apply at all, and any rights to license the Book would be based solely on the terms of the author-publisher contract for that Book. For Books where both the author and the publisher are the Rightsholder, the A-P Procedures will apply only if both Rightsholders have determined to exercise their rights under the ASA.

## 2.7 Arbitration Unfair

**Objection:** The settlement subjects many disputes to mandatory, expensive, binding arbitrations. These procedures are confidential and do not create precedent. *See* [American Law Institute](#) at 7:

In addition, the Arbitration Dispute Resolution Process is unfair to the Institute as it is designed to prevent precedential aggregation (and publication) of arbitration rulings. It instead requires that each arbitration be kept confidential so that only the immediate parties will know it—and they cannot disclose it to others. This violates transparency and accountability, and will only insure a lack of consistency and effective oversight as to what will be determined to be 'Commercially Available' over time.

**Amendments:** The parties to an arbitration may agree “to resolve such dispute in court or by such other dispute resolution procedure as they may agree.”

**Response:** The arbitration procedures are fair to all class members, will be less expensive than judicial determinations, and will be equitable to all concerned parties. *See* [Plaintiffs' Supplemental Memorandum](#) at 103:

Although the arbitration proceedings themselves will be kept confidential, the ASA specifically provides that Rightsholders will enjoy complete access to prior arbitration decisions, with only the names and other confidential information kept confidential. *See* ASA § 9.8. Rightsholders may use these prior decisions in their own arbitrations. All parties, including arbitrators, will have access to a database of decisions rendered pursuant to Article IX, and the arbitrators may rely on this precedent as necessary. *See* ASA § 9.6.

## 2.8 Insert Copyright Owners Disadvantaged

**Objection:** Copyright owners of Books participate extensively in the Revenue Models and can control which Display Uses their Books appear in, but copyright owners of Inserts have limited participation and control. *See* [Arlo Guthrie et al.](#) at 12:

The Named Plaintiffs also failed to attach meaningful value to the exploitation of Inserts. Under the Agreement, Insert authors are consigned to accept \$15 for Google's past infringement of their works, and a small Inclusion Fee of "no less than US \$50 per Entire Insert and US \$25 per Partial Insert" solely for future subscription uses of those works and subject to a cap of \$500 for all uses ever. Yet authors like Catherine Ryan Hyde and Eugene Linden may command as much as \$1,000 or \$1,500 for the inclusion of just one of their works in a larger work. Moreover, Insert authors are afforded merely the right to Exclude their works from all - but not less than all - Display Uses, and have no right to Remove or Exclude them from Revenue Models.

**Response:** The payments to insert Rightsholders are based on publishing industry norms, and provides exceptions that allow Insert holders to gain the full value of their work. *See* [Plaintiffs' Supplemental Memorandum](#) at 106-107:

An Insert Rightsholder is entitled to a minimum Cash Payment of \$5 per Partial Insert and \$15 per Entire Insert, as well as to an Inclusion Fee of \$25 per Partial Insert and \$50 per Entire Insert (if the Rightsholder does not exclude the Insert from the Institutional Subscription, subject to a cap for Inclusion Fees of \$500 for all Inserts from the same work). Plan of Allocation § 1.2. Plaintiffs believe that, in the aggregate, this compensation is fair because Inserts are generally included in other works either without compensation (as a "fair use") or, for larger works (such as forewords, essays, and short stories) through a one-time permission payment covering all uses. Aiken Decl. ¶ 41;; Sarnoff Decl. ¶ 13. Moreover, the Plan of Allocation does provide for exceptions: if any Insert Rightsholder can establish that it has a royalty arrangement or other contractual entitlement to additional compensation for the online use of its Insert in excess of the Inclusion Fee to which it is entitled under the ASA, it will receive additional compensation from the Inclusion Fund. Plan of Allocation § 1.2(h).

## 2.9 “Commercially Available” Definition Inconsistent with Industry Norms

**Objection:** The definition of “commercially available” is not the same as the publishing industry’s standard definitions for “in print.” It does not take account of new models such as audiobooks and e-books. *See* [Jesus Gonzalez](#) at 8:

Print-on-demand books can be declared out of print (or Not Commercially Available) according to the settlement, but the criteria for doing so are completely undefined. The publisher (and author) can be happy with the volume of sales, but Google can declare the work Not Commercially Available, thereby asserting their right to step in and reprint the book regardless.

**Response:** Google’s determination of what works are “Commercially Available” benefits Rightsholders, as they will receive notice and may object to any change in availability, and takes into account wider sources of availability. *See* [Plaintiffs’ Supplemental Memorandum](#) at. 81:

The initial Commercial Availability classification will determine the default treatment of a Book by Google (*i.e.*, whether it is displayed by default or not) *only until the Book is claimed*. Once a Rightsholder claims a Book, the Rightsholder has the right (no matter how the Book is classified by Google) to timely remove the Book or to exclude the Book from all Display Uses at any time. The “Commercial Availability” classification of a claimed Book is only relevant to claiming Rightsholders in two respects under the Settlement: (1) Books that are not Commercially Available must be included by Rightsholders in the Institutional Subscription revenue model if they are included in the Consumer Purchase revenue model (ASA § 3.5(b)(iii)); and (2) Books that are not Commercially Available may not be withdrawn by Rightsholders from the Research Corpus (ASA § 7.2(d)(iv)). Both of these provisions were included in the Settlement at the request of the libraries, and no objection or comment has been received with respect to either of these two provisions.

To the extent that these provisions are of a concern, the ASA now provides that, when a Rightsholder simply asserts that a Book is Commercially Available, Google must change the classification of that Book and cease displaying it. ASA § 3.2(d)(i).

## 2.10 Compilations Disadvantaged

**Objection:** The settlement only defines as an “Insert” those United States works that have been individually registered, and only defines as a “Book” those United States books that have been registered as a whole. In many cases, for practical reasons, copyright owners will register only the collection or only the individual works. *See*: [DC Comics](#) at 7-8:

Without clarification and additional precision, this definition could be interpreted to exclude from the proposed SA copyrighted works that have not been registered by DC Comics for any number of reasons. As an example, individual contributions to a ‘collective work’ or ‘compilation’ are often registered, but the compilation or collected edition may not be. If the individual works are registered, the compilation or collected edition of such individual works should qualify as a “Book” regardless of each individual works’ inclusion in (or exclusion from) the proposed SA and notwithstanding the compilation’s or collected edition’s registration status.”, their names often do not appear in the ‘Search and Claim’ database of the Settlement.”

**Amendments:** The amended settlement defines “Insert” to include United States works that have been registered as part of another work. Some compilations would be excluded entirely under the amended definition of “Periodical.”

**Response:** The rights of Rightholders of compilations or other types of works that have been excluded from the ASA have not been affected or altered at all. These Rightholders still retain all of the rights against any of the parties as before the ASA. See [Plaintiffs’ Supplemental Memorandum](#) at 80:

Copyright owners of these excluded works preserve all rights they have against Google for scanning any of these materials if and as included in Books. . . . The parties were under no obligation to negotiate a global settlement that would settle and extinguish the claims of rightholders of every form of copyrightable work.

## 2.11 Burden of Claiming Works

**Objection:** Particularly given the errors in the Books Database, the settlement imposes on copyright owners a substantial burden of identifying and claiming their individual works. Publishers will have thousands of editions and entries to verify. Even those who wish to opt out of the settlement are instructed to identify their particular works. See [Harrassowitz et al.](#) at 19-20:

The Books Database is, moreover, seriously flawed in numerous respects, making it extremely difficult for rightsholders to identify all of their works, should they wish to direct Google not to use them or to challenge Google’s designation of a work as not Commercially Available. This is because the Books Database does not group works by “book.” Rather, the database contains multiple, and at times, duplicative listings for each work—80 million record entries, which are riddled with errors and conflicting information, including incorrect ISBNs, misspellings of publisher and author names and incorrect publisher and author information, and misuse of publisher and imprint categories.

**Response:** Rightsholders can reasonably determine if their works are registered with the Copyright Office. See [Google’s Memo in Support](#) at 61-62:

For Books registered since 1978, registration records are easily searchable on the website of the United States Copyright Office, [www.copyright.gov](http://www.copyright.gov). For Books registered before 1978 but not yet in the public domain, the Copyright Office maintains records on paper, and lists those records in a publication called the *Catalog of Copyright Records*. . . . Google scanned the entirety of the *Catalog of Copyright Entries* from 1923 . . . to 1978 . . . and made it freely available for searching through Google Book Search. . . . If a potential class member has failed to maintain records of whether or not he has registered his copyright...then he can use either [www.copyright.gov](http://www.copyright.gov) or Google’s scans of the *Catalog of Copyright Entries* to research whether his copyright was registered.

## 2.12 Opting-Out Rightsholders Prejudiced

**Objection:** Even Rightsholders who formally opt out will still, in practice, be required to abide by the settlement’s terms. See [Harold Bloom et al.](#) at 19-20:

Any Rightsholder who opts out of the Proposed Settlement is likely to be placed at the end of the line for digitization and publishing because for the near-future

Google will likely have more than enough to do dealing with the works of class members who did not opt out of the Settlement. Google and the BRR will also be in a position to tender ‘take it or leave it’ terms to those who opt out, since they know that no other entities can provide service of similar scale and scope.

**Response:** Rightholders who opt out are not prejudiced; they merely retain their rights to sue Google. *See* [Plaintiffs’ Supplemental Memorandum](#) at 125:

The ASA does not negatively affect the exercise of rights by copyright owners because they are, in fact, “exercising” their rights when they decide to opt out and preserve their rights to sue Google for infringement.

### 2.13 Secret Termination Clause

**Objection:** The settlement contains a confidential termination clause, giving Google and the plaintiffs a private right to void the settlement, possibly to the detriment of class members. *See* [Federal Republic of Germany](#) at 18-19:

Article XVI astonishingly provides that Google, the Author Sub-Class and the Publisher Sub-Class each will have the right to terminate the Settlement . . . . This *private* right by Google to completely undo the Settlement — which settlement is promoted as serving the *public* interest — is shrouded in secrecy . . .

**Amendments:** The termination clause has been omitted. *See* [Plaintiffs’ Supplemental Memorandum](#) at 170:

That provision, however, has been deleted from the ASA and has no operative effect.

### 2.14 Discounts Unvalue Books

**Objection:** Google may unilaterally provide discounted books for an unlimited time, depriving the right holders of the true value of their work. *See* [Hachette Livre](#) at 14:

Any discounting by Google with regard to Books falling within the scope of the Proposed Amended Settlement Agreement could have significant negative repercussions on the name and reputation of both the author and Hachette with regard to the ‘saleability’ of more recent works falling outside of the scope and currently marketed by Hachette under favorable commercial terms in France or elsewhere”

**Response:** This provision does not change the revenue received by the Rightholder, which remains based on the list price. Furthermore, any change to the list price of any book is subject to approval by the Rightholder. *See* [Plaintiffs’ Supplemental Memorandum](#) at 109:

Even if Google discounts the price of a Book, Google will pay 63% of that Settlement Controlled Price to the Registry. ASA § 4.5(b)(i). Google may also make special offers of Books for Consumer Purchase at reduced prices, subject to notification to Registered Rightholders. Registered Rightholders, contrary to the views of some objectors, will have the right not to approve the reduced prices. If the Registered Rightholder or, in the case of unclaimed works, the Unclaimed Works Fiduciary, does not object to the reduced price suggested by Google, 63% of the discounted price will be paid to Rightholders. ASA § 4.5(b)(ii).





## 3. International

### 3.1 Formality in Violation of Berne Convention

**Objection:** The requirement that class members claim their works with the Registry is a “formality” of the type prohibited by art. 5.2 of the Berne Convention. See [Consumer Watchdog](#) at 14-16:

Not only does the proposed Settlement Agreement attempt to do an end-run around the legislative process, but it also proposes a scheme that Congress could not have adopted because of its clear violation of the United States’ international obligations under the Berne Convention for the Protection of Literary and Artistic Works...By attempting to impose requirements on international Authors and Publishers that are directly contrary to the anti-formality provisions of Berne Art. 5 (2), the parties are asking the Court to put the international business interests of the United State’s ‘artists, authors and other creators’ at risk.

