

The Authors Guild, AAP, Google Settlement Seminar Series

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From Copyright Clearance Center

The Authors Guild, AAP, Google Settlement Seminar Series

To help keep rightsholders fully informed and up-to-date with the latest developments in the proposed class action settlement between Google, the Authors Guild and the Association of American Publishers,

CCC has offered a special educational series of interviews, seminars and presentations on the topic.

The following are transcripts from six of these programs presented from April 2009 to February 2010 and featuring Lois Wasoff, Esq.

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**What Authors and Publishers Need to Know as May 5th Approaches
presented by Lois Wasoff, Esq.**

The session was recorded on April 14, 2009 and since then important dates have changed.

Publishing copyright expert and attorney, Lois Wasoff helps publishers, authors and literary agents understand their options when it comes to deciding whether to participate or opt-out in the settlement.

KENNEALLY: On behalf of Copyright Clearance Center, I want to welcome everyone to this important program today.

As I reflected earlier on the global nature of our audience of authors and publishers, I realized that I should greet those on the Pacific Coast with good morning. To those on the East Coast who may be listening to us while they're having their lunch, good afternoon. To our colleagues in the publishing world, authors and publishers alike, who listen in from Europe and South Africa, as well as even Australia, good evening.

We are here today to discuss what authors and publishers need to know as May 5 approaches. It's an important milestone related to the AAP/Authors Guild/Google settlement. And there's quite a lot of information to be covered here.

As we move through this hour-long program, we suggest you follow along with pencil and paper. But we want you to know that we will make the slides available very shortly on our website, copyright.com.

As the operator explained, we will be taking questions via the Chat box in the lower right corner of the screen. If you would please pose your question to us as we progress, and if you can, let us know whether you are an author or a publisher.

This free informational seminar is one of many educational programs that Copyright Clearance Center offers to help individuals and organizations gain a better understanding of their rights and responsibilities, and to promote respect for intellectual property. I am sure that many of you are familiar with Copyright Clearance Center, and at the same time, I'm sure that given the nature of this program and the viral aspect of this, we've been able to gather an audience here of well over 500. And with the idea in mind that

many of you may not be so familiar with Copyright Clearance Center, let me tell you that we were established 30 years ago by publishers and authors as an independent, not-for-profit organization. Our roots are in the licensing of book and journal content.

Today, CCC currently sells institutional licenses to corporate and academic clients, all together managing more than 300 million rights. We are a member of an established network of global collective licensing organizations, selling licensing rights around the world.

At CCC, we are advocates for rights owners, and we are passionate about ensuring that rights owners are fairly compensated for their work. And to that end, in just the last 15 years, we have distributed over \$1 billion to U.S. rights holders.

Like other international rights licensing organizations, CCC has been participating in the notification process for this settlement. I am joined today by Lois Wasoff. Lois, welcome to our program.

WASOFF: Thank you, Chris.

KENNEALLY: It's good to have you here, and let's tell the audience briefly about your background. You have served at the invitation of the Library of Congress as part of a study group put together to look at issues related to copyright law and libraries. You have been, indeed, an attorney in that field for many years. You were past Chair of the Copyright Committee for the Association of American Publishers, and formerly Vice President and Corporate Counsel at Houghton Mifflin Company.

It's pretty clear to people that you're quite an expert in this field, and you've participated in numerous meetings and conferences in this country and abroad on copyright issues, speaking about legal issues and industry practice in book publishing. Your current clients include non-profits and commercial publishers alike, as well as other organizations involved in publishing. And as well, you work with individuals who have questions about copyrights and publishing.

So I'll tell everybody right now about the agenda that you're going to be covering, Lois.

We're going to review who's included in the settlement. We're going to speak to what the differences are between participating or choosing to opt out. We'll review the settlement benefits to rights holders, including revenue generating programs and payments, how they'll be made. We'll discuss the entity that is to be created if the settlement is approved – that's called the Book Rights Registry.

We're also going to point out and highlight some important facts about the settlement, and most importantly for everyone on the call who is a rights holder, we're going to call out some important dates for you to bear in mind.

And we also want you to be aware of some important questions that you need to reflect upon as these deadlines approach.

Finally, we're going to provide you with some resources that can direct you to more information about the settlement. Now, I do have to say, of course, that what we do today is not intended as legal advice, and if you have further questions of a legal nature, we recommend that you consult your own counsel to get full answers with them.

But let's get started here, as I'm sure the audience is eager to find out more. And Lois, what in fact is getting all the attention here? We've got, as I said to everyone earlier, well over 500 people attending. Why is this so important to this audience of publishers and authors?

WASOFF: Well, the reason that this is so important, Chris, is that literally hundreds of thousands of rights holders, publishers and authors alike, are likely to be covered by the terms of this settlement. That to understand how this settlement can have that kind of scope, it's important to understand the scope of the activities that Google has engaged in.

The estimates that we're hearing is that Google has already scanned more than 7 million books, as part of its Google Library project, which we'll be discussing in a minute. About a million of those books are in copyright and in print. About a million are clearly in the public domain. And about 5 million are probably protected by copyright.

Since the settlement not only includes provisions that deal with Google's past scanning activities, but also creates authorization for Google to do future scanning of books that fall within the scope of

the settlement, and makes future continued use of the works that it has scanned, the implications of this settlement are huge.

KENNEALLY: So we have a timeline here that gives people an idea of how we wound up to be aware of May 5 approaching, and the concerns we have there. So review that for us.

WASOFF: Well, as I mentioned, Chris, this settlement process grew out of the Google Library project. The Google Library project was announced in 2004. That's when Google entered into agreements with significant university libraries, libraries in places like the University of Michigan and Stanford and Harvard, and began to scan books and other materials from those libraries' collections.

Those libraries store within their walls the accumulated knowledge of the world, and their collections are massive and far-reaching.

As I mentioned, the result of the scanning process was the digitization of over 7 million works. Now at the same time that Google was doing this in 2004, it began a separate program for publishers and authors to voluntarily participate in scanning. That program, which is still in existence, is the Google Partner Program. Under that program, Google scanned many more works, combined the scanable databases, and therefore a huge, searchable database now exists that Google uses to deliver search results.

Authors and publishers were quite reasonably concerned about the potential impact of the mass digitization being done by Google under the Library program – that was the digitization being done without authorization – on their ability to control and to be paid for the uses of their work.

So in 2005, the first lawsuit was brought by the Authors Guild, and that lawsuit was brought as a class action. Very shortly afterward, a group of publishers, supported by AAP, brought a second suit against Google. Both of the lawsuits allege scanning and use of the in copyright books constituted copyright infringement.

The two lawsuits were consolidated in front of the same judge in New York City. Google defended against both suits by claiming that the scanning and the subsequent delivery of snippets, as part of a search result, constituted fair use.

Three years went by, but they weren't a quiet three years. There was a lot of activity going on, in the course of very difficult and very

protracted negotiation. Finally, on October 28 of last year, a proposed settlement of both suits was announced.

All of the issues in both suits are addressed in the settlement agreement. And what's critical for our purposes is that the settlement agreement adopted the class action mechanism of the Authors Guild lawsuit.

KENNEALLY: OK, well, clearly then, the implications for what Google was doing is extensive. That's, again, what attracts the global audience to this program. And we understand why the Authors Guild and AAP brought the litigation. So what is the mechanism, this class action, that brings so many people into the settlement? Explain that.

WASOFF: A class action is a form of lawsuit in which a group of class representatives can sue on behalf of others who have similar claims. And it's a very useful mechanism in American jurisprudence, because it gives – it provides a methodology for addressing a situation where there are a lot of small claims, claims in the sense that they involve relatively small amounts of money, so that they might not individually justify a lawsuit.

But because there are common threads that run across the different claims, when a class action is brought, through the use of a group of class representatives to sue on behalf of themselves and others with similar claims, the cumulative effect is to make the action one that's significant enough to be considered by the court, and to reach a resolution.

Because the class action mechanism was used, the settlement agreement, if it's approved by the court, will be binding on all members of the settlement class – all members of the class represented by these class representatives, except those that opt out. And the opt out deadline has been set in the preliminary order and in the settlement agreement. It's May 5, 2009.

As part of this class action process, there's a notice procedure. The notice – a notice has to be sent out to all of the members of the class, or to as many members of the class who can possibly be reached, describing the terms of the settlement. And that notice is intended to give the class members enough information to decide if they want to participate in the settlement or to opt out.

A class action settlement is then subject to court review. There's a procedure called a fairness hearing, and the fairness hearing in this settlement is now scheduled for June 11, 2009. At that hearing, the judge will hear and consider any objections that have been raised. The judge will review the notice procedure, and determine if it was adequate to reach the class members. And the judge will review the overall terms of the settlement.

The judge doesn't have unlimited options here, and it's important to note that the judge has the choice of approving the settlement, disapproving the settlement, or perhaps sending it back to parties for more work – to the named parties for more work, before considering it again. The judge is going to conduct this hearing on June 11, and at that time, the judge's considerations will be informed by any objections that were raised in the course of an objection period that will also end on May 5, 2009.

KENNEALLY: OK, then. So if this class of authors and publishers exist then, and we need to ask the question, who are the members of this class? I'm an author myself. How am I going to determine if in fact I am included in this settlement?

