

## Google Books article

There is increasing debate about the Google Books settlement overseas. Yet, here in New Zealand we seem to be just ignoring it as if it doesn't matter to us. Maybe that's because there seems to have been an assumption that it is only relevant to books published in the US; or maybe we just assume that the publisher will take care of it or maybe it's just one of those things on the list that we'll get to later.

Well whatever your excuse for avoiding it, time is fast running out to do something – and do something you should.

First off, a very brief outline of what we are talking about.

For about 5 years, Google has been scanning books (digitizing is the description Google uses) and putting them into a vast database. It is estimated that it currently has 10 million books in its database (including books by New Zealand authors). It has done this in two ways – with the permission of rightsholders who have contracted with Google through its Partner Program; or without permission. As you might expect, authors and publishers of books that Google has scanned without permission became increasingly concerned over Google's plans for their books. Eventually, the Authors' Guild and the Association of American Publishers together with certain individual authors and publishers sued Google claiming that its digitization without permission was copyright infringement. Google's primary defence was that digitizing books but making only excerpts of the digital copies available online amounted to fair use (a general defence to a claim of copyright infringement in the US, unlike the limited *fair dealing* defences we have here in NZ).

The settlement agreement, running to some 300+ pages, is the parties' proposal as to how the court action will be settled. The wrinkle though is that in the US it is possible for private parties to enter into a settlement that not only affects them but which also binds non-parties who are certified by the Court to be affected in the same way. So, in this case, a New York Court will be asked in October this year to approve this settlement, not just with respect to the parties, but with respect to ALL authors and publishers who are said to fall within the class (made up of the authors sub-class and the publishers sub-class). In the US, once approved, the settlement will therefore mean that unless an author or publisher has reserved their rights by formally opting out of the settlement, they will not be able to make any claim that Google is infringing copyright in their books.

You might well ask at this point how on earth it is possible for a US class action settlement to affect your copyright or that of your publisher in any of your books. Without delving into the detail, ironically, it is the very useful international reciprocity afforded by one of the oldest copyright treaties, the 1886 Berne Convention, that extends the settlement to non-US authors and publishers. As a signatory to the Berne Convention, the US is required to afford rightsholders from other Berne Convention countries the same copyright protections that it affords its own. Since New Zealand is also a signatory to the Convention, the settlement is therefore also applicable to New Zealand authors and publishers. It is a little more complicated than that but the important thing to be aware of is that the settlement applies to New Zealand authors and publishers not because they have published in the US but simply because they have published a book to which the settlement applies, ANYWHERE (including solely in New Zealand).

So we know that the settlement applies to New Zealand authors and publishers, but what does it actually mean?

In a sentence, it means that unless you formally opt out of the settlement, or you formally opt in but request Google not to digitize and/or display your books, Google will have the non-exclusive right to digitize any of your books that were published anywhere before 5 January 2009, whether it has digitized them already or not. Google will then be entitled to display snippets or substantial previews of the books via its Google book search site. Unfortunately, here the settlement does focus on US publication. So, if your book is still generally available

for purchase in the US, then Google will only be able to display part of that book with the consent of the author and publisher. (If the publisher wishes to allow Google to display excerpts, it must notify the author, who then has 30 days to agree or not). However, if your book is not generally available for sale in the US, then it is considered *out of print* and Google can display excerpts without needing any consent. Google is also granted other rights such as the right to sell advertising alongside search results, to sell subscriptions to entire books to partner institutions (libraries etc) and to publish bibliographical material.

Generally, its only books (including inserts such as forewords) that are covered and not photographs or other images in the book. Be aware however that children's book illustrations and tables, charts and graphs are included.

Having established that you as a New Zealand rightsholder are covered, what are your options? For simplicity, we will refer here to a rightsholder – the question of whether it is the author or publisher who has primary responsibility for deciding this depends on your relationship.

The rightsholder has 4 options:

1. Negotiate a separate deal with Google under its partner program. For those that already have, the Partner Program agreement will take precedence although it may or may not cover all the rights that Google gets under the settlement agreement.
2. Opt out by formally notifying Google. The deadline for opting out has been extended to 4 September 2009.
3. Opt in. If you opt in and lodge a claim in respect of a book prior to 5 January 2010, you will receive a share of the \$45 million that Google has put aside to pay rightsholders (the exact amount will depend on how many people claim but will be between US\$60 and US\$300). You will also receive 63% of any revenue received by Google (e.g. from advertising around your book search result or if it is made available on subscription to a library or other institution).
4. Do nothing – in which case you will lose the right to sue Google in the US even if Google does digitize your book and publish excerpts and you will not receive any revenue for that use.

There are various other dates which are important, but, hopefully you will see from the above that the main thing now is for the rightsholder whose rights will be affected by what Google plans to do, to decide which of the 4 options to adopt. Then, if opt in is chosen, a further decision needs to be taken as to what books to claim, remove (totally), or exclude (e.g., to restrict display) from Google's database.

These are not easy decisions for authors who have a substantial catalogue of pre 5 January 2009 works. In the coming weeks leading up to 5 September, we will be providing further guidance and information in our weekly electronic newsletter, on the website or from our National Office. Contact Maggie Tarver on 09 379 4801 or [director@nzauthors.org.nz](mailto:director@nzauthors.org.nz) if you have any queries.

We feel that this is an important issue for our members and we urge you to take this matter seriously.

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