**Amendments:** Many foreign works have been removed from the settlement.

**Response:** The Amended Settlement does not impose prohibited formalities. See [Plaintiffs’ Supplemental Memorandum](#) at 124-125:

Formalities are conditions that are necessary for the “right to exist” and include “administrative obligations laid down by national law” that would lead to a “loss of copyright.” Accordingly, only those rights that are statutory prerequisites for obtaining, maintaining or exercising a copyright right are prohibited formalities. Legal or administrative rules of general application, as distinct from preconditions on obtaining or exercising copyrights, are not formalities prohibited by the Berne Convention. Thus, the requirement that unless class members exercise their right to opt out pursuant to Rule 23(b)(3) they will be bound by a class action settlement (which not unique to the Copyright Act) is not a formality.

### 3.2 Not a Permissible Exception Under Berne Convention

**Objection:** Under art. 9.2 of the Berne Convention, any exception to the exclusive rights of copyright is permissible only if it “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” If the proposed settlement is treated as an exception, it does not pass this test. See [French Republic](#) at 12:

In fact, this reflects the traditional three-part test for copyright exceptions as enunciated in Berne, Article 9(a)(2) which limits such exception for literary works to, “certain **special cases**, provided that such reproduction **does not conflict with a normal exploitation** of the work and **does not unreasonably prejudice the legitimate interests** of the author.” (Emphasis added.) The same test is found in Article 13 of TRIPs: “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.” Clearly, the proposed Settlement undercuts established law and moves well beyond the delimited boundaries of international law for permissible exceptions to copyright.

**Amendments:** Many foreign works have been removed from the settlement.

**Response:** The Amended Settlement does not limit the exclusive rights of the author, so the three-step test of Article 9(2) of Berne does not apply, but even if it were applicable to the ASA, that test is fully satisfied. See [Plaintiffs' Supplemental Memorandum](#) at 131-135:

Because the ASA does not limit the exclusive rights of the author, those provisions [Article 9(2) of Berne, Article 10 of the WCT, and their counterpart in TRIPS, Article 13] are not applicable. Nonetheless, given some of the objections with respect to the ASA's alleged non-compliance with Article 9(2), Plaintiffs describe how the ASA fully satisfies that Article and its counterparts...As to the first step, the ASA qualifies as a "special case." . . . The ASA satisfies the first step because it arises out of the settlement of a particular lawsuit against Google; that lawsuit and its settlement is specific to Google and does not establish a rule of broad application, such as a statute, that would authorize mass digitization projects more generally. Furthermore, the ASA's authorizations to Google are specific, narrowly circumscribed and clearly defined, and are limited solely to Google. Finally, neither the ASA, in general, nor the A-P Procedures, in particular, have any effect as precedent...As to the second step, the ASA does not "conflict with the normal exploitation of the work." . . . The ASA satisfies the second step because it establishes economic models, principally for out-of-print works, that do not compete with the ways in which authors and publishers extract "economic value" from those works. . . . As to the third step, the rights granted to Google and the libraries under the ASA do not "unreasonably prejudice the legitimate interests of the author." . . . The ASA does not unreasonably prejudice Class members because it is subject to specified conditions, there is no "serious loss of profit" for the copyright owner and the ASA specifically provides for compensation to both authors and publishers.

### 3.3 "Commercially Available" Definition Disfavors Foreign Rightsholders

**Objection:** "Commercially Available" is defined only in terms of "then-customary channels of trade in the United States." Books that are in print only in other countries will be made available by default under the settlement. See [Hachette Livre, S.A.](#) at 12:

The concept of 'Commercial Availability' used in the Proposed Settlement does not take into account non-US Rightsholders. The Proposed Settlement, which sets no parameters regarding these channels of trade, thus grants Google wide discretion to ignore a book's 'Commercial Availability' in a non-US jurisdiction or through a non-US website, opening the door for disparate treatment of non-US Rightsholders.

**Amendments:** The definition of Commercially Available now also includes the United Kingdom, Canadian, and Australian markets. A Book will be considered Commercially Available if it can be purchased by consumers in any of these countries from sellers located anywhere in the world. All other countries have been excluded from the settlement.

**Response:** The amended definition of "Commercially Available" does not render books that are in print in other countries subject to default display under the ASA, and even books that are classified as not Commercially available (and hence subject to default display) can be removed from display uses by Rightsholders. See [Plaintiffs' Supplemental Memorandum](#) at 82-83:

The definition in the ASA now makes clear that a Book will be considered Commercially Available (and thus cannot be displayed by Google by default) if the Book is offered for sale “new, from sellers anywhere in the world...” to purchasers in the United States, Canada, the United Kingdom, or Australia. ASA § 1.31. This broad definition is protective of Rightsholders because, as a practical matter, purchasers in one of those four countries are likely to be able to purchase any Books offered for sale anywhere in the world from online retailers, wholesalers or directly from book stores. Such Books will not, therefore, be subject to default display by Google under the ASA. As explained above, even if a Book is classified by Google as not Commercially Available (and thus is eligible for default display by Google), the Rightsholders can prevent Google’s display of such Book by removing it or excluding it from display uses. Rightsholders need not assert, show or prove that the Book is Commercially Available to exercise these removal and exclusion rights, which are independent rights under the Settlement.

### 3.4 Registry Does Not Represent Foreign Rightsholders

**Objection:** Although approximately half of the nearly 10 million books digitized by Google are foreign works, non-U.S. Rightsholders would be denied any representation on the Board of the Registry. *See* [Booksellers Association of the United Kingdom and Ireland](#) at 12:

Furthermore, it is proposed that the Registry is controlled by US publishers and authors. But much of the material held electronically comes from authors and publishers outside the US. There is, for example, no European representative on the Board of the Books Registry.

**Amendments:** The amended settlement specifies that the Registry must have at least one author and at least one publisher representative from each of the four countries that remain in the settlement.

**Response:** There will be at least six non-U.S. Rightsholders on the Board of the Registry, which will solicit additional views of other non U.S. Rightsholders. *See* [Plaintiffs’ Supplemental Memorandum](#) at 66:

As to non-U.S. Rightsholders, the Settlement expressly commits that no fewer than six members of the Board will be from outside the United States. ASA § 6.2(b)(ii). Plaintiffs anticipate that the Registry may also solicit the views of other Rightsholders from outside the United States. It may also solicit additional views, including those of Google’s customers, through advisory committees or working groups.

### 3.5 Settlement Violates Foreign Law

**Objection:** The terms of the settlement conflict with the laws of various countries. *See* [New Zealand Society of Authors](#) at 1-2:

The Settlement therefore seeks to override New Zealand copyright law by, for example, extending copyright in New Zealand books further than the term granted under New Zealand law.

**Amendments:** Many foreign works have been removed from the settlement.

**Response:** Foreign law is inapplicable to the settlement. *See* [Plaintiffs’ Supplemental Memorandum](#) at 117:

Copyright law is territorial and has no application to acts of infringement that take place entirely outside a country's borders. United States courts do not apply foreign copyright laws to infringements of the Copyright Act.

In this case, Google is scanning books in the United States and is providing copies to libraries in the United States. For that reason, and in recognition of the principle that copyright law is territorial, Plaintiffs only alleged violations of United States copyright law, and the ASA addresses and settles only those claims arising under United States law.

### 3.6 Foreign Rightsholders Required to Act Illegally

**Objection:** Where terms of the settlement are contrary to their obligations under foreign law, compliance with the settlement would require foreign Rightsholders to act illegally. *See [Hachette Livre](#)* at 9:

[D]isputes between French publishers and their authors are subject to French law. The dispute resolution procedure set out in Appendix A to the Proposed Settlement may contravene the contractual obligations of the parties under French law. A decision by the Registry under the procedure set out in Appendix A of the Proposed Settlement would probably not be enforceable in France.

**Amendments:** Many foreign works have been removed from the settlement.

**Response:** Compliance with the settlement does not require foreign Rightsholders to act illegally, as its procedures allow them to avoid any such obligations. *See [Plaintiffs' Supplemental Memorandum](#)* at 99:

Such publisher [Hachette] can waive whatever rights it may have under the ASA; for example, it may choose not to claim certain Books, not control Books in a manner that would override decisions made by its authors and agree that the author should be paid 100% of the revenues of a Book. As to authors, to the extent that they own all rights in their Books - that is, they have never conveyed any publication rights or all rights have reverted to them (whether by contract, operation of law or otherwise) - the A-P Procedures have been amended to provide that they retain 100% control of those Books under the ASA (because such Books are treated as "Author--Controlled" under the Procedures) A-P Procedures §3.1.

### 3.7 Arbitration Rules Inequitable to Foreign Rightsholders

**Objection:** The rules of the American Arbitration Association inequitably impose mandatory jurisdiction in New York and other financial costs on international Rightsholders. *See [Japan Visual Copyright Association](#)* at 3:

[T]he proposed settlement agreement requires future disputes between authors and Google concerning the Google Library Project to be subject to commercial arbitration in New York unless another place is agreed to by the parties. For many authors and copyright holders living outside the United States, traveling to New York for a dispute resolution is financially burdensome, which may discourage them from actively policing their copyrights.

**Amendments:** Parties to an arbitration may agree to other procedures, or may request telephone or videoconference arbitration.

**Response:** The arbitration procedures are fair, inexpensive and equitable. *See* [Plaintiffs' Supplemental Memorandum](#) at 102-103.

Arbitrations will be conducted by the American Arbitration Association (“AAA”), a neutral body with no affiliation with, or funding from, Google. . . . The parties can agree on the language of the arbitration (should they not want to arbitrate in English) and the place of the arbitration (should they not want to arbitrate in New York). Moreover, the ASA specifically provides that Rightsholders can participate in any arbitration by telephone. ASA § 9.3(a). . . . Objections concerning the application of U.S. law to ‘claim[s] outside the U.S.’ are misplaced because the ASA’s dispute resolution procedures are only applicable to the legal claims arising under United States law that are settled by the ASA.

### 3.8 Foreign Rightsholders Not Truly Excluded

**Objection:** Even though certain foreign countries have been excluded from the Proposed Amended Settlement, some of these foreign countries are still affected by the Settlement. *See* [Indian Publishers](#) at 6:

i. Indian authors whose works are either registered with the United States Copyright Office or published in the United Kingdom, Canada and Australia as of January 5, 2009; ii. Indian authors/publishers, whose books have already been scanned and included by Google in its database” are examples of Foreign Rightsholders whose rights are still affected by the Settlement.

**Response:** Rightsholders are free to remove or exclude Books from display uses. *See* [Plaintiffs' Supplemental Memorandum](#) at 82-83:

[E]ven if a Book is classified by Google as not Commercially Available (and thus is eligible for default display by Google), the Rightsholders can prevent Google’s display of such Book by removing it or excluding it from display uses. Rightsholders need not assert, show or prove that the Book is Commercially Available to exercise these removal and exclusion rights, which are independent rights under the Settlement.

### 3.9 Arbitrary Criteria Used to Determine Excluded Foreign Rightsholders

**Objection:** It is arbitrary to include foreign works that were registered with the US Copyright Office and exclude those that were not. *See* Hachette U.K. at 5:

HUK believes that Rightsholders not residing in the United States, Canada, the United Kingdom or Australia should not be put in a position of being split within the scope of the Proposed Amended Settlement Agreement and outside of its scope based on a totally arbitrary criterion relating to those cases in which works were registered with the US Copyright Office (as a general rule, before 1990, when the Berne Convention entered into force in the United States) and those cases in which they were not (as a general rule, post-1990).

**Response:** The criteria used to determine included foreign Rightsholders are based on Rightsholders’ affirmative acts of registration and consequent protection by U.S. copyright laws. *See* [Plaintiffs' Supplemental Memorandum](#) at. 77.

Books that were registered with the Copyright Office were included because the

affirmative act of registration indicated that their copyright owners had decided to invoke the protection of the U.S. copyright laws. Google is infringing those copyright owners' U.S. copyrights and the ASA resolves that suit for infringement.