WASOFF: Well, there's very specific defined terms in the settlement agreement that will let you know whether or not you're included. The first criteria are that you have to hold a copyright interest, and you have to hold that copyright interest in a book or an insert. So let's go back for a minute and look at those terms.

A copyright interest, for this purpose, means a U.S. copyright interest that covers rights that are implicated by the uses authorized by the settlement agreement, and we'll be talking about those uses a little later.

You hold that copyright interest if you hold the entire interest, or you hold the interest jointly with another person or entity, or if you're the exclusive licensee of a copyright interest.

Now, books and inserts are also specifically defined. Books are defined as printed works. So the book has to have had an existence as a hard copy in order to be covered, printed works that were registered with the Copyright Office as of June 5, 2009. Books specifically do not include periodicals, including scholarly journals, unpublished diaries, notes or letters, or sheet music. That doesn't mean that these materials weren't scanned by Google. We'll talk about a little bit later. There's material in the Google database that

isn't covered by the settlement. But the terms of their past scanning and future use are not covered by the settlement.

And inserts are content that appears within a book that's owned by the copyright holder other than the owner of the book. And those are things like text, children's book illustrations, musical notations and tables, charts and graphs, permissions materials that many of our listeners would be familiar with. Specifically excluded from the settlement, though, are some permission materials that our listeners will also be familiar with. Photographs, illustrations except for children's book illustrations, maps and paintings, are all excluded. They are not inserts for the purposes of the settlement.

KENNEALLY: OK, well, there's obviously a lot to absorb here, and as I mentioned at the top, I hope that people are following along with pencil and paper. Rest assured, though, we will provide the slides shortly after the program.

But I wonder if I can sort of hone in a bit more on what you mean by U.S. copyright interest. As we've been saying, this is a global audience on the call here, and the U.S. piece of that is probably very important. Can you explain that again?

WASOFF: OK, I will – I'll give you an example. The publisher of a book, unless all rights to the book have reverted to the author, has a copyright interest in the book. The author of the book, who's entitled to receive royalties on the book, unless the author of the book – if the book is a work, say, for hire, for example, or is also a rights holder for that particular book. So a particular book can have more than one rights holder, and in many, many instances, there will be more than one rights holder claiming rights to a book.

And although the settlement applies to U.S. copyright interests, and importantly, the settlement only authorizes Google to use the works within the U.S., a work of foreign origin may have a U.S. copyright interest associated with it. The libraries included many, many works of foreign origin, and many works of foreign origin in many languages are included in the Google database, and are included in the settlement.

Those works of foreign origin are subject to a slightly different rule. Most of them will be covered by the settlement even if they were not registered with the Copyright Office by January 5, 2009, so long as they were published prior to January 5, 2009.

KENNEALLY: OK. So let's say I am a rights holder, and it sounds like according to those definitions, in my case, I am. What do I need to do now?

WASOFF: If you meet these criteria, it's important to know that you have to affirmatively opt out by May 5 if you do not want to participate in the settlement. Simply ignoring the notice is not an opt out.

If you wish to participate in the settlement, and we'll talk in a minute or two about the consequences of the decision to participate, you don't need to take any action before May 5. You will have some other important choices facing you, but you won't need to make an affirmative choice to opt out, because your silence will constitute your participation, which brings up another issue.

The people on this call are evidencing their interest in this settlement, and in managing the rights they owe, in part by being on this call. They're obviously aware of the settlement agreement and concerned about its implication.

But there are many, many thousands of punitive rights holders, who will not be actively participating. And that's why the importance of an affirmative opt out is important here. This settlement will end up controlling the works – controlling the use of many, many – what we think of as orphaned works, works that don't have active rights holders even though they are still subject to copyright, because those inactive rights holders will not have opted out, and therefore, their works will be subject to settlement.

KENNEALLY: Well, as you say, people who have joined us certainly have made an affirmative choice of interest at least in all of this, and I'm sure they're going to ask this question, and that is, well, if I am a participating rights holder, what does that mean for my work? How can Google then use my books if the settlement is approved?

WASOFF: Well, as you said, Chris, the settlement covers past activities on the part of Google, and very importantly, it covers future uses of the work. And the settlement breaks those uses up into two major categories – display uses, and non-display uses.

Among the display uses that Google will be permitted to make under this settlement of all works covered by the settlement, all works for whom the rights holder is participating in the settlement, are preview uses, which will allow a user of the Google database to view a portion of the book before making a purchase decision, and the

agreement provides certain specific different defaults about limits of how much can be seen at a given time.

Snippet display – that’s the use that people are familiar with already, if they’ve used the current Google book search. Preview display is now going to be specifically an authorized display use under the Google settlement agreement, and that will be the display of a few lines of text around a search term. So the use that we’re used to seeing now, for the current database.

Pragmatic (sp?) display is also a display use, and that’s the display of bibliographic information as it appears in the book – title page, copyright page, table of contents, index, all those will be covered. Access uses also will be authorized by the settlement, and those are important, because those are newer, and they’re not something that we’re used to seeing if we’ve used Google book search before.

Those access uses include consumer purchase, and that’s where individual users will be able to purchase the right to access the full text of books online. The book will reside on the Google host computer, but the user will be able to purchase the right to go to the work and see it in full text.

Google is creating an institutional subscription, and the expectation is that educational government and corporate institutions will be able to purchase time-limited subscriptions that will give them the right to access the full content of the database.

Both of these access uses, both consumer purchase and institutional subscription, will allow users to copy and paste and print portions of the work, and perhaps ultimately print up to the entire work, though, in most cases, it wouldn’t be a convenient way to print the work. You’d have to do it in stages.

The settlement agreement contemplates that there may be a negotiation that permits Google to do print on demand, deliver print copies of full works, PDF downloads, and perhaps create individual consumer subscription opportunities similar to the institutional subscription.

In addition, there are free public access uses contemplated by the agreement. Google is going to make one terminal available upon request at each public library building. Google is also going to make one terminal per a specified number of full time equivalent students

available at college libraries. And those public access uses are going to allow printing at a per-page fee.

And then the final use, I think it's worth noting here, even though it isn't technically an access use, is that Google is going to share ad revenues. When Google does provide preview access for similar access to a user, and there are ads associated with a page that relates to a particular book, Google will share the ad revenues generated by those advertisements with the rights holder.

KENNEALLY: Well, we've been hearing a lot about what Google can do, and so again, thinking of the rights holder – I'm sorry, we have even more uses, if possible.

WASOFF: Well, just briefly, there are also non-display uses authorized by the agreement. And those are uses that are defined as uses that don't actually display the expression that's included in the book, but they use other associated information, or use the content, but don't replicate the expression. And those are things like full text indexing, bibliographic data, and internal research and development at Google.

And it is important to touch on those, to distinguish between display and non-display uses, because of the rights that we will talk about that rights holders will have to control certain uses made of their work.

KENNEALLY: Right. Well, then I suppose I could be forgiven for jumping the gun, because I want to know what this means to me as a rights holder. As I say, we are hearing just now a lot about what Google can do. What's going to be the benefit to the rights holder from all of this?

WASOFF: Well, the settlement agreement includes a lot of potential benefits to rights holders. Some of them are economic. There are payments associated with what Google has done and what it will do. So there is a provision for rights holders whose works were scanned – and the key date there is works that were scanned prior to May 5, 2009. Those rights holders will be able to claim a payment associated (break in audio) their work by January 5, 2010.

The payment – Google is allocating at least \$45 million to cover those past scanning activities, and the payments will be made on a per-book or per-insert basis, \$50 per book, and either \$5 or \$15 for inserts.

There are also going to be ways for rights holders to share in the ongoing payments from the uses that we were just describing. And as a general matter, those are going to be split – those revenues are going to be split 53% to the rights holders, and 37% to Google.

KENNEALLY: OK. Well, we're just about halfway through the program. This is Chris Kenneally from Copyright Clearance Center, speaking with Lois Wasoff about the AAP/Authors Guild/Google settlement, and what authors and publishers need to know as May 5 approaches.

And so Lois, I want to turn now to one of the reasons that publishers and authors challenged Google about all of this was that they were concerned about their ability to control their works, and maintaining that ability as we move into the digital future. How does the settlement address those issues?

WASOFF: I think one of the key benefits to rights holders in the settlement, and one of the key goals of the Authors Guild and the AAP in negotiating the settlement, was to give rights holders the ability to exercise control. And simply stated, rights holders can grant or refuse permission to Google to make particular uses of the book.

Now the – this comes up in several contexts. The ultimate control is that a rights holder can instruct Google to remove any or all of its books from the database. And that's another important deadline that's coming up – that removal request needs to be made by April 5, 2011. Even if you ask – if your work was scanned before May 5, 2009, even if you subsequently remove it, you'll still be entitled to that payment for scanning. But obviously, you wouldn't be sharing in the revenues associated with future uses.

If you miss that deadline of April 5, 2011 to ask that your book be removed, Google will only honor a removal request if it hasn't yet scanned the book. If the book has already been scanned, a request after that date won't be honored.

You can also make, as a rights holder, decisions about excluding your book from certain uses. You might determine, for example, that you want the book to be available for snippet use and preview use, but you don't want it to be available for consumer purchase. There are mechanisms in the settlement that let the rights holder

flip the switch – change the level of authorization that it's giving Google.

But what's very important here is that certain default rules apply to those decisions, and that's where the concept of commercial availability comes in, in the settlement. And it's an important definition.

