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Last Chance to Opt Out of Google Book Settlement

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January 28 is the last day on which owners of copyrights in books published in the U.S., UK, Canada, and Australia can opt out or object to the proposed settlement of the Google Book Search (GBS) class action lawsuit initiated in 2005 by the Authors Guild.

There is a huge difference between opting out and objecting, and copyright owners who dislike the settlement must choose between them.

Opt-outs will not be bound by the settlement. (This does not necessarily mean that Google will not scan your books or that it will remove them from GBS; this must be separately requested.) Although opt-outs can separately sue Google for infringement, this is probably not a sensible option for most authors because of the litigation expense. Opt-outs are not precluded from later negotiating a deal with Google to make their books available through the Google Partner Program (GPP).

An advantage of filing an objection is that the judge must consider your reasons for dissatisfaction with the deal in deciding whether to approve the settlement. Some authors have objected to the GBS settlement because it calls for close monitoring of book usages without guarantees of privacy protection; some object to \$60 per book as inadequate compensation for Google's past scanning; others object to the de facto monopoly that the GBS settlement would give Google to "orphan" books (i.e., those whose rights holders cannot be found).

If the judge decides that your objection has merit, this may lead to changes in the settlement. But if he rejects your objection, you will be bound by the settlement, even if it still contains terms to which you objected, and it will be too late to opt out.

Opting out is most sensible for in-print books. If you want Google to commercialize your books, do so through the GPP. If you stay in the settlement and do not become a Google partner, Google will not automatically commercialize your books because the default setting for in-print books is that "no display" will be made of their contents. You can allow Google to commercialize your in-

print books by signing up with the Book Rights Registry (BRR), but you will likely earn less through BRR than through the GPP because BRR will take a nontrivial cut for its administrative fee.

Signing up with BRR might seem unnecessary if you want the "no display" default for your in-print books to continue, but you should realize that there is some risk that failure to sign up with BRR will result in your in-print books being commercialized anyway. The current settlement calls for BRR to appoint "fiduciary" for unclaimed books whose job is to find rights holders and sign them up with BRR. This person has the power to authorize Google to commercialize unclaimed in-print books.

For out-of-print (OOP) books, the calculus is different. The settlement gives Google the right to commercialize all OOP books (unless rights holders direct otherwise) and Google is obliged to give the BRR 63% of its revenues from four revenue models: sales of individual books to consumers; licenses of an institutional subscription database (ISD) to universities and other entities; ads run next to book contents; and fees for printing out pages from the ISD. If you don't sign up with BRR initially, it may reach out to find you to give you money earned from your books.

Should you opt out of the GBS deal? Maybe so. For one thing, the GBS settlement agreement is very complex and far-reaching and some institutions on which it relies don't exist yet. This makes it difficult to have much confidence that the deal will be as good for everyone as its proponents profess.

Second, virtually every author and author rights group--except for the Authors Guild who negotiated the deal--who have opined on the GBS deal are urging authors to opt out. Many, including notably Ursula LeGuin, oppose the settlement because it seems to turn copyright inside out: giving Google a license to books without asking the rights holders' permission and putting burdens on the rights holders to say no.

Third, those who stay in the GBS deal must waive trademark and publicity rights in their names, likenesses, character names, and the like. If you want to run ads to promote your books through GBS, Google may ask you to buy keyword rights to your name, etc. for its AdSense program; you may even need to buy these keywords if you don't want others to buy them.

Fourth, authors who remain in the GBS settlement will be precluded from claiming 100% ownership of e-book rights under the *Random House v. Rosetta Books* decision from 2002. Rosetta persuaded William Styron and Kurt Vonnegut to license their books for its e-book series. These authors had signed contracts with Random House under which they gave Random House rights "to publish the work[s] in book form." Random House asserted this gave it e-book rights and charged Rosetta with infringement. The court ruled that this contract language was understood in the trade as a limited grant, and since e-books were a new use not contemplated at the time of the initial publishing contract, the rights remained with the authors.

Random House has not resolved the heated dispute over e-book rights. Appendix A of the GBS settlement offers a compromise. For books whose contract language about e-book rights is

ambiguous, the author will get 65% of revenues from Google's commercializations for those published before 1987 and 50% for those published after 1986. It also provides a low-cost (although generally compulsory) arbitration procedure through which authors and publishers can resolve disputes over e-book rights. It also defines procedures by which authors can effectuate reversion rights to copyrights in OOP books.

For what it's worth, I'm objecting to the settlement, not opting out. Academics like me tend to want as many books as possible to be widely available to the public. The more opt-outs there are, the less likely GBS is to achieve the lofty ambitions of being a universal digital library to make the knowledge in books more accessible to all. My objection is aimed at making the GBS deal fairer for academic authors whose books constitute a substantial majority of books in GBS.

Time is running short for opt-outs and objections. A sample opt-out letter can be found <http://nwubook.org/>, and dozens of objection letters, including one by me, at <http://thepublicindex.org/documents/responses>.