### 3.10 Narrowed Definition of “Books” Deprives Rightsholders of Removal Rights They Had Under the Original Proposed Settlement

**Objection:** The narrowed definition of “Books” deprives Rightsholders of their right to remove all of their works from coverage under the ASA. *See* [Hachette Livre](#) at 9:

The narrowing of the definition of Books has excluded many Hachette’s works digitized by Google from indemnification. As for its rights, Hachette had the right to remove all of its works published before that date [1990]. Under the new, narrow definition of ‘books,’ this right is limited only to those works which it has registered with the US Copyright Office and which thus fall within the scope of the Proposed Amended Settlement (as a general principle, before 1990). Given that the Proposed Amended Settlement Agreement does not prohibit Google from continuing to digitize works falling outside of its scope. Hachette loses the contractual rights which it had under the Original Proposed Settlement Agreement for all of these other works (post 1990).

**Response:** The settlement is not required to include all potential class members. *See* [Plaintiffs’ Reply to ASMP Motion to Intervene](#) at 1:

The Author Sub-Class and the Publisher Sub-Class were under no obligation to settle and extinguish the claims of every person conceivably affected by the conduct of Google. *See In re Holocaust Victim Asset Litigation*, 225 F.3d 191, 201 (2d Cir. 2000) (even a broadly drafted “complaint in a class action lawsuit does not vest in putative class members a right to be part of the class ultimately certified by the District Court”).

### 3.11 Exclusion Procedures Arbitrarily Discriminate Between Anglophone and Non-Anglophone Class Members

**Objection:** Books published in non-Anglophone countries before 1990 that were not registered with the US Copyright Office are excluded from the Settlement even if digitized by Google., whereas books from the United Kingdom, Canada, and Australia are included. *See* [Hachette Livre](#) at 9-10:

[T]he members of the class who are from Designated Anglophone Countries will be indemnified for their total injury whereas the non-Anglophone Members . . . who do not publish in the Designated Anglophone Countries will be indemnified for a part of their injury only, or not at all if they have never registered their works with the US Copyright Office. Such discrimination is arbitrary. . . . It is both illogical and inequitable.

*See also* [Canadian Authors](#) at 8–9:

In addition, it should be pointed out that most notifications and the settlement document itself were in English. While Canada is called a bilingual country, most English Canadians do not speak French, and many Quebec writers do not speak English, or if they speak it, not very well. Certainly, not well enough to

comprehend a complex document such as the GBS. This English-only communication proved extremely frustrating for Quebec’s publishers and authors.

**Response:** There is no discrimination against class members on the basis of nationality. *See [Plaintiffs’ Supplemental Memorandum](#)* at 135-36:

First, the objection confuses the definition of covered works – Books and Inserts – with the nationality of Class members. The ASA does not discriminate among groups of Rightsholders. Any Rightsholder, no matter where he or she resides or is located, whether in the United States or the other three countries, may have works that are covered by the ASA based on the place of publication of Books or on whether the work was registered with the United States Copyright Office.

### 3.12 Lack of Access to Benefits and Protections under the Settlement

**Objection:** Foreign Rightsholders’ Works (or books) are included, but they cannot access the service to either benefit themselves or protect their works. *See [Jenny Darling and Associates](#)* at 3:

The Amended Settlement further highlights how unfair this is, stating that ‘the services authorized by the Amended Settlement will be unavailable to users outside the United States.’ So, Australian works are subject to the Settlement, yet we - individuals, libraries, academics - will be unable to access the services it will ultimately provide.

**Response:** Not directly addressed.

## 4. Jurisdiction

### 4.1 Court Lacks Article III Jurisdiction

**Objection:** Claims by copyright owners whose books Google has not yet scanned and claims based on future acts by Google do not present a “case or controversy” over which the court has Article III jurisdiction. *See* [Consumer Watchdog](#) at 5-6 n.4:

The class members’ claims against Google for reproduction and sale of complete works, which the settlement releases, are not properly before the Court, are not justiciable, are not redressed by the settlement and are neither a case nor a controversy under Article III of the Constitution.

**Response:** The court does have Article III Jurisdiction because the actions by Google present a “Case or Controversy.” *See* [Google’s Brief in Support](#) at 25:

There is no serious dispute that the Court has Article III jurisdiction over this case, and therefore jurisdiction to approve a settlement of it. Plaintiffs alleged that Google exercised plaintiffs’ exclusive right to reproduce their works and to make them available to the public. This reproduction, if infringing, represented a concrete incursion on the rights of every member of the class. For its part, Google asserted substantial defenses of its actions. If these defenses prevailed they would establish tangible limits on the scope of the rights of every member of the class. The parties’ conflict was and is quite real. Nor does it matter that Google has not yet scanned the works of each and every class member. In the Second Circuit, a “case or controversy” exists where an alleged infringer has made adequate preparations for the allegedly infringing activity. *See Wembley, Inc. v. Superba Cravats, Inc.*, 315 F.2d 87, 89 (2d Cir. 1963) (in the patent context, the alleged infringer must “either be engaged in manufacturing, using or selling the invention, or [state] that he has the immediate intention and ability to do so”)

### 4.2 Court Lacks Personal Jurisdiction over Class Members

**Objection:** Members of the plaintiff class lack sufficient “minimum contacts” with the United States and the state of New York for the court to issue an order binding them without violating the Due Process Clause. *See* [Members of the Japan P.E.N. Club](#) at 9:

[T]he Supreme Court’s reasons for relaxing the ‘minimum contact’ requirement for absent class action plaintiffs are not present here. First, the burdens placed on the proposed foreign absent class plaintiffs—particularly those in Japan—are enormous.

**Response:** The court does have personal jurisdiction over Class Members. *See* [Plaintiffs’ Supplemental Memorandum](#) at 62-63:

So long as notice meets the requirements of Rule 23, members of a class who are located outside the United States may be properly bound by a settlement approved by U.S. courts. *See Vivendi Universal*, 2009 WL 855799 at \*14 (“The challenges of providing direct and published notice have been met in numerous cases involving foreign class members.”); *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 at \*1--2, \*4 (approving settlement where notice was given in 21 different languages on a rolling basis); *Vancouver Women’s Health*, 820 F.2d at 1362 (approving worldwide



notice program that included materials translated into 29 languages); *In re Royal Abold N.V. Sec. & ERISA Litig.*, No 1:03--MD--01539, 2007 WL 3128594 (D. Md. Sept. 26, 2007) (approving worldwide class action settlement and notice program that disseminated materials in 16 languages); *Abearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (approving worldwide settlement and notice program that included newspaper notice translated into 10 languages and published in 57 newspapers in 21 countries).

### 4.3 States Have Sovereign Immunity

**Objection:** The Eleventh Amendment prohibits states from being sued in federal courts without their consent. States are therefore not proper members of the plaintiff class. *See* [State of Connecticut](#) at 2:

Connecticut, and every state, is protected by the Eleventh Amendment and the doctrine of sovereign immunity, and cannot be swept into this litigation or its proposed resolution by settlement except by express consent.

**Response:** States can be included in the Class. *See* [Plaintiffs' Supplemental Memorandum](#) at 162-163:

Asserting Eleventh Amendment jurisprudence, Connecticut somehow claims to be immune from the Settlement. Connecticut, however, is in the plaintiff Class. It is not being sued as a defendant. The Eleventh Amendment precedents are entirely irrelevant. . . . The State of Connecticut is not objecting in its capacity as a governmental entity, with police or other regulatory powers that might be affected by the releases in the Settlement. Instead, its copyright claims are indistinguishable from those of any other member of the Class. It therefore stands in exactly the same position as every other member of the Class and can be bound in the same way.

## 5. Class Action Procedure

### 5.1 Settlement Releases Claims for Future Conduct

**Objection:** Class-action settlements may only release claims arising from the “identical factual predicate” alleged in the complaint. The proposed settlement would release Google from liability for conduct it has not yet undertaken. See [Amazon.com](#) at 35:

While a settlement can release claims that were not specifically alleged in the litigation, a settlement cannot release claims that are not part of the ‘identical factual predicate’ as the class claims.

**Amendments:** The amended settlement limits possible revenue models to a specified list.

**Amended Settlement Objection:** Despite the elimination of possible of open-ended business deal, the ASA is still too broad. See [United States of America](#) at 4:

In response to concerns expressed by many, the ASA eliminates the open-ended ability of Google and the Registry to agree in the future to unspecified business models. Compare PS § 4.7 with ASA § 4.7. Yet, what remains is nevertheless quite broad and well beyond what the class representatives sought to litigate or could have litigated.

**Response:** Courts routinely approve settlements affording prospective relief including settlements that have detailed structural arrangements addressing matters beyond the scope of the complaint. See [Google](#) at 8-9:

The Supreme Court’s decision in *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“*Firefighters*”) established that district courts have the authority to approve forward-looking settlements within very broad limits designed to ensure that there is jurisdiction over the dispute and that the settlement is appropriate to the controversy before the court. The Supreme Court in *Firefighters*, like many other courts, approved forward-looking relief, and the settlement proposed here is well within the capacious standards of that case.

**Response:** The ASA satisfies the “identical factual predicate” test. See [Plaintiffs’ Supplemental Memorandum](#) at 51:

Every claim released in the ASA is released for fair consideration: the claims for past infringement are released in exchange for the Cash Payments and the injunction claims are released in exchange for the right to control the use by Google and the libraries of one’s Books and the right to receive revenues for their use.

### 5.2 Settlement Implements Commercial Transaction

**Objection:** The settlement is primarily commercial, rather than compensatory, and is therefore impermissible in a class action. See [Scott E. Gant](#) at 5:

This part of the settlement is fundamentally a commercial transaction, which the settling parties are improperly attempting to impose through the judicial process and the procedural device of Rule 23.

**Response:** Class actions that establish a forward looking commercial arrangement between class members and the defendant are permissible. See [Google’s Brief in Support](#) at 10:

But it [the Department of Justice] cites *no* case disapproving a settlement on that ground. Nor does any other objector. On the contrary, courts have approved class settlements in a variety of contexts that could be called ‘business deals’ insofar as they could *not* have resulted from litigation to judgment. Nor does any other objector. On the contrary, courts have approved class settlements in a variety of contexts that could be called “business deals” insofar as they could not have resulted from litigation to judgment.

### 5.3 Named Plaintiffs Not Representative of Diverse Industry

**Objection:** The Author Subclass is divided among different groups of authors, e.g. trade, academic, etc. Authors Guild membership is not available to many authors. The Authors Guild and the named plaintiffs represent only a small, atypical slice of the Author Subclass. Similarly, the Association of American Publishers does not represent the full diversity of publishers. See [Science Fiction and Fantasy Writers of America](#) p. 5:

[N]one of the individual named class representatives are authors of adult trade fiction. Thus, they do not adequately represent the interests of many SFWA members, whose works are widely distributed in the stream of commerce.

**Response:** The class is adequately represented. See [Plaintiffs’ Supplemental Memorandum](#) at 14:

The Second Circuit has stated that “a subset of a class” does not “lack adequate representation when the lead plaintiffs of that class possess the claims of that subset.” See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 111 (2d Cir. 2005) (construing *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000)). That is the case here. The Representative Plaintiffs, who are authors and publishers, possess the same claims as the rest of the Class. Compl. ¶¶ 12-21. The Representative Plaintiffs, as is true of other members of the Class, are Rightsholders of works that Google has already scanned and works that Google has not yet scanned, and are rightsholders of in-print and out-of-print books. Like the Class as a whole, they assert claims for damages and injunctive relief. Compl. ¶¶ 63-79.

### 5.4 Named Plaintiffs Not Representative of Foreign Copyright Owners

**Objection:** All named plaintiffs are United States authors and publishers who cannot represent the interests of foreign authors and publishers. The Authors Guild and Association of American Publishers are not effective representatives for their foreign counterparts. See [Federal Republic of Germany](#) at 7-8:

For an author to join the Authors Guild, he or she must have been published by an established American publisher. . . . This fails to acknowledge the important role that German authors play in world literature or that not all German authors will have secured a U.S.-publishing arrangement. . . . Similarly, the plaintiff Association of American Publishers does not adequately and fairly represent Germany publishers or their interests because its membership is only to ‘all U.S. companies actively engaged in the publication of books, journals, and related electronic media.’ A non-U.S. publisher by definition would not be permitted membership.

**Amendments:** The Third Amended Complaint adds representative plaintiffs from the United Kingdom, Canada, and Australia. All other foreign works are excluded from the settlement.