A book is commercially available under the settlement if it's for sale, new, through normal channels, in the U.S., with the authorization of the rights holder. If the book is commercially available, Google can make non-display uses of the book, but it can only make display uses if it gets the affirmative permission of the rights holder.

If the book is not commercially available, Google can make both display and non-display uses, but one of the rights holders can instruct Google to stop making display uses, and Google has to comply with that instruction.

It's – the contest is two to hire, one to fire. The more restricted instruction will control in each instance if the rights holders don't agree amongst themselves how they would like to see a particular book that they jointly control used.

There is also some restriction on – so that rights eternal (sp?) uses is not completely unfettered. There is a concept in the agreement called the coupling requirement, and that essentially says that with some exceptions, if you are taking advantage of the consumer purchase display uses that generate direct revenue for you, you can't simply exclude your book from the institutional subscription use unless your book is commercially available. That's a limitation on the complete, unfettered right you have to control your work.

In addition, rights holders get control over pricing. In the case of the consumer purchases, the rights holder can choose to either let Google do the pricing – there's a default mechanism outlined in the agreement in some detail for that – or, the rights holder (inaudible) specific price.

For institutional subscriptions, the pricing hasn't been determined yet, but Google is going to set that price in the first instance, and then the price is going to be – have to be approved by, they'll have to be negotiated with the Book Rights Registry.

If this sounds complicated, it's because it is. And it is going to be extremely complicated to manage all of these rights.

KENNEALLY: Well, certainly – and some things are becoming clearer. You just highlighted then the importance of display and non-display. We're learning about commercially available, all these terms that are going to be very important moving forward.

How is it all going to work? How will these rights be managed, and how will the money, the benefits for all of this, get into the hands of rights holders? Lois, tell us about the structure, the mechanism for this, that the settlement contemplates.

WASOFF: Well, the settlement – acknowledging, I think, the complexity of this and also to create a way for Google to deal with a single entity rather than the many, many, many thousands of individual rights holders that are implicated by the settlement – the settlement agreement creates an entirely new entity called the Book Rights Registry. The Book Rights Registry has many roles in the implementation and management going forward of the agreement. But its key role is to act as the representative of all the rights holders in their future dealings with Google under the agreement.

The Book Rights Registry is going to be a non-profit entity. It's going to have a Board of Directors. It's equally divided between author representatives and publisher representatives.

Its creation is going to be initially funded by Google - \$34.5 million has been set aside as part of the monies paid under the settlement to both pay the cost of the notice procedure we discussed earlier, and to fund the initial creation of the Book Rights Registry.

Subsequently, when that initial creation investment is run through, the Book Rights Registry is going to be funded through deductions from the fees that it collects from Google, before it distributes the remainder to the rights holders.

So what – among the key tasks for the Book Rights Registry is going to be to create and maintain a rights information database, and that's going to be a monumental task. As you know, Chris, rights information is a moving target.

KENNEALLY: Well, absolutely. That's something that we live with every day at Copyright Clearance Center. There's, as you mentioned, shared rights holders in many cases. The status of rights can

change over time, and certainly will, in the case of the books involved here. It is very much a complex undertaking.

And what is the way that the Book Rights Registry is going to distribute money?

WASOFF: The Book Rights Registry is going to take the money from Google, and distribute it out according to the provisions of the settlement agreement that cover both the relationship between publishers and authors, and that deal with the allocation of certain kinds of payments amongst rights holders. This is among the more – most complicated parts of the settlement. The – because some of the money generated will apply to an individual work, some of it will apply to the use of the institutional database, which will be a database comprised of many, many works. It's going to be a complex process.

The Book Rights Registry is going to take the money in, then allocate it out according to these instructions. There is also, as one would expect, going to be disputes over who controls the rights of a particular work, how the money will be allocated among the rights holders. There may be disputes about how works are characterized, whether works characterized as commercially available are not commercially available.

All of these kinds of disputes are going to be handled through arbitration procedures and through a dispute resolution mechanism that's outlined in the agreement, and managing that, assisting in that, is going to be one of the important roles of the Book Rights Registry.

KENNEALLY: OK, well, we've told people that they need to be very attentive to this approaching deadline of May 5, and there are some decisions that the authors and publishers on this call, and everyone involved in the class, are going to have to make ahead of May 5.

So if you would, then, Lois, can you review, what are the considerations we need to take into account as we prepare to make those choices?

WASOFF: Well, there's a fork in the road coming up on May 5. And there's a choice presented to rights holders. The first choice is, do you want to participate? If you choose to participate, as I said, you don't need to do anything. By default, you are a participant if you

don't notify Google, (inaudible) the settlement administrator otherwise.

If you choose to participate, you're a rights holder, and you have the rights and the benefits that we just outlined. You are authorizing Google to make the uses of your works that we just outlined. You will be entitled to those payments.

You're also entitled, because you've chosen to be within the umbrella of the settlement agreement, to file formal objections to the settlement if there are aspects of the settlement that trouble you. And the deadline for filing objections is also May 5.

To release any claims you'd otherwise have against Google, and against the libraries that provided the book to Google for scanning, and you become subject to the dispute resolution mechanisms in the agreement that I outlined.

The other choice that's before you is to opt out. There is – we'll be discussing the book settlement website in a moment, but the procedure on the book settlement website is the easiest way to opt out. It is literally a tab to click on that brings you to a form that you can fill out.

If you make that choice, you will be receiving no payments under the settlement agreement. You will not be participating in the revenue models established. You will have reserved your right to sue Google. You will also have waived your right to object to the settlement, because you will have put yourself outside of it, benefits and burdens.

Know also, though, that if you opt out, you can request that Google remove your books from the Google database. There is literally a checkmark on that claim form. Google is not obligated to honor the requests for removal made by parties that opt out, but according to what Google's public statements on the settlement administration website and elsewhere, Google has stated that it is Google's current policy to voluntarily honor such requests for removal, and not display the works of class members who opt out.

KENNEALLY: OK, then. So for everyone that's been following along and concentrating, as I have, on all of this, we need to ask the really important question about the practical reality here. What are the next steps I must take immediately, with only two or three weeks left?

WASOFF: Well, each rights holder is going to want to get a sense of whether its works are – have already been scanned, to get a sense of the potential benefit from the payments for prior scanning. So I think the first step is going to be to go to the website. It's www.googlebooksettlement.com – easy to remember. And it's googlebooksettlement.com – there's only one S in there.

And you're going to want to see whether or not your works are listed in the database. You should be aware that the database was constructed to be broader than the number of works scanned. And you should also be aware that by participating in the settlement, you're giving Google the right to scan your books published prior to January 5, 2009, after May 5. You will be entitled to payment for works scanned prior to May 5. But Google can scan works after May 5 that falls in that definition of books without making a payment for the scanning.

You'll want to look and see if the information is correct about your books. You'll want to consider claiming your books and your inserts. You need to be aware that the claims process is going to be a little bit complicated. There are – there's information you're going to need to give Google in order to claim your work.

You're going to have to identify yourself as either a publisher or an author. You're going to have to decide what subclass you're part of. You're going to have to indicate on the claim form is or is a work for hire, and that's important, because work for hires have no author interest associated with them. They are – only the publisher will control the use and can get the payment for works for hire.

You're going to have to understand the reversion characteristics of your work. You're going to have to understand whether or not your – the rights, if you're an author, have the rights reverted to you. If you're a publisher, have you reverted the rights? You need to understand the relationship between the author and the publisher.

You're going to need to provide information to identify the book – title, ISBN if it has one, works from the – older works may not have ISBN. You're going to have to identify the U.S. – whether or not the work is a U.S. work. If it is a U.S. work, it will need to have been registered. If it's a foreign work, it may not need to have been registered.

So you're going to have to do your homework. And the slide we've got up now outlines some of the things that you're going to have to think about. If you don't have copies of your contracts, get them. If you're not aware of what the reversion status is of your works, whether as a publisher or as an author, look into it. Because these are all questions that you're going to need to answer if you're going to get full advantage of the settlement. And depending on the answer to these questions, you may or may not decide that you want to affirmatively opt out.

KENNEALLY: OK, well, we've been focusing on May 5, because obviously, that's the first of a series of deadlines coming up. But let's lay out for people a calendar that takes us well into the next couple of years, Lois. What are some important dates moving forward?

WASOFF: Well, we've gone over some of them, and I think it's a good idea, Chris, to emphasize from now. May 5 is the immediate date (inaudible), and that's a date by which, if you're going to opt out, you have to do it. It's also the deadline to file objections to the settlement.

June 11 is the fairness hearing – that's when that is scheduled to take place now. Depending on what happens at the fairness hearing, subsequent dates may move a bit, but the dates that we're looking at now are that by January 5, 2010, if you want to be paid for the past scanning of any of your works that were scanned as – on or before May 5, 2009, you have to have filed your claim then. You have to file, claim your books prior to that date.

By April 5, 2011, if you want to remove certain copies, certain of your books from the Google database, you have to notify the – at that point, the Book Rights Registry, that you want those books removed. After that, as I mentioned, removal will be – Google will agree to remove a book only if it hasn't already included the book, if it hasn't already scanned the book.

So I think those are the key dates coming up, the key decision points.

KENNEALLY: OK. Well, again, this is a process that isn't a guaranteed dateline here, but if all goes according to plan, this is where we're moving.

Right now, let's move to some questions. We have been speaking with Lois Wasoff, copyright attorney of great respect around the world. My name is Chris Kenneally, from Copyright Clearance Center. We have some time left to take some of the questions that many of the several hundred – in fact, more than 600 people involved on this call, this global call, from across North America, Europe, South Africa and Australia, have been writing in to us on the Chat box. You can continue to do so.

And as we sort of sort out some of those questions here, I do want to thank everyone for joining us. As we mentioned, this is clearly an important case settlement proposed here, and what we are trying to do is to give you the information you need to make some important decisions.

We have a question here, Lois, from an author, who asks, when I check the database of the settlement website, I saw that some of my works have been scanned, or appear to have been scanned multiple times. Do I get paid for each scan, or for each book?

WASOFF: You get paid based on the scanning of the principal work included in each book. So, just to give you an example, if your book was published in both hardcover and softcover form, and both formats were scanned, there will be only one payment associated with the book. If the book exists in different editions, perhaps, with different forewords or afterwards, that's still one principal work, and it implicates one payment.

And then it's also useful to keep in mind that that one payment, that at least \$60 payment, will be divided among the various rights holders to that principal work. So if the book in our example were an in-print trade work, to which both the author and the publisher have a copyright interest, then the \$60 payment would be allocated between them as set out by the procedures in the settlement agreement.

KENNEALLY: OK, that's important, and that then brings back this important distinction we've been making about having a copyright interest here. And it may include more than one party – in fact, probably does, in the case of commercially available books.

WASOFF: It often – it very often will. And the settlement talks about that at some length. Books fall into different categories. Author controlled works would be trade works to which all rights have reverted. Work for hire materials always are publisher materials.

And there are materials that it is anticipated will be in the grey area. But it will be very common for there to be more than one rights holder for a particular book, and this is a good question to ask, because it will also be very common to find the same work having been scanned on more than one occasion. It was obviously overlap between each library collection. And it is not at all hard to imagine multiple copies of the same work (inaudible) database.

KENNEALLY: And so, I'm thinking about benefits to me as well, again, as an author. If I think I've got ten books that I've written, it's not necessarily going to be \$60 times ten, that's my payment. It could be far different from the \$600.

WASOFF: That's correct.

KENNEALLY: All right. We have another question here about books published after January 5, 2009. Again, we've been trying to make a point about all the various dates involved here. Here's one that's important – January 5, 2009. What about books published after that?

WASOFF: The settlement doesn't cover books published after January 5, 2009. It doesn't authorize Google to scan books published after that date. It doesn't authorize Google to make use of the books published after that date.

It's certainly possible, even probable, that books published after that date will be included in the Google Partner Program. And the Google Partner Program, as I mentioned, I think, at the beginning, is a voluntary program. It's a contractual agreement between Google and either a publisher or an author, and it provides for certain uses.

And that Partner Program may be a little bit of a moving target. It may change and evolve over the next year or two. I think we can expect that it will. But that's how books after January 5 would come into the Google structure.

KENNEALLY: We have a question here that a lot of people have been asking. What happens if the settlement is not approved? What's the likelihood of that? And have there been any objections made so far?

WASOFF: There have been a couple of formal objections filed so far. In addition, there's been a public request by a consumer advocacy group for the Department of Justice to intervene in the settlement

on behalf of consumers, and intervention is different than objecting. You can only object to the settlement if you are a member of the class. You can ask the court's permission to intervene in the settlement process, to be heard at the fairness hearing, if you are affected by the settlement. And that decision about whether or not to permit a third party to intervene will be with the judge.

We've also heard that a number of amicus briefs that are going to be filed. Those briefs will be information for the judge to consider in reviewing the settlement, and there are amicus briefs that may be filed on behalf of library groups, or some academic groups.

So there's certainly a lot of discussion about this. Remember, though, the court itself can't change the agreement, so it will be interesting to see what effect those and other objections and other submissions have on the court's ultimate decision.

If the court does decide not to approve the settlement in its current form, the question is going to be whether the agreement could be modified by the parties to address that basis for rejection. I'm not saying the court will reject it, but that's going to be the question, whether it will – the court is fundamentally changing the terms of the agreement so the parties no longer have a consensus, no longer can come to agreement.

There will also be a question about whether or not the terms are – the court is suggesting changing the terms in a way that requires re-noticing, then you add a new notice to the class.

We don't know yet what's going to happen. We'll know a lot more after the fairness hearing on June 11.

KENNEALLY: OK, thank you. You know, we've been talking about rights management here – we've got to do some time management, too. We've got about five minutes left, so we're going to go to just one more question, and then wrap up the program. We appreciate everyone being with us for this time. We want to respect your valuable time as well.

And the question is from a publisher here, who asks, if we participate in the settlement, and we don't remove or exclude books from access uses, what will end users be able to do with them?

WASOFF: Well, the access uses allow Google to make the full text scan hosted by Google available online to purchasers. That would be one

book at a time for consumer purchase, and the entire database for institutional subscriptions. And as we said earlier, purchases will be able to copy and paste, print portions, perhaps up to the entire book using multiple commands.

There's also a tool, that I don't think we discussed, a book annotation tool that can be turned on for certain books – will actually allow users to make and maintain their own annotations on their copy of the book.

What the agreement doesn't currently do is give Google the authority to allow downloading. It doesn't give Google the authority to allow any reuse of the materials, any republishing or redistribution of copies of the books. Those uses might be separately negotiated later as part of the new revenue models I mentioned, and those negotiations would be between Google on the one hand, and the Book Rights Registry on the other, representing the interests of rights holders.

KENNEALLY: Right. Well, those interests of rights holders – I mean, that has been the theme we've been hearing, I think, throughout this whole hour with you, Lois. Thank you so much for that.

And understanding how works are being used, and the value of your rights as an author or a publisher, is something that Copyright Clearance Center is obviously very interested in. We are the rights licensing experts. As we say, we are global licensing agents, currently managing over 300 million rights, and currently selling institutional licenses to academic and corporate clients, including rights from many organizations, many publishers, many authors on this call right now.

We at Copyright Clearance Center are available to help you understand how your works are being used, and as well, to understand better the value of the rights associated with those works. We are urging you, suggesting that you get more information today from Sue Kesner, who is our Director of Rights Holder Experience. She is available to answer any questions you may have, and to help with your licensing needs.

Those on the call who recognize the name Sue Kesner will remember her as the President, just last year, of SSP, the Society for Scholarly Publishing. She has been with Copyright Clearance Center for a number of years, and is actually a trained librarian. So she's very able to help you with any questions you may have.

She can be reached at suekesner@copyright.com – that’s S-U-E-K-E-S-N-E-R@copyright.com. Her telephone line direct is (978) 646-2727.

We have been speaking with Lois Wasoff today, and I want to, again, thank you so much for all of the information and your expertise, Lois. It’s been a pleasure.

WASOFF: Thank you, Chris.

KENNEALLY: It’s been a little hard work, actually, following along, but that’s OK – I need to do that. You are an attorney in copyright and trademark, publishing, licensing and Internet. You’ve been past Chair of the Copyright Committee for the Association of American Publishers, and formerly Vice President and Corporate Counsel at Houghton Mifflin Company.

We will just direct our audience to several online resources – tell you again that the settlement website itself is at googlebooksettlement.com. You can find there settlement information, claim forms, and you can do a search of the database to determine whether your books are there.

Some other important sources of information would be the AAP website, at publishers.org, the Authors Guild website, authorsguild.org, and our own Copyright Clearance Center website at copyright.com.

Again, I do want to thank everyone involved on the call here. I want to thank Lois for her help and expertise. I want to thank the audience for joining us, for sharing their time with us, for being patient as we have sorted out this hundreds of pages of the settlement proposed, and tried to give you the kind of information that you can use moving forward, again, knowing that May 5 is bearing down on us quite quickly.

If, again, you have any questions and would like to learn more about how to manager your rights, you can direct those questions directly to our Director of Rights Holder Experience, Sue Kesner. She can be reached at suekesner@copyright.com.

We hope that you have found it helpful, and of some value to be in on this call. And I want to say, I’ve enjoyed it very much. My name is Chris Kenneally, Director of Author Relations.

**What's Next for Authors and Publishers?
An update from Lois Wasoff, Esq.**

Recorded June 22, 2009

Lois Wasoff returns to fill you in on the latest developments of the settlement. Key deadlines have been extended and the fairness hearing has been delayed, raising many questions for those who may be affected by the settlement. Ms. Wasoff answers your questions and sorts out what these changes mean to you.

KENNEALLY: The journey toward a settlement in what's become known as the Google books case began last fall, when the Authors Guild, Association of American Publishers, and Google, released details of a proposal they planned to put before the federal court in New York.

It's summer now, and while the terms of the settlement haven't changed since October, important deadlines for action by authors and publishers have moved. Tracking those changes and making the necessary decisions required is sure to focus the minds of rights holders in the United States and around the world, even as we look to enjoy the best this fair season has to offer.

On behalf of Copyright Clearance Center, welcome, everyone. My name is Christopher KENNEALLY. As Director of Author Relations here at CCC, I have the great pleasure to speak again with Lois Wasoff, who has the very latest updates on this historic piece of copyright infringement litigation.

Lois, thanks for joining me.

WASOFF: Thank you, Chris. It's nice to see you again.