**Amended Settlement Objection:** Despite the addition of representative plaintiffs from United Kingdom, Canada, and Australia, the representation by these members may not be adequate. *See* [Susan Price](#) at 2

The addition of these two [UK] authors was not made public until the Amended Settlement was published so there was no opportunity for other UK authors to communicate with them during the negotiation phase.

One of the authors is a poet and a novelist, the other is a novelist and a biographer. . . . They do not adequately represent those whose books have not yet been digitized, children's authors, academic authors and those who write non-biographical non-fiction.

They have also both written books published in the US and registered with the US copyright office. They would therefore still be members of the class if UK books were excluded so they do not adequately represent UK authors who have never had a book published in the US.

*See also* [United States of America](#) at 12:

[T]here are significant numbers of foreign authors from outside Canada, the UK, and Australia whose works were published in one of those countries or registered in the United States, and thus are subject to the ASA, even though the rightsholders may not have been represented by the new associated plaintiffs.

**Response:** The named representative plaintiffs were sufficiently representative of the class. *See* [Plaintiffs' Supplemental Memorandum](#) at 25-26:

Second, the ASA has six non-U.S. based Representative Plaintiffs who fairly and adequately represent the interests of Class members whose Books and Inserts were published in the U.K., Canada or Australia. Third, if those Class members are included in the ASA because their works were registered with the Copyright Office, they are identically situated with respect to authors and publishers of United States works, who also are only in the Class to the extent that they had registered their works. There is no fundamental conflict between the Representative Plaintiffs and owners of U.S. copyright interests located outside the United States.

## 5.5 Named Plaintiffs Not Representative of Orphan Works Owners

**Objection:** Orphan copyright owner members of the plaintiff class have not been adequately represented by the plaintiffs, all of whom are active copyright owners. *See* [United States of America](#) at 10:

There are serious reasons to doubt that class representatives who are fully protected from future uncertainties created by a settlement agreement and who will benefit in the future from the works of others can adequately represent the interests of those who are not fully protected, and whose rights may be compromised as a result.

**Amended Settlement Objection:** Orphan works, despite the creation of the Unclaimed Works Fiduciary, remain unrepresented in the settlement negotiations. *See* [Microsoft](#) at 10:

The fiduciary would not be appointed until after the settlement's approval. Rule 23 (a)(4) requires that absent class members be adequately represented *during* the litigation, not after it ends. When a class is settled, they must be adequately

represented during the settlement negotiations. *Amchem*, 521 U.S. at 623-24. The post-settlement fiduciary contemplated here cannot cure the failure to comply with Rule 23(a)(4).

**Response:** The terms of the ASA show adequate if not superior representation. The status of the Rightsholder, whether or not they have filed or can be found, is irrelevant to their representation. *See* [Plaintiffs' Supplemental Memorandum](#) at 17:

No conflict exists between Rightsholders of unclaimed works and Rightsholders of claimed works. The claims of infringement that Rightsholders have against Google do not turn on whether the copyright owner has filed a claim or can be identified or located. Although it is true that some Books may not be claimed in the settlement claiming process, that is no different from virtually every other class action, where less than all class members file a claim. A less than 100% claim rate, or even one that is significantly less, does not signify inadequate representation. Few, if any, class action settlements would ever be approved if it did.

If anything, the protections the ASA affords Rightsholders merit a finding of superior representation by Representative Plaintiffs. Under the ASA, Rightsholders can come forward *at any time* to claim and control their Books.

## 5.6 Authors Guild Played Improper Role in Settlement Negotiations

**Objection:** The Author's Guild, which is not a class member, improperly directed the settlement negotiations. *See* [Scott E. Gant](#) at 36:

As a threshold matter, the Authors Guild never asserted it had standing to pursue damages claims against Google for copyright infringement - as reflected in the Complaints, where it sought to pursue only injunctive or declaratory relief. It is therefore apparent that the Authors Guild did not - and never could have - served as an appropriate class representative with respect to the litigation of damages claim, or the negotiation of a potential resolution of those claims. Yet it appears the Authors Guild was intimately involved in negotiating the compromise of class members' damages claims, culminating in the Proposed Settlement.

**Response:** Not directly addressed.

## 5.7 Notice Insufficient

**Objection:** Some class members received no notice at all, and the publications chosen for notice were inappropriate for reaching class members. *See* [Members of the Japan P.E.N. Club](#) at 14:

Here, the notice given to Japanese rightsholders was woefully deficient. While we have not been able to ascertain the precise methods of notice used due to the settlement proponents' failure to provide that information to date, we have not been able to identify any author, including those who are prominent and successful in Japan, who received an individual actual notice in the mail. The only publication notices we have been able to identify appeared in a single publication of two major daily newspapers on the same day, and in a single publication of a trade paper on a subsequent date.

**Response:** The class received the "best notice practicable under the circumstances." *See* [Plaintiffs' Memorandum](#) at 61:

Both the content and manner of dissemination of the Notice, Summary Notice and Supplemental Notice were more than adequate. Written in plain terms, the Notice provided sufficient information about the action, the settlement and the Class members' legal rights thereunder, and it was disseminated in an extremely comprehensive and robust manner.

## 5.8 Individual Notice Required but Not Given

**Objection:** Individual notice must be mailed to all class members whose addresses are known. Most copyright owners have a last-known address, but notice was not individually mailed to them. *See* [Scott E. Gant](#) at 17-18:

[T]he Supreme Court has made clear that Rule 23's individual notice requirement 'may not be relaxed based on high cost.' The fact that there are millions of class members does not excuse the settling parties from their individual notice obligations.

**Response:** Individual notice is not required; the notice given was sufficient under the circumstances. *See* [Plaintiffs' Supplemental Memorandum](#) at 62-63:

"[T]he absence of individual notice is not fatal to class certification or settlement. If the members of a putative class may not be determined by reasonable means, then constructive notice by publication may satisfy the requirements of Rule 23(c) (2)." *Thomas v. NCO Fin. Sys.*, No. 00-CV-05118, 2004 WL 727071 at \*3 (E.D. Pa. Mar. 31, 2004) (putative class would be notified by publications in USA Today, with a circulation of 5.6 million, and through PR Newswire's National Newswire, reaching 3,000 newspapers, magazines, national wire services) (citing *Carlough*, 158 F.R.D. at 325). *See also* *Browning v. Yahoo! Inc.*, No. C04-01463, 2007 WL 4105971 at \*4 (N.D. Cal. Nov. 16, 2007) (notice apprising putative settlement class via email, regular mail and settlement website was reasonable; direct notice to each of the 14 million class members not necessary).

## 5.9 Notice and Settlement Not Properly Translated

**Objection:** The notice was poorly translated, and the settlement itself was not translated at all. *See* [Harrassowitz et al.](#) at 6-7:

Plaintiffs expressly promised this Court that 'Plaintiffs and Google will maintain a Settlement website . . . on which the Notice, this settlement agreement, and other relevant information (translated into approximately 35 languages) will be displayed.' . . . Inexplicably, since its launch over seven months ago, the Settlement Website has never included any translation of the Settlement - even though large numbers of foreign rightsholders lack the language skills necessary to read or comprehend this dense 334-page document in English.

**Amendments:** Foreign works from non-Anglophone countries are excluded from the settlement.

**Response:** The direct notice provided to foreign class members meets the requirements of Rule 23. There is no legal requirement for the settlement to be translated. *See* [Plaintiffs' Supplemental Memorandum](#) at 60-61:

The reason for not requiring translations of a settlement agreement is that class action settlement agreements are legal contracts, often addressing reasonably

complicated legal matters. They may not be readily understood by the average member of any settlement class. The official notice serves the function of apprising the class of a settlement's terms. Due process requires, therefore, the dissemination of notices to the class, not of the settlement agreement itself...

[T]he Notice, Summary Notice and Supplemental Notice adequately describe in plain language the key settlement terms and all required information. *See* Final App. Br. Section E. The Notice and Supplemental Notice were translated into the 36 languages that are read by 96% of the Class. Kinsella Decl. ¶ 37. The Summary Notice was translated into 72 languages. *Id.* at ¶ 24.

### 5.10 Notice Confusing and Misleading

**Objection:** The summary notice and full notice were confusingly written and mischaracterized important aspects of the settlement. *See* [Edward Hasbrouck](#) at 3:

The repeated references to 'against Google and the [sic] Participating Libraries' and to 'against Google' falsely and misleadingly imply that these are the only two parties or categories of parties against whom claims would be released by those who opt in (or don't opt out.)

**Response:** Not directly addressed.

### 5.11 Attorneys' Fees Excessive

**Objection:** The proposed fees are excessive and disproportionate in light of the work actually performed on behalf of the class. *See* [Harold Bloom et al.](#) at 27:

Forty-five million dollars in attorneys' fees is excessive when compared to the \$45 million that the Proposed Settlement *may* provide to members of the Author sub-class.

**Response:** The proposed fees are reasonable for the services provided. [Memorandum of Law in Support of Motion for Fees](#) at 7-8:

Counsel for the Author Sub-Class investigated and prosecuted this litigation intensely and thoroughly for the past four years. Thousands of hours have been spent developing the authors' case against Google, with the resulting settlement providing tremendous benefits to the authors that they could not possibly have achieved in the absence of the ASA. *See supra* at 2-6, and declarations cited therein.

Counsel for the Author Sub-Class expended over 19,000 hours with a resulting lodestar of more than \$10 million in the investigation, prosecution, and settlement of this litigation. Boni Dec. Ex. A. Additional substantial hours and resources will necessarily be expended assisting Class members with their claims, assisting with the establishment of the Registry, responding to other inquiries, as well as overseeing the settlement administration process and distributing Cash Payments.

### 5.12 No Fee Petition Filed

**Objection:** Settlement does not meet requirements of FRCP 23(h) because no fee petition has been filed. *See* [Charles D. Weller and Dirk Sutro](#) at 7:

Notwithstanding the fact that the Fairness Hearing was originally scheduled for June 11, 2009, with an objection date in May, no fee petition has been filed as of

the date that these objections are being filed. This does not comport with the requirements of Rule 23(h).

**Response:** Fee Petition was filed on February 11, 2010. See [Motion for Approval of Attorney's Fees and Reimbursement of Costs](#).

### 5.13 Opt-Out Period Too Short

**Objection:** Deadline for opting out or objecting was too short for class members to make an informed decision. See [Sanoma Magazines Belgium](#) at 3:

As however European rightsholders weren't part of the negotiations, they should have enough time to think about the possible consequences of the settlement for them and should have enough time to make a decision with regard to the settlement. Also because of the objections mentioned in this letter, and because of the ongoing investigation of the European Commission on the effect of the Google Book Settlement agreement on the European publishing sector, European authors, European consumers, and society at large . . . the deadline for making objections is still too short and should therefore be postponed.

**Amendments:** The deadline for opting out or objecting was extended to January 28, 2010, and other relevant deadlines were also extended.

### 5.14 No Notice Has Been Given to Newly Excluded Parties

**Amended Settlement Objection:** The ASA has failed to give sufficient notice to parties dropped from the settlement class. See [Washington Legal Foundation](#) at 6:

Notification on a world-wide basis is warranted because so many of those dropped from the class are likely to reside outside the U.S., Canada, the United Kingdom, and Australia. Unless the Court requires the parties to provide supplemental notification in forum outside those four countries, many individuals are unlikely ever to be told that they are no longer putative class members.

The Amended Settlement's failure to require sufficient notice to class members being dropped from the suit violates both FRCP 23(c) and the Due Process Clause of the Constitution.

**Response:** Not directly addressed.

### 5.15 Electronic Supplementary Notice is Ineffective

**Amended Settlement Objection:** Electronic supplementary notice excludes class members who do not use computers. See [Science Fiction and Fantasy Writers](#) at 7-8:

Posting notice procedures in this manner potentially precludes authors of older works, who may not be on-line, from becoming fully informed of their options in this suit and how their rights might be affected. Although the Order Granting Preliminary Approval of Settlement directed Plaintiffs' counsel to forward the Notice to identifiable Settlement Class members by postal mail, there is no evidence suggesting that any physical mailing has taken place. Moreover, even if the affected authors were on-line, the authors still may not have received notice of the PASA if they are not registered with the relevant litigation database, their e-mail



addresses are unknown, or they have e-mail filters blocking messages from unknown senders.

**Response:** Supplementary notice was far more than required. See [Plaintiffs Memorandum of Law in Support](#) at 64-65:

The program of disseminating the Supplemental Notice also fully met the applicable standards. It is well-settled that limited, or even no, supplemental notice is required where the amended provisions benefit or do not materially impair the interests of class...

The decision in *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 292 F. Supp. 2d 184 (D. Me. 2003), is instructive. There, the court denied final approval of a proposed settlement after a program of individual and publication notice to the class. The parties then proposed an amended settlement. The court granted preliminary approval and approved a supplemental notice program under which defendants' informational websites were continuously updated and maintained to reflect the terms of the amended settlement; an informational toll-free number was continued; and objectors and opt-outs were sent written notice of the amended settlement. The court concluded that "such notice was sufficient because it would be too burdensome and costly to repeat a mailing to the over eight million class members informing them of favorable changes in the proposed amendment, especially to those who never objected to the first proposed settlement." *Id.* at 186. "The relevant case law supports limited notice to non-objectors when the class members have already received an earlier form of notice." *Id.* Accordingly, Plaintiffs' dissemination of the Supplemental Notice, *see supra* p. 56, was far more than required under the circumstances.

## 6. Registry

### 6.1 Registry Will Not Represent Interests of Copyright Owners

**Objection:** The Registry will not be accountable to copyright owners and cannot be trusted to act in their interests. See [Harold Bloom et al.](#) at 20:

For example, the Registry is “*authorized* to act on behalf of Rightsholders,” (emphasis added) yet nowhere in the Proposed Settlement is the Registry *required* to act in the best interests of Rightsholders, much less assigned a fiduciary obligation to do so.

**Response:** The Registry will have fiduciary obligations to copyright owners. See [Plaintiffs’ Supplemental Memorandum](#) at 65-66:

The Registry will serve the Rightsholders’ best interests, will favor no subset over another and will have a fiduciary duty to each and every Rightsholder... all Rightsholders are entirely free to direct the Registry as to how, if at all, they want their Books and Inserts used under the Settlement. That right is a fundamental benefit of the Settlement.

### 6.2 Registry Will Be Beholden to Google

**Objection:** The Registry will be funded with money derived from Google and is likely to be excessively deferential to Google in negotiations. See [Harold Bloom et al.](#) at 20:

This is of particular concern since all of the Registry’s initial funding is provided by Google and all of its continuing funding derives from a percentage of revenues generated from Google’s use of class members’ works. Similarly, the Registry’s records and reporting and audit obligations run only to Google. Rightsholders have no explicit ability to seek an accounting of the Registry’s activities or to view its annual reports. See *id.* §§ 6.3(c) & (d).<sup>15</sup> Nor do Rightsholders have a clear right to periodic accountings from Google (individual or otherwise) concerning revenues generated by exploitation of their individual works. The audit that the Registry may seek from Google is subject to confidentiality, and, thus, individual Rightsholders may not be privy to its details. See *id.* § 4.6(e). These conflicts serve to highlight the fact that the Registry has no real independence from Google.

**Response:** The Registry will be independent from Google. See [Plaintiffs’ Supplemental Memorandum](#) at 67:

The Registry’s independence is ensured by its funding and structure. Google has no control whatsoever over how Plaintiffs or the Registry use the settlement funds paid by Google to establish the Registry. . . . Similarly, Google will have no control over the Registry’s operations or strategy. Google will not have any ownership, membership or any other stake in the Registry, nor will it have any seats on the Registry’s Board of Directors.

### 6.3 Registry Will Not Represent Interests of Owners of Unclaimed Works

**Objection:** The Registry, which will be controlled by active copyright owners, cannot be trusted to fairly represent the owners of unclaimed works. See [Institute for Information Law and Policy at New York Law School](#) at 16:

Here, however, the Proposed Settlement is structured to disadvantage the orphan work book copyright owner members of the Settlement Class for the benefit of active members. Any money paid to the Registry that is unclaimed after five years — as the money for many orphan works will be—will be reallocated away from the copyright owners whose works were responsible for it. Some of that money will be reallocated to other copyright owners who have registered with the Registry.

**Amendments:** The Registry will now contain an Unclaimed Works Fiduciary responsible for protecting the interests of the owners of unclaimed works. *See* [Plaintiffs' Supplemental Memorandum](#) at 65-66:

As to unclaimed works, the ASA provides for an Unclaimed Works Fiduciary, whose responsibility is to act in the best interests of the Rightsholders of unclaimed works.

**Amended Settlement Objection 1:** The settlement does not provide a meaningful mechanism to hold the Unclaimed Works Fiduciary accountable in discharging its duties. *See* [Science Fiction and Fantasy Writers](#) at 14-15:

While the PASA includes the method by which the Fiduciary and any successor are chosen and decisions reserved for the Fiduciary to make on behalf of Unclaimed Works, it does not outline a method by which owners of Unclaimed Works can later hold the Fiduciary accountable for their performance. *See, e.g.,* §§ 3.2(e)(i), 3.10, 4.2(c)(i). Owners of the Unclaimed Works who are displeased with the Fiduciary's performance or decisions with regard to their works would be forced to commence costly litigation against the Fiduciary and the Registry, but this would only divert the Fiduciary's time and waste limited funds reserved for the Unclaimed Works of Others. Additionally, many of the owners whose works fall within the Unclaimed Works designation may not have the financial means to maintain litigation against the Fiduciary.

**Amended Settlement Objection 2:** The Unclaimed Works Fiduciary's powers are too limited in some respects. *See* [Pamela Samuelson et al.](#) at 6:

The UWF can, for instance, choose to change the default setting for an unclaimed in-print book from “no display” to “display,” but not the reverse. The UWF also has the power to approve changes in pricing bins for unclaimed books available through the consumer purchase model, but seemingly no power to set prices for individual unclaimed books not to provide input about price-setting of institutional subscriptions. This seems strange to us because all or virtually all of the unclaimed books will be in the ISD and revenues derived from the ISD are likely to be substantial.

**Amended Settlement Objection 3:** The Unclaimed Works Fiduciary's powers are too broad in some respects. *See* [Pamela Samuelson et al.](#) at 6:

One power the PASA grants to the UWF which we strongly object is the power to authorize Google to alter the texts of unclaimed books. We can imagine no circumstance under which changes to the historical record embodied in books from major research libraries would be justifiable. Granting the UWF the power to authorize alteration of text poses risks of censorship.

**Amended Settlement Objection 4:** The Unclaimed Works Fiduciary represents both the authors and publishers of orphan works, pitting the interests of these two opposite sub-classes against each other. *See* [Science Fiction and Fantasy Writers](#) at 16:

The Fiduciary would be a two-headed monster embodying opposing interests of the author and publisher sub-classes, unable to faithfully serve as a fiduciary to either. The PASA provides no guidance as to which interests - those of authors or publishers - should be given priority by the Fiduciary, or how to resolve conflicts between the two sub-classes.

## 6.4 Unclaimed Funds Are Unclaimed Property Under State Law

**Objection:** The provisions of the settlement that permit the redirection of unclaimed funds to be used for the benefit of the Registry or distributed to claiming rightsholders violate state laws governing the distribution of unclaimed property. *See* [State of Connecticut](#) at 6:

Because § 6.3 of the proposed Settlement Agreement is a contractual agreement between Google and class members for the use of property owned by class members, the funds generated by operation of this commercial agreement should become the property of the owner of the work generating the profits at the time of use. The terms of § 6.3 trigger the operation of state abandoned and unclaimed property disposition statutes.

*Id.* at 3:

Under Connecticut's unclaimed property law, unregistered Rightsholders are afforded the same protections as Registered Rightsholders. At the end of three years, unclaimed funds, whether held by BRR for registered or unregistered Rightsholders whose rights are subject to the laws of Connecticut, should be turned over to the Connecticut State Treasurer to be preserved for its rightful owner. Nearly every state in the country has a similar law requiring that unclaimed property be turned over to the state at the end of a three-year or five-year period from the time the property became eligible for transfer or distribution to the Rightsholder.

**Amendments:** The Unclaimed Works Fiduciary is now charged with maintaining unclaimed funds. It may use these funds to attempt to locate rightsholders of unclaimed Books. After ten years, and under court supervision, unclaimed funds may be distributed to literacy-based charities. Under no circumstances are unclaimed funds distributed to the Registry itself or to other rightsholders.

**Response 1:** States lack standing to object because no unclaimed funds presently exist. *See* [Plaintiffs' Supplemental Memorandum](#) at 154:

The ASA has not yet been approved, the Registry has not yet been formed, Google has not yet sold any Books under the ASA, and no revenues have yet been earned. Thus, none of the State AGs presently have standing to object because there are no funds to which they arguably might be entitled.

**Response 2:** The settlement is consistent with requirements under state laws governing distribution of unclaimed funds. *See* [Plaintiffs' Supplemental Memorandum](#), p. 154-158; [Plaintiffs' Memorandum](#) at 22:

After ten years, upon approval of the Unclaimed Works Fiduciary, the Registry may make *cy pres* motions seeking Court approval to distribute Unclaimed Funds to not-

for-profit entities that directly or indirectly benefit Rightsholders and the reading public in the United States, Canada, the United Kingdom and Australia. Such cy pres motions must be made on notice to all claiming Rightsholders, the attorneys general of all states, and the Fully Participating and Cooperating Libraries.

## 6.5 State Law Governs Distribution of Charitable Assets

**Objection:** Any reallocation of unclaimed funds held for a charity is illegal. See [State of Connecticut](#) at 8-9:

BRR's expenditure of any portion of charitable funds or distribution of any portion of such funds other than to the Rightsholder or to the appropriate state's unclaimed property custodian will constitute a breach of fiduciary duty and an unlawful conversion of charitable property. See Conn. Gen. Stat. §§ 45a-514 and 47-2 (property dedicated to charitable purpose shall be used for that purpose forever and for no other purpose). Every state, through common law or statutory provisions, similarly protects charitable assets. Therefore, compliance with the provisions of the Amended Settlement Agreement with regard to retention, expenditure and distribution of revenues due to unregistered Rightsholders for whom the copyright is for the benefit of charitable purposes would result in an unlawful conversion of charitable assets under the law of every state. Distribution of revenues due to unregistered Rightsholders in accordance with state unclaimed property laws will ensure that charitable assets continue to be held indefinitely for the intended charitable purposes in accordance with state law.

**Response:** Rule 23 governs the distribution of unclaimed funds in a settlement of a federal copyright claim and the charitable trust laws of all of the states as to various state charities are inapplicable. See [Plaintiffs' Supplemental Memorandum](#) at 161-62:

This Court is entitled to exercise its discretion under Rule 23 as to the cy pres distribution of unclaimed funds in this national settlement, which settles a federal copyright claim, and not be forced to apply the charitable trust laws of all of the states as to various state charities. Under the logic of this objection, for example, this Court could presumably not aggregate unclaimed funds to make a cy pres distribution that would be meaningful, but would have to balkanize the amounts attributable to each separate charity's unclaimed funds in each state and then try to make a cy pres distribution only according to the specific charter and bylaws of that charity. Furthermore, if, as they assert, the State AGs are, indeed, the appropriate custodians of funds that the ASA might generate for charities in their states, then nothing would prevent them from filing a claim with the Registry, on behalf of those charities (or from urging those charities to file themselves), such that the funds would never be unclaimed.

## 7. Institutional Subscription

### 7.1 Institutional Subscription Pricing Unclear

**Objection:** The current explanation of how much institutional subscriptions will cost is vague. Given the lack of comparable products and the uncertainty about bundling and pricing tiers, it is impossible to predict what these prices will be and whether they will be reasonable. See [University of California Faculty](#) at 2:

Even with the dual objectives of revenue and public access, we perceive grave risks of similar price gouging if the Book Search Settlement is approved without some additional safeguards. The agreement now states in Sec 4.1(a)(ii) that pricing decisions made by Google in consultation with the Book Rights Registry (BRR) will be based on several factors, including importantly ‘pricing of similar products and services available from third parties.’ If this clause is meant to refer to pricing of journals from commercial publishers, this bodes ill as a meaningful limitation on price increases, for commercial publishers have priced journal subscriptions at excessive levels for years. If the intent is not to compare institutional subscriptions to the Book Search corpus to these journals, then we are at a loss to comprehend what it might mean.