KENNEALLY: It is indeed, and we should tell people a bit about your background, Lois. You have participated in numerous meetings and conferences in the U.S. and abroad on copyright issues, and spoken about legal issues and industry practice in book publishing frequently.

Your current clients include non-profit and commercial publishers and others involved in publishing, as well as individuals with questions about copyright and publishing itself.

We were together back in April, April 14, and presented an overview of the Google books settlement, and you're back today to give us an update and highlights on events that have changed all of that information since this original program.

Today, we're going to take a look at the settlement agreement itself, the current status of the agreement including extension of dates for opting out or objecting, as well as a delay of the fairness hearing. We'll look at the reasons for the extension of these key dates. We'll get to understand a bit better some of the comments filed with the court to date, as well as potential implications of the delays and comments for the settlement agreement itself.

And finally, we'll provide a review of rights holder considerations and decision points.

So let's get started, Lois. And key to all of this, and it will be a theme throughout our chat today, is that this is a class action which requires certain formalities be observed. So to give people the – sort of the top headline here, what happened – what has happened since our interview back in April?

WASOFF: Well, Chris, as we discussed then, when a class action is settled, the class members have to be given an opportunity to decide whether they want to opt out of the settlement entirely, or perhaps to stay in the settlement but file objections to some of its terms. The timeframe within which that decision has to be made has changed for this settlement.

Originally there was a May 5 deadline for class members to opt out or to object. Being silent meant, and still means, that you've consented to participation in the settlement. The major recent change that our listeners need to be aware of is that this deadline for deciding whether to opt into the settlement, or to opt out, or to object, has been extended to September 4.

KENNEALLY: So that's the first note to take. Cross out May 5, and write in September 4.

WASOFF: Exactly.

KENNEALLY: OK. What else, then?

WASOFF: Well, secondly, like all class action settlements, this settlement is subject to court review in what's called a fairness

hearing. The purpose of that hearing is for the judge to hear and consider the objections raised, to review the notice procedure that was used to let class members know what the terms of the settlement are, and also, to review the overall terms of the settlement. The judge's options are to either approve the settlement or disapprove it, or perhaps to send it back to the parties for more work.

That fairness hearing had originally been scheduled to take place on June 11. That has now been postponed to October 7.

But I think the key takeaway point here is that all of the other dates in the agreement are unchanged. So just to pick one example that I think will be of particular interest, the settlement agreement included a deadline of January 5, 2010, by which claims had to be filed if the rights holder wanted to be given a payment for past scanning of that rights holder's books, for scanning done prior to May 5, 2009. That date hasn't changed. Those claims still need to be filed by January 5, and they will still only relate to scanning that was done prior to May 5, 2009.

KENNEALLY: OK. So we have an idea then of what has changed, but it's important to emphasize that some things have not changed.

And now let's back up, take a deep breath and back up, and go back to the beginning, and give people some overview of the settlement as a way to review the actions that have occurred since the very beginning of all of this, and to give everybody a sense of just how complex a matter this really is. So where does this all start, then, Lois?

WASOFF: Well, I'll just run through this briefly. We'll just flash back for a moment or two to 2004, because that's when Google entered into agreements with major university libraries like the University of Michigan, Stanford, and Harvard, and began to scan books and other materials from those libraries' collections. That was the Google Library Project.

And the understanding was that these digital copies would be maintained by Google, and that a copy of the end digital version would go back to the participating library.

The works in those libraries are – encompass the works of the world. The holdings of these libraries are obviously very, very extensive.

At the same time Google was scanning books taken from these libraries, with the permission of the libraries, Google began a separate, voluntary program for publishers and authors, known as the Partner Program, and acquired more books through that program.

A huge, searchable database exists as a result of all of the scanning activity on the part of Google. Google then made books that are a part of this database available online for various uses, including searching and snippet displays in the results.

Well, when the Google Library Project, which was done without publisher permission, began –

KENNEALLY: Publisher and author permission.

WASOFF: Publisher and author position, exactly – permission. Authors and publishers were quite reasonably concerned about the impact that this kind of mass digitization might have on their ability to control, to be paid, and to be paid for the uses of their works.

So in 2005, the Authors Guild brought a suit against Google, and they brought that suit as a class action. Very shortly after, we had a group of publishers, supported by the AAP, brought a separate suit against Google, alleging that its scanning and use of the end copyright books constituted copyright infringement.

Those cases were consolidated in front of the same judge, and settlement negotiations started fairly quickly after that. It took three years of protracted and difficult negotiations, but as you've already mentioned, in the fall of 2008, a settlement was announced.

This settlement is – utilizes the class action mechanism that we've discussed. A class action, just to go back over that ground for a second, is a form of lawsuit in which a group of class representatives can sue on behalf of others with similar claims.

KENNEALLY: So in this particular case, the Authors Guild, for example, is suing on behalf of named plaintiffs, but also on behalf of all authors in the United States.

WASOFF: That's exactly correct. And because – although the publishers' lawsuit wasn't originally brought in that format, because this class action mechanism has been adopted, the AAP's part of the action is also being settled as a class action. So, the settlement

agreement is binding not only on the five publishers who were named as plaintiffs in the suit, but also on all publishers who are members of the publisher subclass.

KENNEALLY: So for our purposes, and for the audience's purposes, it's everybody, really. If you've got a published book as an author or a publisher, this settlement has an effect on you in the United States.

WASOFF: Pretty much. That's not an overstatement. There are definitions in the settlement of what a book is, and what an insert is. But if your work falls within those broad definitions, then – and you are a rights holder in the work, you are affected by the settlement.

And then, as we discussed, the – as part of this class action mechanism, there has to be a notice period, class members have to be given an opportunity to find out about the settlement, given an opportunity to make a decision about participating or not in the settlement. That notice period – those notices began to be sent out in January of this year.

KENNEALLY: But then, we've had some extensions around the notification period and the time that everyone has to make some important decisions. And how did this happen? I mean, why did we get to the point where we were approaching May 5, and then it moved forward to September 4?

WASOFF: Well, as that May 5 date approached, the public and the private comment on the terms of the settlement agreement increased exponentially. One of the requests actually filed with the court as a formal request was made on behalf of an author group. That request was for a four month extension of the opt out deadline. It was – the formal request apparently had been made after an attempt to work out an extension period with the proponents of the settlement with the Authors Guild, with AAP, and with Google.

So pretty much simultaneously with the filing of this small subset authors' group, with the filing of their request for a four month extension, the proponents filed papers with the court asking the court to order a two month extension of the date.

The court ultimately granted the authors' request, and granted the four-month extension of the date. And that's how we moved from May 5 as the opt out deadline to September 4 as the opt out deadline.

KENNEALLY: And so, what people will recognize, and even the proponents of the settlement, as you say, is that some more time was needed. Why would that be the case? Why do people think it was necessary to need more time on this?

WASOFF: Well, different views have been expressed on this. Maybe the simplest thing to do is to report on the reasons that the authors' group gave for seeking the extension. And keep in mind, as I am recounting this, the court granted the four-month extension. It didn't necessarily agree or disagree with the reasons that the Authors Guild – I'm sorry, with the authors' group, with the group that were seeking the four month extension, the reasons that they gave for seeking the extensions. What they –

KENNEALLY: So in other words, we shouldn't read too much into this. They gave people more time. What the court's reasons for that decision were is unknowable, really – just the fact remains that we have some more time.

WASOFF: That's correct. The – you can't – shouldn't infer from the fact that the court granted a four month extension that the court agreed with everything the – this authors' group that was seeking the extension had to say for its – as its justification.

But what that group of authors – and just so we know who we're talking about, and we don't get confused with the Authors Guild here, that was a group led by – one of the named members of that group was the Steinbeck Estate, so if we call it the Steinbeck Estate Group, it might be a little bit clearer.

KENNEALLY: Surely.

WASOFF: And that group argued to the judge that given the complexity of this agreement, the notice provision – the notice process did not provide sufficient time for authors to assess their rights under the agreement. As I mentioned, the worldwide notice period – and worldwide is, should be emphasized here. This settlement is about U.S. uses, but it implicates an enormous number of works of foreign origin as well as U.S. origin.

KENNEALLY: Just on that point, there was an article in the *New York Times* that detailed how many different languages and how many different publications around the world were employed to get the

word out on this, so we are not overstating that at all. This was a global notification.

WASOFF: This was a global notification process. And it began formally in January of 2009, and was supposed to be completed by the end of February of 2009, a two-month period.

In fact, the counsel for the Steinbeck authors' group said that there were – they had heard anecdotally that there were class members who actually didn't receive notice until April or later. And they also argued that even if the notice had been timely given, a two month period to analyze an agreement this complex, an agreement with these kind of broad implications, was in any event inadequate.

The authors' group pointed out that unlike more typical class action settlements that deal primarily with past behavior and with measuring damages for past activities, the settlement agreement in this case has a lot of future implications. It, if approved, will authorize Google to engage in future uses of copyrighted works, potentially in perpetuity.

It's a very broad license of many rights to the books and the inserts that are covered by the settlement agreement. It has provisions for the use of those rights in the future in various forms, primarily digital, but various forms. And it establishes an entirely new entity, an entity called the Book Rights Registry, that's going to manage those rights and disburse payments received from Google in connection with the exploitation of those rights.