**Response:** Google will determine pricing in consultation with the BRR in order to ensure that prices are consistent with the stated policies of the program, and if the BRR feels that Google is taking advantage of its stronger position, it can request arbitration. See [Plaintiffs’ Supplemental Memorandum](#) at 148-149:

The Registry will have only a limited role in reviewing Institutional Subscription prices proposed by Google to ensure that they satisfy the dual objectives of “(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education.” ASA, § 4.1(a)(1). This limited role is essential to protect the interests of Rightsholders, because Google’s self-interest could lead it to reduce the prices of Institutional Subscriptions well below the equilibrium market price to maximize revenue from other Google services (*e.g.*, Section 4.1(a)(ix)), which it is not required to share with Rightsholders. The Registry can only propose modifications to Google’s proposed pricing strategies; it cannot impose prices. If Google and the Registry disagree, an arbitrator will decide on a strategy that is consistent with the dual objectives quoted above. ASA § 4.1(a)(vii)(2).

### 7.2 Libraries At Risk from Google Monopoly

**Objection:** Lack of competition compromises core library values of access and dissemination. If libraries become dependent on the Institutional Subscription and Public Access Service, Google will acquire dangerous power over these civic institutions. See [Urban Libraries Council](#) at 4:

The practical effect of the proposed settlement will be a monopolistic situation. Google and Book Rights Registry will control the market for delivery of millions of books, without much danger of effective competition. While there is no present indication that the parties to the settlement will abuse their position, there is also no check upon them.

**Amendments:** The Amended University of Michigan agreement includes pricing review arbitration. The amended settlement allows the Registry to authorize more than one Public Access Service terminal per library building. See [Google’s Brief in Support](#) at 52-53:

This could not be farther from the truth, as is reflected by the outpouring of support from libraries large and small. Anne Kenney, University Librarian of Cornell University, explains that “most of the Library’s holdings, most of which have been out of print for decades and are of little commercial value, will not just be indexed, but will also be available to readers across the country,” and that “[t]he potential benefit of this to researchers is inestimable.” D.I. 241 at 1. Ms. Kenney further notes that the Cornell University Library’s collections have been opened for scanning both to Google and to competing scanning projects run by objectors Microsoft, the Internet Archive, and Amazon.com. *Id.* . . . And, while they urge Court oversight following approval, settlement approval is supported by the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries, representing over 139,000 libraries in the United States. D.I. 100 at 1-2. As discussed in Plaintiffs’ briefs, far from harming libraries, the ASA provides substantial benefits for libraries large and small through the free Public Access Service and the offering of Institutional Subscriptions.

### 7.3 Institutional Subscriptions Treat Institutions Differently

**Objection:** Different institutions, such as university libraries, K-12 schools, and governments, are treated differently in the terms on which they may purchase access to the Institutional Subscription. See [American Library Association et al.](#), at 9-10:

While this price discrimination could promote economic efficiency by setting the price at the point that meets the demand within that category, it could lead to bizarre results from a societal perspective. Google will conduct surveys among potential subscribers, and might learn that the higher education institutions have a much stronger demand for institutional subscriptions than K-12 schools. The low demand for institutional subscriptions at K-12 schools might cause the price of an institutional subscription to fall so low that many K-12 schools could afford to purchase the subscription. Meanwhile, higher education institutions in the same communities might not have the resources to pay the higher demand-drive prices charged to that category.

**Response:** Not directly addressed.

### 7.4 Institutional Subscription Excludes OCLC Networks

**Objection:** The definition of “Institutional Consortium” eligible for discounts unfairly excludes networks affiliated with the Online Computer Library Center. See [Lyrisis et al.](#) at 3-4:

[T]he Settlement does not permit *amici* to determine whether any or all of them are members of ‘COLC’ or ‘affiliates’ of OCLC, simply by virtue of their dealings with these two named organizations.

**Amendments:** OCLC-affiliated networks are now eligible to be treated as Institutional Consortia for discount purposes.

## 8. Antitrust

### 8.1 Settlement Controlled Pricing Is Illegal Retail Price-Fixing

**Objection:** Under Settlement Controlled Pricing for Consumer Purchase, Google will set individual retail prices for many copyright owners’ books using a common formula. This is *per se* illegal price-fixing under § 1 of the Sherman Act. See [Amazon.com](#) at 18-19:

Under that provision, a Rightsholder can elect to set its own price, or else it can choose to sell its book at a price created by a “Pricing Algorithm” to be developed by Google—with the latter as the default. Such coordinated pricing is unlawful. . . . It matters not that the coordination would be executed through use of a common formula.

**Amendments:** Settlement Controlled Pricing must now “maximize revenues for the Rightsholder for such Book and without regard to the price of any other Book.” See [Plaintiffs’ Supplemental Memorandum](#) at 148 n.268:

In response to alleged ambiguities, the parties revised Section 4.2(b)(i)(2) of the ASA to make clearer that Google will unilaterally set the Settlement Controlled Price at a level that simulates how a Rightsholder would unilaterally price the Book in a competitive market. Google is developing the algorithm without Registry or Rightsholder involvement (although the Registry may use a third-party expert solely to confirm that the algorithm is designed to accomplish its goal). ASA § 4.2(c)(ii) (2).

### 8.2 Royalty Rate Is Illegal Wholesale Price-Fixing

**Objection:** By fixing the royalty rate at 63% of Google’s net advertising and purchase revenues, the settlement constitutes an collective agreement fixing prices in the wholesale market. See [United States of America](#) pp. 19-20:

The parties have fixed the royalty rate at 63% of all revenues Google earns under the settlement. This term operates as a price floor (even for those who elect not to use the Proposed Settlement’s default pricing mechanisms), diminishing the incentives of individual authors or publishers to discount or offer other terms more favorable to the purchaser.

**Amendments:** The amended settlement gives both Google and Rightsholders the right to request renegotiation of their individual revenue splits. See [Plaintiffs’ Supplemental Memorandum](#) at 144 & n. 262:

Each Rightsholder is free to decide whether, and to what extent, to participate in the ASA, or to negotiate its own arrangement with Google. . . [The objection] that the ASA... imposes a “price floor” at the wholesale level, D.I. 840 at 6, [is] wrong. Authors will be free to negotiate their own deals with Google and other distributors.

### 8.3 Google Is Illegally Restricted from Offering Discounts

**Objection:** Google is permitted to offer only “temporary” discounts regardless of its willingness to accept a smaller share of revenue in exchange for increased sales. Even with



the Registry's and rightsholder's permission, discounts not funded by Google may not exceed 40%. See [United States of America](#) at 21-22:

The Proposed Settlement also restricts Google from discounting off a rightsholder's list price without authorization of the Registry and notification of the rightsholder, either of which may veto the discount. This term discourages Google from funding discounts and making the rightsholder whole, as any other retailer might. And allowable discounts are limited to 40% off a book's list price. In other contexts, such collective restraints on discounting have been held to be per se violations of Section 1.

**Amendments:** The amended settlement strikes the "temporary" discount restriction and there is no limit on the amount of a discount the Registry and rightsholders may authorize. See [Plaintiffs' Supplemental Memorandum](#) at 93:

Google may also make special offers of Books for Consumer Purchase at reduced prices, subject to notification to Registered Rightsholders. Registered Rightsholders, contrary to the views of some objectors, will have the right not to approve the reduced prices.

#### 8.4 Blanket Pricing for Institutional Subscription Pricing Is Illegal Price-Fixing

**Objection:** Google sets a single price for access to the whole Institutional Subscription, which includes works from thousands of competing copyright owners. While the Supreme Court upheld a similar blanket licensing scheme licensing in *CBS v. BMI*, the Registry is not subject to the same conditions as ASCAP and BMI, including judicial supervision of the pricing. See [Amazon.com](#) at 23-24:

The blanket license offered by ASCAP and BMI survived judicial scrutiny under the rule of reason only because the consent decrees and continued oversight of those decrees by the Department of Justice 'disinfected' their operations. These provisions included a requirement that all comers be licensed, that pricing be non-discriminatory for similarly situated licensees, and ultimately that the court retain jurisdiction to set a price where licensor and licensee could not agree on one. Because the Proposed Settlement lacks any comparable safeguards, the unfettered power of the Registry and Google to set the price of the institutional subscription should be judged very differently under the rule of reason than the blanket licenses sold by ASCAP and BMI.

**Response:** The ASA has fewer potential anticompetitive effects than the agreement in *BMI* because its arrangements are non-exclusive. See [Google's Brief in Support](#) at 47-48:

Under *BMI*, the Registry's involvement in approving prices set by Google is not unlawful. In *BMI*, neither the Supreme Court nor the appellate court on remand found collective price-setting for a blanket license problematic. . . . [T]he *BMI* courts relied on the ability of customers to purchase individual licenses from Rightsholders as sufficient to offset any concerns regarding competitive effects. . . Under the ASA. . . there are substantially fewer, if any, potential anticompetitive effects, because the arrangements are entirely non-exclusive. The Registry as well as individual Rightsholders can license books to Google's rivals on any terms they choose, thereby permitting other distributors to include these books in their own blanket licenses; and Google enables customers (if permitted by Rightsholders) to purchase books individually as well as through the institutional subscription.

## 8.5 Google Will Have Exclusive Access to Many Unclaimed Works

**Objection:** Due to the requirement that class members actively claim their works to remove them, unclaimed orphan works will be available only through Google. No competitor could make them available without committing large-scale copyright infringement. *See* [Public Knowledge](#) at 7:

Since no party other than Google can license the use of orphan works, Google will have an absolute monopoly on selling access to these works. The agreement prevents Google from licensing to others the use of any of the scanned works (Proposed Settlement § 2.2), and unless the agreement allows the BRR to license orphan works to other parties, this means no other entity has the legal ability to display or distribute orphan works. While the number of orphan books at stake may be debated, it remains true that for every single work orphaned, Google becomes the only permitted user, insulated from potentially massive copyright liability.

**Response:** The Registry is free to license unclaimed books in any future settlement. *See* [Google's Brief in Support](#) at 35:

[T]he ASA increases certainty regarding the possibility and potential costs of a subsequent settlement, and it also creates a licensing entity that could act as an “agent” for Rightsholders. Under the ASA, the Registry is not prevented from licensing the entire corpus of unclaimed books in any future settlement on terms more favorable than the terms provided to Google.

## 8.6 Google's Competitors Will Be Unable to Offer a Similar Product for Claimed Works

**Objection:** The Settlement Agreement was a result of fortuitous coincidences. Competitors will be required to assemble competing products on an opt-in basis, leaving them with an incomplete collection. *See* [United States of America](#) at 23-24:

Google's competitors are unlikely to be able to obtain comparable rights independently. They would face the same problems - identifying and negotiating with millions of unknown individual rightsholders - that Google is seeking to surmount through the Settlement Proposal. Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement.

**Response:** Google's competitors are free to do the same. *See* [Google's Brief in Support](#) at 53:

[O]ther digitization efforts [would not] be in any way hampered by approval of the ASA. All of the authorizations contained in the ASA are entirely nonexclusive; no Rightsholder sacrifices any right to authorize scanning and display by Microsoft, the Internet Archive, or Amazon.com by virtue of participation in the ASA's Revenue Models. The ASA does not preclude anyone else from digitizing books. In one signal respect, the Amended Settlement facilitates digitization efforts because it will create a Registry, which will maintain a database of Books that are claimed. The Registry can communicate directly with claiming Rightsholders, on behalf of third

parties, to ask them whether they would authorize the Registry to license third parties.

## 8.7 Settlement Thwarts Negotiations with Google Competitors

**Objection:** The Registry is prohibited from offering Google’s competitors better terms under some circumstances, deterring others from trying to compete with Google. *See [Yahoo!](#)* at 22 n. 18:

Even if authors or publishers could theoretically negotiate individually with potential competitors, the ‘most-favored nation’ clause insulates Google from price competition. This guarantees that no third party may negotiate terms more favorable than those currently granted Google. PS § 3.8(a). Thus, the overall effect of the Proposed Settlement is to create an exclusive and protected market for Google.

**Amendments:** This clause has been removed. *See [Plaintiffs’ Supplemental Memorandum](#)* at 151 n.274:

Because numerous objectors complained that Section 3.8(a) of the original settlement, which gave Google “Most Favored Nation” status under certain circumstances, created a potential barrier or disincentive to entry . . . the parties eliminated that provision from the ASA.

## 9. Privacy

### 9.1 Constitution and State Laws Require Reader Privacy Protections

**Objection:** Forty-eight states protect library patrons' privacy by statute. The proposed settlement does not guarantee similar protections for users of Google Books. See [Privacy Authors and Publishers](#) at 19-20:

Virtually every state protects public library reading records by statute, in recognition of the importance of having a citizenry that can freely avail itself of all the information in all the books without fear of monitoring. . . . Without explicit privacy protections in the Settlement, these long-held rights to privacy and freedom to read could be extinguished in this new digital age merely because Google converts public library books into a private set of services.

**Response:** The Google Books Privacy Policy will provide safeguards for users. See [Google's Brief in Support](#) at 55:

Counsel for the Privacy Authors and Publishers pressed Google for enforceable written commitments regarding user privacy for the services contemplated by the ASA even before those services are made available to consumers, in a departure from Google's regular practice. Keller Decl. ¶ 5. After lengthy discussions, Google made meaningful commitments in the form of its Books Privacy Policy, a document that is enforceable under the Federal Trade Commission Act. See 5 U.S.C. § 45(a); *In the Matter of GeoCities*, FTC Docket No. C-3850. In addition to the current privacy commitments in place for the entire Google Book Search program, Google has committed to additional safeguards for the services authorized under the ASA, which are described in further detail in the Google Books Privacy Policy itself.

### 9.2 Privacy from Government and Third Parties Not Required

**Objection:** Google will have sensitive information about users of its services under the settlement, and should be required not to divulge this information unless compelled by law. See [Electronic Privacy Information Center](#) at 17-18:

Privacy laws have typically regulated the circumstances under which such information may be disclosed to the government. But there are no such restrictions contemplated in the settlement which underscores the threat to the right to receive information anonymously and the associated First Amendment interests.

**Response:** Google will continue to fight for high standards to protect users from overreaching information requests. See [Google's Brief in Support](#) at 56:

The objectors would have the ASA require Google to refuse to respond to every civil subpoena seeking user information, and produce such information only if ordered to do so by a Court. D.I. 281 at 22. Google has already committed to raise such objections in jurisdictions where there are applicable legal protections for information about books, and to continue its history of fighting for high standards to protect users against overreaching information requests where the law may be unclear.

### 9.3 Institutional Subscription Database Provides Google Too Much User Data

**Objection:** Subscribing institutions should be responsible for authenticating their own end users without sharing that information with Google. *See* [Center for Democracy and Technology](#) at 17:

Under the terms of the Proposed Settlement, institutions can obtain an ‘Institutional Subscription’ that allows many users to use the New Services through the institution . . . There is no need under the Proposed Settlement for Google to be involved in the authentication of individual users within institutions. Institutional Subscribers alone should be responsible for authenticating their own end users without sharing authentication credentials or other personal information with Google.

**Response:** Subscribing institutions will authenticate users without Google knowing who that user is. *See* [Google Books Privacy Policy](#) at 2:

Use of the Institutional Subscription. Schools or other institutions that sign up for subscriptions will be able to authenticate users based on the user’s or the institution’s IP address, or using other technologies that allow Google to confirm that a user is part of a subscribing institution without knowing who that user is.

### 9.4 Registry Does Not Protect User Privacy

**Objection:** The settlement requires Google to provide the Registry with usage data, but places no limitations on the level of detail of the data that will be collected and reported to the Registry. *See* [Electronic Privacy Information Center](#) at 7:

The Settlement also requires that Google provide data to the Book Rights Registry (BRR), including the “name of any library to which it has provided Digital Copies of Books Digitized in the United States...This information may also implicate reader privacy.

**Amendments:** The amended settlement provides that Google will not reveal personally identifiable information about users to the Registry absent valid legal process.

**Response:** Settlement approval hinges on whether it is fair, adequate and reasonable to class members as Copyright owners, not simply as Internet users. *See* [Plaintiffs’ Supplemental Memorandum](#) at 164:

Some objectors argue that the Settlement should not be approved because it does not contain terms that adequately protect the privacy of users of Google Book Search. Plaintiffs agree that maintaining the privacy of sensitive user information is important with respect to consumer products available on the Internet, particularly information about the reading habits and preferences of users. Plaintiffs support the efforts of privacy advocates to improve privacy policies for web users. The determination whether the Settlement should be approved, however, turns on whether the Settlement is fair, adequate and reasonable to members of the Class as copyright owners, not as users of Internet--based products. Moreover, the issue of user privacy is not unique to this Settlement. To the contrary, anyone who has purchased books on Amazon’s website is familiar with Amazon’s practice of suggesting other books to that purchaser based on past purchasing history.

## 9.5 Book Search Data May Be Combined with Other Google Data

**Objection:** Google is free to combine the data it obtains from Book Search with other data that it collects, adding a rich and personal dimension to the profiles that Google already maintains about individuals' searching and Web searching habits. *See* [Electronic Privacy Information Center](#) at 5:

The Settlement provisions indicate that users will practicably be required to use a Google Account to use the Google Book Search database. Such a requirement would permit Google to integrate Google Book Search users' information with data concerning other Google products. The Settlement contemplates integration of Google Book Search and other products, stating that Google may create hyperlinks to Preview Use Book pages from its other revenue generating services 'including, for example, Google Web Search, Google Earth and other Google services that show search results by browsing.'

**Response:** The settlement must be approved before the Privacy Policy can be implemented according to user needs. *See* [Google's Brief in Support](#) at 54, quoting [Declaration of Dan Clancy](#) at 21:

We have a strong privacy policy in place now for Google Books and for all Google products. But our settlement agreement hasn't yet been approved by the court, and the services authorized by the agreement haven't been built or even designed yet. That means it's very difficult (if not impossible) to draft a detailed privacy policy. While we know that our eventual product will build in privacy protections—like always giving users clear information about privacy, and choices about what if any data they share when they use our services—we don't yet know exactly how this all will work. We do know that whatever we ultimately build will protect readers' privacy rights, upholding the standards set long ago by booksellers and by the libraries whose collections are being opened to the public through this settlement.

## 9.6 Notice and Transparency Not Required

**Objection:** The Proposed Settlement contains no provision requiring Google to notify readers about the data it collects in connection with services under the settlement. *See* [Center for Democracy and Technology](#) at 15:

Although Google does voluntarily provide some notice, we believe that it should be required to clearly and prominently disclose the following:

- (a) What information Google collects in connection with the New Services, including information that can be used to identify individual readers;
- (b) What information Google collects about individuals' use of the New Services;
- (c) The purpose for which this information is collected;
- (d) How long each type of data is retained;
- (e) What technical mechanisms Google uses to track readers on the site;
- (f) How readers can exercise choice about having their data collected and used in connection with the New Services; and
- (g) How reader data is safeguarded against theft or misappropriation.

**Response:** Without settlement approval, it is difficult to draft a privacy policy, but the eventual product will always give users clear information about privacy. *See* [Google’s Brief in Support](#) at 54, quoting [Declaration of Dan Clancy](#) at 21:

We have a strong privacy policy in place now for Google Books and for all Google products. But our settlement agreement hasn’t yet been approved by the court, and the services authorized by the agreement haven’t been built or even designed yet. That means it’s very difficult (if not impossible) to draft a detailed privacy policy. While we know that our eventual product will build in privacy protections—like always giving users clear information about privacy, and choices about what if any data they share when they use our services—we don’t yet know exactly how this all will work. We do know that whatever we ultimately build will protect readers’ privacy rights, upholding the standards set long ago by booksellers and by the libraries whose collections are being opened to the public through this settlement.

## 9.7 Personal User Information Collection Not Limited

**Objection:** The Settlement does not significantly limit what other information Google might collect, nor does it say whether Google is permitted to collect details about how individual readers interact with books. *See* [Center for Democracy and Technology](#) at 16:

Google’s potential technical capability to intimately track reader behavior should not trump individuals’ long-standing ability to read books anonymously. Thus, CDT believes that Google should be permitted to collect only the data necessary to provide the services described in the settlement, and that Google should limit collection of detailed data connected to readers’ use of books (for example, pages read or time spent reading) to situations in which such usage data is necessary to account for Preview uses (or to provide services chosen by the user where the user has expressly given consent for the collection of the data).

**Response:** Google must collect personal information about its users in order to provide a useful service to them. *See* [Plaintiffs’ Supplemental Memorandum](#) at 165:

Registration is necessary for the Consumer Purchase service, because Google needs to keep track of who has purchased which Book. However, Google plans to build protections to limit the information (such as book titles) available to credit card companies about book purchases, and to enable users to delete or disassociate the titles of books purchased from their Google Accounts. With respect to the privacy of information regarding the users of Google’s products, the Settlement provides that Google shall not provide personally identifiable information about its end users to the Registry unless required by law. ASA § 6.6(f).

## 10. Copyright Policy

### 10.1 Orphan Works Issue for Political Branches

**Objection:** The political branches of government, rather than the judicial branch, are best positioned to respond to the orphan works problem, which bears all the hallmarks of a traditionally legislative issue. The political branches also have the political and electoral accountability required to make their decisions democratically legitimate. *See* [Consumer Watchdog](#) at 7-8:

The proposed Settlement Agreement, if approved, would so massively reallocate the existing rights and remedies under copyright law that it would effectively rewrite the existing statutory regime for the benefit of a single player—Google. But Supreme Court precedent is clear: courts may not modify copyright law. Only Congress has “the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests” that must be balanced when amending the Copyright Act.

**Response:** The ASA does not interfere with orphan works legislation. *See* [Google’s Brief in Support](#) at 6:

Nor does the ASA interfere with orphan works legislation, as some objectors allege. Congress remains free to legislate in this area, and Google has long supported such legislation. Indeed at a recent House Judiciary Committee hearing, Google expressed support for the possibility of legislation opening up access for other companies to use works under the same or similar terms Google would receive under the ASA. Notably, when legislators asked a representative for objector Amazon.com whether that company would support such a proposal, the representative demurred.

### 10.2 Settlement Makes Foreign Policy

**Objection:** This settlement in a private lawsuit will interfere with the public interest in international copyright relations and conflict with international agreements. *See* [Microsoft](#) at 13:

Notice and registration are two formalities that international treaties prohibit as forbidden “condition[s] on the enjoyment and exercise of copyright.” Imposing this new regime can only be done by Congress - and to the extent it implicates international treaties, the President - not the courts.

**Amendments:** Many foreign works have been removed from the settlement.

**Response:** Not directly addressed, but see section 3, *supra*.

### 10.3 Google Rewarded for Unilateral Infringement

**Objection:** Google deliberately infringed copyright by scanning books without permission. A settlement that should punish Google for these acts of willful infringement instead rewards it by giving it a lucrative business opportunity. *See* [United States of America](#) at 23-24:



Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement. Even if there were reason to think history could repeat itself in this unlikely fashion, it would scarcely be sound policy to encourage deliberate copyright violations and additional litigation as a means of obtaining approval for licensing provisions that could not otherwise be negotiated lawfully.

**Response:** Google will pay adequate consideration to compensate for its alleged past infringement. See [Plaintiffs' Supplemental Memorandum](#) at 54:

Plaintiffs' and the Class' damage and injunction claims are released for fair and adequate consideration.

#### 10.4 Involuntary Transfer of Copyright

**Objection:** The Copyright Act prohibits governments from seizing, expropriating, transferring, or exercising rights of ownership over copyrights whose authors have not voluntarily transferred them. See [Amazon.com](#) at 32:

To the extent the Proposed Settlement purports to reallocate the rights of copyright owners, it can constitute a valid exercise of judicial power only over those authors who have previously given express or implied consent. Where the Proposed Settlement purports to apply more broadly, reaching authors who have not previously transferred their copyrights voluntarily and who have not clearly authorized such a transfer, it runs afoul of this statutory provision.

**Response:** Section 201(e) does not apply to private parties. See [Plaintiffs' Supplemental Memorandum](#) at 112-114:

Amazon, an online bookseller with an obvious competitive interest, claims that the ASA violates Section 201(e) of the Copyright Act. That is incorrect...Section 201 (e) was enacted to prevent the Soviet Union from squelching dissidents by confiscating their copyrights. That is why it expressly prohibits any "governmental body" or organization from the seizure, expropriation, transfer, or exercise of ownership rights of any copyright. It does not apply to actions by private parties nor is there any support for the proposition that it would apply to the ASA or to the Registry, as a private organization.