So the authors' group, this Steinbeck group, pointed out that this was a very complex, far-reaching settlement that required more time to consider than the time that had originally been provided. They also argued that there were some defects in the original notice, that the actual notice didn't give the recipients of the notice the ability to ascertain with certainty whether their works were necessarily covered by the agreement. The notice was a 30 page document, at least, and it linked to, or encouraged people to go to the settlement set up by the settlement administrator, googlebooksettlement.com, where there were and are extensive FAQs.

So this is a complex settlement, and the – in essence, the Steinbeck authors' group said, everybody needs more time to figure out what this means.

KENNEALLY: Well, we've got that extra time. So tell us some of the ways that various parties have been using that time. There have been some comments, some objections. What are the issues that people are raising in the court right now?

WASOFF: Well, there isn't much going on, actually, in the court right now. Things aren't being formally filed with the court now. We, I think, can pretty reasonably expect a flurry of activity in August, in very, very early September, as we approach the deadline.

There were objections filed in advance of the original May 5 date, because the extension didn't come through until the end of April. So there was activity leading up to it. And there has been a lot of public discussion, and we've all seen reports in the media about some of these concerns, objections, explanations of the benefits of the settlement – there's a public debate going on, as well.

KENNEALLY: And so, the absence of activity in the court really is, again, not an indication of anything at all. What you're suggesting is that people are going to hold their comments until very close to the deadline itself.

WASOFF: Yeah, I think it's a timing issue. I think that people will file, as we get closer to the deadline. It's also probably an opportunity for there to be some informal discussions going on, that may or may not allay some concerns or lead to some other resolutions. But –

KENNEALLY: But very broadly, what are some of the issues that have been raised?

WASOFF: Well, this settlement agreement has been getting a lot of attention. The agreement has, as I said, it has enormous reach. It involves not just the private rights of a huge number of individuals and corporate rights holders, but there are very substantial public policy issues represented as well. The libraries have been very active in their comments and concerns about this.

As the proponents of the settlement agreement point out, it may prove to be an invaluable tool for making millions of otherwise obscure or difficult to locate works readily accessible to the public. On the other hand, some of the critics are saying that they are concerned it will provide unprecedented power over the selection and delivery of content to a single commercial entity, that single commercial entity being Google.

So it's not surprising that it's produced substantial public comment. What's particularly interesting is that the comments are coming in from a broad variety of stakeholders, and that some of those stakeholders are taking positions that some may find to be a little bit unexpected.

So to go through some of the specific stakeholders who have raised issues, the library community, as I mentioned, has been very concerned with the implications of the settlement. There was a very important article written by Robert Darnton, who is the Head Librarian at Harvard now, when the settlement – shortly after the settlement was first announced. It was in the *New York Review of Books*, where he expressed some concerns about the settlement, while acknowledging its possible advantages for users in terms of increased accessibility.

The brief that was filed by the library community, the formal brief that was filed before the May 5 deadline, I believe – certainly it is formally a part of the record by now – did ask the court to approve the settlement. So the formal Library Association position did say to the court, please approve the settlement.

But, that same brief also asked the court to very closely supervise the implementation of the settlement – asked the court to stay very active in the management of the settlement, and expressed some very specific concerns about the content of the settlement. Those concerns included a concern that Google and the Books Rights Registry might have too much control over a very sensitive database that could, over time, become what they referred to in the brief as an essential facility for doing scholarly research.

They were concerned that the settlement agreement does not include provisions to protect user privacy, contrasting that with the provisions, the somewhat detailed provisions in the agreement, that deal with security of the database. And also, because the settlement lets Google and the rights holders remove works from the database, the library community expressed some concerns that there may be a threat to intellectual freedom.

So those concerns are before the court, and they're part of what the court will presumably consider in deciding what to do next.

There have been a number of comments filed with the court, and also made in the media, that argue that the agreement would give Google a privileged position with respect to orphaned works.

Remember that orphaned works are those works that are still protected by copyright, but for which the copyright owners are not actively managing the rights, or in most cases, just cannot be located any longer.

The – one of the most vocal critics of the orphaned works aspect of this has been the Internet Archive. The Internet Archive, as you know, has a long history of copying and maintaining the history of the Web. Internet Archive has always been a vocal supporter of orphaned works legislation, which would permit the use of these unclaimed, unmanaged works under certain circumstances and with certain limitations on exposure for the user.

The effect of the settlement, because those works are included in the settlement because of the class action nature of this, if their owners – if the rights holders associated with those works do not come forward and opt out, the works will be covered by the settlement, and their future uses will be covered by the settlement. By definition, if the work's an orphan, the rights holder isn't going to come forward. So the Internet Archive and other critics have been arguing that the settlement will functionally give Google an exclusive license to the use of orphaned works in the future, and for the uses licensed under the agreement.

Google denies this. The proponents have been responding to this argument, but it's been a key tension point in the discussion around the settlement, and it hasn't gone away. The judge denied Internet Archive's motion to actually intervene in the action and become a party to the action, but in his denial, the judge said to the attorneys representing Internet Archive, nevertheless, we want to hear your comments.

Brewster Kahle, who is the head of Internet Archive, as recently as a week or so ago, wrote a Wall Street Journal op/ed piece, in which he argued that the settlement was flawed for this very reason.

KENNEALLY: So I guess that only emphasizes the point here that is relevant, not only about orphaned works, but all kinds of works, is that a certain amount of silence is a very powerful statement.

WASOFF: That's an excellent point.

KENNEALLY: Right. Well, what are some other issues that are being raised by other groups? Certainly foreign authors and publishers have made comment on this as well.

WASOFF: Oh, yeah. There has been a lot of comment from foreign authors, foreign publishers. And again, as we mentioned, the settlement covers uses in the U.S., but the definition of books, of books and inserts that are included in the settlement agreement, is broad enough to include a vast number of works of foreign origin. These libraries who provided the corpus for scanning have in their collections an enormous number of works of foreign origin. Those are in the database – those are included in the settlement.

Formal comments that are generally critical of the agreement have been received from some foreign authors and groups representing foreign rights holders. And we think that concerns have been expressed in other ways, by the foreign rights holder communities. There has been some media coverage that indicates that the European Union, at the request of some European rights holders, has begun to look into the antitrust implications of the settlement agreement.

However, to balance this, we are also hearing that there have been discussions between the proponents of the settlement, between Authors Guild, AAP, Google, and foreign rights publishing groups, and foreign rights authors – foreign authors' groups, and that there are attempts being made to allay some of the concerns that have been expressed.

But this has clearly been a sensitive area for foreign rights holders.

KENNEALLY: Well, another area that's gotten attention is one that's been reported in major newspapers earlier in June, and that is that the United States Department of Justice is evaluating the proposed settlement for antitrust implications, just as you mentioned the European Union is looking at this.

Can you give us your reaction to this news, and can you tell us how the proponents are responding to it?

WASOFF: Well, we now know with a high level of confidence that there is an active Department of Justice investigation going on. It had been rumored for a while, even before the May 5 deadline was extended. But the Department of Justice hadn't made any formal public statements about its intentions. Just on June 9, there was an article in the *New York Times* that confirmed that not only is the Department of Justice thinking about taking action and beginning to look into it, but that it has actually gone so far as to serve what's

called a civil investigative demand, a formal request for information, on various proponents of the settlement – major publishers, Google, AAP, and the Authors Guild.

So it appears that the DOJ is interested in looking into the settlement agreement and making an evaluation of its antitrust implications. It also appears, from what we've heard, that a focus of the inquiry may relate to the orphaned works aspect of the agreement that we've spoken of.

But I just want to emphasize here that antitrust laws are extremely complicated. The fact that the DOJ is looking into the settlement agreement does not mean that it violates antitrust laws, nor does it mean that the Department of Justice is likely to ultimately determine that it does violate antitrust laws. What I think is important here is that the fact of this investigation clearly may have an impact on the review and on the ultimate approval of the settlement agreement.

KENNEALLY: So there's a degree of due diligence that's being undertaken here, but we should all be aware that it may have an impact further on down the road on various deadlines and so forth.

WASOFF: It may.

KENNEALLY: It may.

WASOFF: It may. It's –

KENNEALLY: Emphasize may.

WASOFF: It's not possible to predict where that's going to go now.

KENNEALLY: Right. Well, thanks for covering that. And tell us, if you will, about how the proponents themselves are responding to some of these points.

WASOFF: Well, the settlement proponents have continued to work very actively to inform rights holders about the benefits of the settlement. And as you and I have discussed before, Chris, when we reviewed the provisions in more detail back in April, there are – the agreement includes potential benefits for rights holders who choose to participate in it. Those include payments for Google's past scanning of books, as we've discussed. The agreement also includes a mechanism for ongoing payments associated with Google's future

uses of these works. The sort of basic split is that Google will take revenues that it generates, and give 63% of those revenues to the Book Rights Registry as the rights holder representative, keep 37%.

And then, in addition, the settlement has built into it provisions that will permit – would permit – rights holders to manage the uses of their works under the settlement, to flick the switch on and off for certain of the specific uses that Google is authorized to make.

The defaults – the default positions of those switches varies according to a number of factors, whether a book is assumed to be included in a particular work, or assumed to be – in a particular type of use, rather. Or is assumed to be excluded from that particular type of use, is the subject of a set of default rules in the agreement that's sort of beyond the scope of our conversation today.

But certainly, the proponents are – believe that this settlement benefits rights holders, and are making that case to the rights holders. They also are continuing to argue that the settlement is going to increase the visibility of these works, and it is true that the settlement – that works that would be included – fall within the settlement, are not just in print and copyright works, but there are literally millions of works that are in copyright, and long out of print or otherwise not readily available.

And the argument has been that including those works in the Google database, and making those works available in the various formats authorized by the settlement agreement, will increase their visibility, increase their utility to the user community, and will potentially create new revenue streams for those works.

Among the actions being taken by the proponents are – for example, there was a meeting at Book Expo in late May, to which publishers' representatives were invited, and at which the settlement benefits were discussed. The settlement website remains active, the Frequently Asked Questions there continue to be updated as questions are raised about the settlement.

And perhaps most importantly, progress is being made on the formation and organization of the Books Rights Registry. That's the entity that will be managing the relationship between Google and the rights holders, collecting and disbursing the revenues.

Michael Healy has been named the likely Executive Director of the Book Rights Registry. Michael is currently the Executive Director of

the Book Industry Study Group, which is the entity that manages the ONIX system that most publishers are well familiar with.

The Book Industry Study Group is considered to be one of the industry's leading trade associations for policy standards and research. And I think Michael Healy's choice as the potential first Executive Director of the Book Rights Registry has generally been very well received.

And I understand, Chris, that you've had a recent discussion with Michael Healy.

KENNEALLY: In fact, we did it just a week ago here in this very room. And I enjoyed that very much. That's available for all of our listeners on copyright.com. They can hear from Michael himself speak about his background as a librarian, and as an expert in the book standards that you mention. And as well, some of the reasons he sees for suggesting that rights holders sign on to all of this. So we do really direct people to listen to that at copyright.com.

But let's continue then, and take a look at some of the activity that Google itself has been involved in. They've just been actively engaging the library community in a couple of different ways. Tell us about that.

WASOFF: Well, that's important, too. When I was talking about the activities that proponents were engaging in to continue to support the settlement agreement and to educate people about the settlement agreement, I was focused mostly on the rights holders' side, the authors and the publishers. But obviously, the libraries are a critically important stakeholder in this process.

Google announced in late May that it had entered into an agreement with the Library of Michigan, the University of Michigan, which as you'll recall, was one of the earliest and most enthusiastic participants in the book scanning project. That new agreement or amendment that Google did is going to give Michigan much more input in the pricing of the institutional database subscription that's contemplated by the settlement agreement. The institutional database subscription is a new form of distribution for these databases, for the Google database, that is an important part of the settlement agreement.

And one of the most significant objections raised by some of the library based commentators on the agreement has been a concern

that the pricing of that institutional subscription will be driven more by revenue concerns than by the desire to make the database widely available. In the settlement agreement itself, the formula, the process for determining pricing, specifically incorporates both of those considerations, both revenue generation and availability.

But the library community is concerned that the – there might be an opportunity to price those subscriptions in a way that the library community is concerned about.

So Google has entered into this agreement with the University of Michigan, and according to what we are reading, is interested in entering into agreements like this with other participating libraries. And that seems, aside from what other considerations Google may have had in doing that, it does seem that it is a way of allaying at least some of those concerns.

KENNEALLY: Reassuring people, certainly.

WASOFF: Reassuring, yeah. Reassuring the library community.

It's not possible to say whether the settlement agreement is going to be approved or not, or if it is approved, what it's going to look like, how it might be changed. But I think it's good to keep in mind, as we're talking about all the moving parts here, and all the things that might be changing, and all the objectors, and all the comments, that this agreement was the product of a very difficult, very protracted negotiation. It is strongly supported by Google, by AAP, and by the Authors Guild.

Millions of dollars have already been spent on some of the actions that needed to be taken even before the settlement goes through the formal approval process, like the notice process, and the early work being done to establish the Book Rights Registry.

So there's a lot of momentum behind the settlement agreement. All the delays and comments that we've been talking about may complicate the process. But the settlement agreement, for the purpose of our listeners, for the purposes of rights holders thinking about what this means for them, that's – the settlement agreement is very much alive, and I think it's still very much relevant to rights holders, and they need to be thinking about it as these larger questions of approval or disapproval, amendment or not, get worked through the courts.

KENNEALLY: Well, we're coming to the end of our special update here on the Google books settlement. This is Chris KENNEALLY from Copyright Clearance Center with Lois Wasoff, who is a copyright attorney and publishing expert.

And I guess the way to wrap this all up for people, Lois, would be to underscore again some things they need to be aware of right now, this summer. So tell us about those points.

WASOFF: OK. I think key points are, you need to keep in mind that only the deadline for objecting or opting out of the agreement and the date of the fairness hearing has been changed. All of the other dates in the agreement remain the same.

And the example I've given, and the one I want people to keep in mind, is that rights holders, if they want to get payments for past scanning, still have to claim their works by January 5, 2010. And those payments will apply to works that were scanned prior to May 5, 2009.

That date hasn't moved, and if there are complexities involved, and – you're only entitled to the scanning payment if you opt in, and so we may be getting a little bit ahead of ourselves here. But I think it's important for our listeners to keep in mind that if there are complexities involved for you in making those claims, if you need to compile your internal information and get your own records in order so that you can provide the necessary information to the settlement administrator, you don't want to be starting that over the Christmas holiday.

The deadline – that deadline hasn't moved, so that work still needs to be done if you are interested at all in making those claims.

KENNEALLY: So the critical decision then now is, participate or opt out – review the points there on that.

WASOFF: OK. That's the initial fork in the road. You can decide to participate. If you've decided to participate, you need do nothing, because as we've emphasized several times, silence is consent.

If you participate, your books and inserts will be included in the settlement agreement. Google will have a license to use them as specified in the settlement agreement. You will have a right to control those uses as specified in the settlement agreement.

As I said before, if you participate, you can file a claim if you do it in a timely fashion to get certain payments for past scanning. And you will be able to participate in the other revenue producing programs that are contemplated under the settlement agreement.

If you participate, you will be entitled to file formal objections to the agreement. If you are participating but have some concerns, you will be able to get those concerns before the court, but you will have to file those objections by September 4, in order for them to be considered by the court at the fairness hearing.

And, if you participate, you will become subject to the dispute resolution mechanisms in the agreement, which include arbitration. Again, those are a little beyond our scope today, but they're an important factor. They're something someone should be thinking about, understanding, if they're deciding to participate.

KENNEALLY: You're just saying, be aware.

WASOFF: Be aware. If you want to opt out – if you've considered these factors and you decide to opt out, you will not be included in the settlement. You will not receive the benefits conferred by the settlement, and you will not retain – but you will retain, you will retain the right to sue Google and the libraries that provided works for Google in connection with the scanning we've discussed.

If you opt out, you will not be eligible for the payments for past scanning, or to participate in the revenue models under the settlement. You could still participate in the – on a voluntary basis, in the Google Partner Program. That's also something that's a little beyond the scope of our discussion today, but that option could still exist.

You should also be aware that if you opt out, you leave behind any right you have to object to the settlement, the theory being that if you are no longer going to be subject to the settlement, you will no longer be interested in objecting, and the court will no longer be interested in hearing your objection. So you will lose your right to object.

KENNEALLY: Put yourself outside of the settlement, literally.

WASOFF: That's very well put. That's exactly right.

The other thing to keep in mind is that if you opt out, you can request that Google remove your works from its database. Google is not obligated to honor those requests, but it has publicly stated, and continues to publicly state on the settlement administration website, that Google's current policy is to voluntarily honor requests, and to not display the works of class members who opt out.

KENNEALLY: OK, so finally, let's review these dates here. And again, people with your little notepads out, bear in mind, a few things have changed from our original program back in April. So Lois, very quickly, what are those, again?

WASOFF: OK. Your deadlines in 2009 – your deadline, really, in 2009, is September 4. And that's the date by which you have to either opt out of the settlement, or if you are going to participate in the settlement but want to file some objections, that's the date by which you need to file objections to the settlement. If you have done nothing by – on or before September 4, and you are a rights holder in books or inserts, as those terms are defined in the settlement agreement, you're in the agreement.

The other date to be aware of – it's not really a deadline, but it's a date when lots of interesting things are likely to happen, is that on October 7, 2009, the judge will be holding the settlement fairness hearing. That's the currently scheduled date, and that's when those – the objections and the discussion that we've been having today, that's when those kinds of issues will be formally considered by the court.

The next date coming up for you is in 2010, and that's the January 5 deadline to file claim payments, if you want a payment for any of your works that are covered by the settlement that have been scanned. You can only file those claims and seek those payments if you have not opted out of the settlement – if you're still subject to the settlement.

And then there's another date coming up that we haven't talked about, it's a little beyond our scope today, and that comes up in 2011. The – on April 5, 2011, you'll be facing a deadline to request removal of digital copies of your works from the Google database. This presumes that you haven't opted out of the settlement entirely, your works are in the settlement. You would still have the option up to April 5, 2011 to ask Google to simply take some of your works out of the settlement – out of the Google database.

There are some considerations around that – again, beyond our scope today. But something that people who are thinking about their future as a potential participant in the settlement agreement should be aware of.

KENNEALLY: Right. What’s interesting about all of that is the long-term implications of making some decisions today in 2009 that will affect your work moving forward for quite a long time.

I’ve been speaking today with Lois Wasoff, who is a copyright attorney and publishing expert on an update to an earlier seminar we did at Copyright Clearance Center on the Google books settlement, and Lois, thank you very much again for joining us here today.