## II. Information Policy

### II.1 Privatization of Knowledge

**Objection:** The settlement establishes Google and the Registry as uniquely powerful gatekeepers over human knowledge in book form. This role should not be played by any single institution, let alone a private company devoted to its shareholders, rather than to the public welfare. *See* [Pamela Samuelson et al.](#) at 12:

The future of public access to the cultural heritage of mankind embodied in books is too important to leave in the hands of one company and one registry that will have a de facto monopoly over a huge corpus of digital books and rights in them. Google has yet to accept that its creation of this substantial public good brings with it public trust responsibilities that go well beyond its corporate slogan about not being evil.

**Response:** Google is merely opening the door for itself and its competitors to expand knowledge in a digital form for all classifications of books and other works. *See* [Google's Memo in Support](#) at 28-29:

The ASA will enable the parties to make available to people throughout the country millions of out-of-print books that are now generally available only in research libraries. This is precisely the kind of beneficial innovation that the antitrust laws are intended to encourage, not to frustrate. *See* *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription’”). . . .

Here, the ASA increases output, and consequently consumer welfare, in *every* category of books. That includes the books covered by the ASA, as well as out-of-copyright books that are not covered by the settlement. And, the ASA, which is strictly non-exclusive, does not increase (and if anything reduces) the entry barriers to other firms that wish to provide the same services.

### II.2 Excessive Discretion to Exclude Books from Display Uses

**Objection:** The settlement allows Google to exclude books from Display Uses. It could choose to do so for reasons of commercial self-interest or in response to political pressure. *See* [Pamela Samuelson et al.](#) at 9-10:

How, if at all, will Google exercise its right under the Settlement Agreement to exclude up to 15% of books from the corpus for editorial and non-editorial reasons? . . . It is difficult to discern answers to these simple questions from the Settlement Agreement or from public statements of the parties and their lawyers. It would be helpful to know the answers to these questions before making decisions about whether and how academic authors might want to participate in the Settlement Agreement.

**Response:** Google must provide documentation and its rationale for excluding any work. *See* [Plaintiffs' Supplemental Memorandum](#) at 163-164:

Plaintiffs and the libraries involved in the negotiations insisted on, and secured, a excludes a Book from one or more Display Uses for editorial reasons (*i.e.*, not for quality, user experience, legal or other non--editorial reasons), Google must notify

the Registry and provide it with a digital copy of the Book, and the Registry may engage another provider to make comparable Display Uses available for the Book (subject to approval of the library(ies) where the Book was scanned). ASA § 3.7 (e).

Plaintiffs have no basis for believing that Google has any interest in “censorship.” All evidence is to the contrary. *See* Clancy Decl. ¶ 7. Even so, because the possibility of “censoring” books was so important to the author and publisher representatives, Plaintiffs negotiated for and obtained this beneficial anti-censorship provision. Boni Decl. ¶ 6.

### 11.3 Scan Quality

**Objection:** Google’s scans are not at high enough resolution for preservation purposes and are marred by frequent errors. Given the risks that Google’s collections will displace print collections of many libraries, the scans should be of higher quality. *See* [Pamela Samuelson et al.](#) at 8:

Neither in the Settlement Agreement, nor as we understand it, in the side agreements Google has been negotiating with library partners, has Google committed itself to providing guarantees as to the quality of digital scans. . . . As scholars, researchers, and academic authors, we are seriously concerned that the Book Search corpus will fail to achieve its potential as an important scholarly resource unless Google makes meaningful commitments to improving the quality.

**Response:** Google and the Rightsholders have a vested interest in continuing to have scans and digitalized books of the best quality possible. Both parties must ensure that this interest is met. *See* [Google’s Memo in Support](#) at 59:

Google commits in the ASA that it ‘will strive to detect and eliminate errors in the Digitization quality’...Rightsholders may inform the Registry of any metadata errors, and the ASA provides that the Registry will notify Google of any metadata errors of which it is aware...The interests of Rightsholders and Google are aligned.

### 11.4 Metadata Quality

**Objection:** The database is filled with incorrect publication dates, authors, countries of origin, and other mistakes that will prevent users from locating books, or will mislead them about the nature of the books. *See* [Hachette Livre](#) at 13-14:

At present, the databases used by Google are deficient and unreliable for a number of reasons including, *inter alia*:

- Some records show wrong identifiers.
- The same publisher has different names in different records;
- Some records show wrong publishers;
- The same contributor may have different names in different records;
- Some records show wrong contributors;
- Some records show wrong titles or year of publication;
- Some records show wrong information about the availability statue (in print)

- Some records show missing information about title, contributor, year of publication, etc.
- Some works, such as journals, which are not part of the settlement are included in the database.

**Response:** Although the amount of data involved from numerous sources will naturally lead to some mistakes or omissions, Google is endeavoring to make the best database possible. See [Google's Memo in Support](#) at 58:

Each of these [metadata] sources may contain errors; Google, however, shall use commercially reasonable efforts to determine whether a Book is Commercially Available or is not Commercially Available using a methodology reasonably agreed to by Google and the Registry that is designed to minimize the overall error rate...

Google is using the best available data about Books...to assist Rightsholders in identifying and managing their Books. It is using metadata from 48 libraries and pays approximately \$2.5 million per year to license metadata from 21 commercial databases of information about books.... But, like every library catalog ever created, Google's database of information about books is not perfect. Despite the assiduous efforts of generations of catalogers and commercial aggregators of book data, even the best available information about books is sometimes incomplete, incorrect, or simply nonexistent. This is not a problem Google created, but it is a problem Google has every incentive to remedy, and Google has committed to remedy such errors as they are found.

## 11.5 Open Access Not Allowed

**Objection:** The settlement does not respect the wishes of authors who wish to make their books available freely for broad distribution. Where these books have been made available under licenses (such as Creative Commons ShareAlike or the GNU Free Documentation License) that require unrestricted distribution and the display of the license, the proposed settlement programs violate the terms of those licenses. See [University of California Faculty](#) at 4-5:

[T]he agreement does not explicitly acknowledge that academic authors might want to make their books, particularly out-of-print books, freely available by dedicating their books to the public domain or making them available under a Creative Commons or other open access license. We think it is especially likely that academic authors of orphan works would favor public domain or Creative Commons-type licensing if it were possible for them to make such a choice through a convenient mechanism. We are concerned that the BRR will have an institutional bias against facilitating these kinds of unfettered public interest, open access alternatives.

**Amendments:** The amended settlement allows rightsholders to direct that their books be "sold" at a price of \$0.00 and allows them to choose a Creative Commons license to be applied to the work. See [Plaintiffs' Supplemental Memorandum](#) at 65:

The Registry will serve the Rightsholders' best interests, will favor no subset over another and will have a fiduciary duty to each and every Rightsholder. This means, for example, carrying out an academic author's request to give her Book away for free, enter into a Creative Commons license and permit limitless annotation

sharing. Moreover, all Rightsholders are entirely free to direct the Registry as to how, if at all, they want their Books and Inserts used under the Settlement. That right is a fundamental benefit of the Settlement.

## 11.6 Research Corpus Encumbered

**Objections:** Use of the Research Corpus is artificially restricted to “non-consumptive” research, and access is unnecessarily restricted to certain users. Google and the Registry must approve commercial use of information gathered from the Corpus, even where copyright law would not be implicated. *See*: [Pamela Samuelson et al.](#) at 8:

The Settlement Agreement restricts the class of persons eligible to be ‘qualified users’ of the GBS research corpus for purposes of engaging in non-consumptive research to non-profit researchers. Many academic researchers routinely engage in joint research projects with researchers from profit-making firms. The Authors Guild did not adequately appreciate that the restriction on who could be a qualified user would be harmful to the research freedoms of academic researchers.

**Response:** The purpose of the restriction to non-consumptive research is to ensure that any and all research is done for academic purpose. Any researcher who teams with a profit-making firm should not be allowed to use the ASA as a means to reduce research costs. *See* [Plaintiffs’ Supplemental Memorandum](#) at 168:

One objector has criticized the ban on commercial uses of information extracted from Books in the Research Corpus. The purpose of this restriction is to ensure that the Research Corpus is used for academic and research purposes, rather than to compete directly with the Rightsholders’ copyright interests. The legal basis for the restriction is contractual, not copyright-based, and the ASA does not itself take the position that the Research Corpus is a separate copyrightable work.

## 11.7 Library Holdings of Physical Books Endangered

**Objection:** Libraries will rely solely on the Institutional Subscription and will have no need for hard copies of books. This will present a problem if the Institutional Subscription fails. *See* [International Federation of Library Associations and Institutions](#) at 2:

When the digitization project is concluded, it will comprise a large proportion of the world’s heritage of books in digital format. The participating libraries will have copies of “their” files for preservation or other uses. Although the Google settlement has provisions for business continuity, the settlement does not seem to include provisions for the long-term preservation of the entire database. Analyses of cost effectiveness may at some point in the future lead Google to reduce the amount of data by discarding parts of them. The importance and utility of the entire database for users worldwide requires that the agreement include provisions ensuring the long-term database as a whole.

**Response:** Not directly addressed.

## 11.8 Printing and Copy/Paste Restrictions Excessive

**Objection:** Restrictions on the number of pages that can be printed, per-page fees for the Public Access Service, and restrictions on copy/paste artificially impede research and access to knowledge. *See* [Pamela Samuelson et al.](#) at 7:

Academic authors would not have agreed to the provision that severely restricts the number of pages that users of the Book Search subscription database can cut and paste from particular “display” books or can print out at any one time. Given that the institutional subscription database available both to institutional subscribers and to public libraries will consist mainly of out-of-print books, we think the cut-and-paste and page print-out restrictions are unreasonable narrow.

**Response:** This concern is user-oriented, and does not represent the views of class members. *See* [Plaintiffs’ Supplemental Memorandum](#) at 166:

From the standpoint of the members of the Class, rather than that of the user-oriented interests that are articulated in these objections, the copy/page restrictions were designed appropriately to protect Rightsholders’ interests against unlimited copying of their works. In any event, to the extent that academic authors, as Rightsholders, would prefer that more liberal copying and pasting restrictions be applicable to Consumer Purchases of their Books, they are free to adopt alternative licensing schemes, as permitted by Section 4.2(a)(i) of the ASA. Moreover, the Settlement specifically allows any Rightsholder to direct Google to permit more liberal uses of their Books, in both the Consumer Purchase and Institutional Subscription Revenue Models. ASA § 3.3(g).

## 11.9 Preservation of Google Books Corpus Not Guaranteed

**Objection:** The corpus of scanned books is a public good, but the settlement does not sufficiently ensure that the corpus will be preserved if Google chooses to exit the business. *See* [Pamela Samuelson et al.](#) at 10–11:

The GBS corpus is a public good which should be preserved, even if for one reason or another, the settlement doesn’t work out as the parties intend. Google could conceivably lose interest in GBS, for instance, go out of business or go bankrupt, sell the GBS corpus to China, Rupert Murdoch or Wal-Mart, neglect to fulfill its promises under the Settlement Agreement, or lose the Authors Guild lawsuit. Many other things could go wrong as well. . . . No one, of course, predicts that any of these failures will occur. In reviewing the Settlement Agreement, we think that the court should consider what will or should happen to the GBS corpus if something seriously goes awry.

**Response:** Not directly addressed.

## 11.10 Settlement Limits Annotation-Sharing

**Objection:** The settlement puts excessive limits on how Google Books users will be able to share their annotations with each other. *See* [Pamela Samuelson et al.](#) at 6:

Individuals can share their annotations only with 25 persons, all of whom must be purchasers of the digital book, and they must be identified in advance. Only minimal annotations are anticipated, such as personal notes, or in a group setting, sharing comments among members of a book club or a class. In academia,

annotation is a time-honored form of communication, and the practice of sharing annotations within a scholarly community, and not just with 25 or fewer people, is normal. Collaborative uses of annotation and tagging are, moreover, a growth area in the fields of information retrieval and social networking,<sup>17</sup> a trend that the annotation-sharing restriction would countermand.

**Response:** Not directly addressed.