WASOFF: Thank you, Chris.

KENNEALLY: It’s a pleasure, and really, it can’t be overstated that you helped make a very complex subject at least digestible for this one particular non-lawyer, and I appreciate that – non-lawyer and rights holder, by the way, so I certainly appreciate the work you’ve put into all of this.

And today’s program is the latest in a series of presentations from us at Copyright Clearance Center about the Authors Guild/AAP/Google settlement. Recordings of this and all other sessions can be found online at copyright.com.

And for all of us at Copyright Clearance Center, this is Christopher KENNEALLY, wishing you a very good day.

Lois Wasoff Returns to Discuss What's Next for the Google Settlement

Recorded on September 23, 2009

In this session renowned attorney and copyright expert Lois Wasoff returns to help sort out the diverse viewpoints circulating in anticipation of upcoming important events in this historic lawsuit. Lois puts into easy-to-understand terms, the complex issues facing Judge Dennis Chin as he approaches a resolution to this case.

Q: Welcome to everyone today. On behalf of all of us at Copyright Clearance Center, a very good morning, good afternoon, good evening, in fact, because several hundred of the people involved today in our presentation are with us from across North America and indeed across Europe, and we're very happy to have you all join us.

We are here again to discuss the latest news in the Google Book settlement and indeed we'll underscore the word latest, because as of late yesterday afternoon, we received breaking news that the parties involved in the suit have filed a memorandum of support for the unopposed motion to adjourn the October 7 fairness hearing and to schedule a status hearing with the court. Now, that's a mouthful, but you'll be hearing more about it later on from our presenter.

The program today will focus on this late breaking news and the changes we could anticipate in the settlement proposal for this important case. We've got a lot to cover in the next hour and so I want to start by asking you to join me in welcoming Lois Wasoff as she returns to Copyright Clearance Center to help us sort out the extraordinary evolution of this proposed settlement and welcome again, Lois. Nice to see you.

A: Nice to see you, Chris.

Q: We'll tell everybody just briefly about Lois and her background as an attorney in copyright and trademark law. She has been past chair of the copyright committee at AAP, the American Association of Publishers. She was for many years the vice president and corporate council at Houghton Mifflin. She has served as part of study groups that look at a variety of issues related to copyright law and libraries. She's a frequent speaker in this country and abroad on issues related to the copyright practice in the book publishing industry.

Her current clients include nonprofit and commercial publishers and authors who have all got questions about copyright and publishing. And these days, who doesn't have questions about copyright with something like this ahead of us?

So, Lois, let's get right away into the meat of the matter and set for us and the rest of the audience the progression of events that brought us together today.

- A: Thank you, Chris. The slide that's up now has been, as you can imagine, evolving over the last couple of days. We've had some interesting recent developments. But I'm going to start by taking us back a little bit.

This whole process began in 2004, which was when Google began its massive library digitization project scanning entire books within the largest academic libraries in the United States. Google's stated intent at that time was to include the scans in a database that would be used for search and with respect to the copyrighted works, to make snippets available in search results.

Google justified its library scanning as a fair use. However, there was a certain amount of controversy about that interpretation of fair use and many authors and publishers disagreed with Google's fair use interpretation, so in 2005, lawsuits were filed against Google by the Authors Guild and by a group of publishers with the support of the AAP. Both of the lawsuits accused Google of copyright infringement.

In October of 2008, it was announced that the parties had agreed to a settlement of both lawsuits. The settlement that was proposed by the parties adopted the class action mechanism that had been used by the Authors Guild in its lawsuit and bore very little resemblance to the initial complaints and to the original issue that had triggered the settlements, which was Google's scanning and display of snippets as a claimed fair use.

Instead, the settlement became a complex business arrangement that is potentially binding upon literally millions of copyright holders – rights holders – and their works.

And now, as of yesterday, we know that that proposed settlement is going to change. The event that occurred just yesterday afternoon was that the proponents of the settlement filed a motion asking the

judge to postpone the hearing that had originally been scheduled for October 7 – to adjourn that hearing, actually, without date and to instead set a date for a status hearing in early November. And the reason for that requested adjournment was that the parties are working on a revised settlement agreement.

What we're going to talk about today is how we got to this point and we're going to try and draw some information from the events of the last couple of months about what the revised settlement agreement might look like. And actually, one of our major guideposts in that is going to be this statement of interest that was filed by the U.S. Government with respect to the original settlement agreement. That statement of interest was filed on September 18.

Now, because of their broad reach, class action settlements require both a notification to class members to give the class members an opportunity to opt out or object and court approval. So what we'll be discussing today was the process by which the court was going to be considering the terms of this settlement.

Q: Right, Lois, and obviously, given all the media attention to the proposed settlement, it's very clear that thousands of voices have expressed their opinions on all sides of this settlement. Here at Copyright Clearance Center where we represent literally thousands of authors and publishers, we've heard all of that. But we're delighted to have you to help us sort through it, to understand better what the various parties are trying to say in all of this.

So why don't we get started and take a look at some of the issues that are – or some of the matters that are before the court right now.

A: Well, in the course of considering whether or not to approve the settlement, the judge has the opportunity to consider the views of many interested parties. The slide we have up now breaks out the kinds of – by category, the kinds of materials that were submitted to the court, the categories of filings that were submitted to the court.

To go through them just very briefly, those included amicus briefs. Amicus briefs are statements submitted by individuals or organizations that are not parties to the suit but that have views they'd like the court to consider. There were about 15 amicus briefs filed in this matter.

Objections were submitted to the court. Objections are filings made by members of the class, the putative class, that have not opted out,

and these filings run the gamut. There were many of them and they run the gamut from filings by individual authors, by author groups and in some cases, by large corporate entities. Some of these filings specifically discussed narrow issues confronting the particular objector, but many spoke to some of the very broad issues in play that we'll be discussing. As one example, Microsoft filed a very lengthy objection to the settlement, citing many of the issues in the settlement agreement.

Another set of submissions were motions to intervene, and we can dismiss these pretty quickly because the court did. A motion to intervene is a request by a third party to become a party to the action. There were several filed. The judge should not grant any of them, but he did invite those groups that had tried to intervene to submit their views in the form of amicus briefs. So, for example, the Internet Archive's concerns were first raised in the context of a motion to intervene. They're now before the court as part of an amicus brief.

Now, there are some other matters that the court's going to be thinking about. One is the Congressional testimony that occurred on September 10, which isn't technically part of the court record. On September 10, the House Judiciary Committee had a hearing on these issues and of particular interest were the views of the register of copyrights who spoke at some length at the hearing and her views should certainly be given particular weight.

And next but not least is what I think we can properly characterize as the game changer here. That was the statement of interest filed by the U.S. Government at the request of the judge. We're going to go into detail on that a bit later.

The final item that is before the court now is that motion that was made just yesterday by the proponents by the settlement – made actually by the Authors Guild and the AAP, but unopposed by Google – to seek an adjournment to give the parties time to negotiate a revised agreement.

Q: Well, you clearly made it pretty clear that there are, as I say, thousands of voices involved here, the loudest, the last, if you will, being the government's voice expressed just last week.

What are the concerns that people have raised? Kind of sort those out for us.

A: Well, just to give you a quick overview, Chris, they fall into several categories, the five major categories that we have up on this slide. There were antitrust concerns, issues related to the class action rules, Rule 23 of the Federal Rules of Civil Procedure and whether those have been complied with in this circumstance. Issues about copyright law and policy have been raised, issues about how the settlement will be funded and issues about public policy.

Q: Let's get started and move straight into the first and perhaps the most important concern. That's the antitrust issues.

A: Well, the debate over the antitrust issues has been quite heated. The proponents feel that the aspects of the agreement are in fact pro-competitive, that the agreement will help create a robust market for digital books. The opponents say that there is already such a market and that the broad authorizations granted to Google, combined with its already great size and its great reach, will allow it to dominate the market and ultimately foreclose competition.

There's also been a dispute about whether the agreement is in fact exclusive or nonexclusive. The proponents say that the agreement is nonexclusive because the Book Rights Registry, which we'll be discussing in more detail in a few minutes, can deal with parties other than Google when it acts on behalf of the rights holders. And Google also has pointed out that another entity could undertake its own comparable scanning activity.

The response from the other side has been that the Book Rights Registry is in fact limited in its dealings with third parties because it can only give third parties the rights to the works of registered rights holders. By definition, then, only Google will have a right under this settlement to use orphan works without a fear of liability. So with respect to orphan works, Google has an exclusive.

Q: Orphan works is a term of art that we're familiar with here at Copyright Clearance Center, but perhaps not everybody on the call may be. Can you explain briefly just what you mean by orphan works?

A: Sure. Orphan works are works that are still protected by copyright but for which the owners cannot be located. And because of the mechanism used by this settlement, the proposed settlement agreement, which requires an affirmative opt out in order to avoid the reach of the settlement, orphan works are covered by the settlement.

Now, to return to our slide, there have been disputes. There's been great discussion about whether the agreement is going to result in monopolization by Google of certain critical markets such as for example the markets for Internet searching or for products like institutional subscriptions.

Some have pointed out, in support of the argument that there isn't a monopoly potentially created, that competitors could enter this market just as Google has. Others, for example, Yahoo in its filing, have claimed that the settlement creates barriers to entry for future competitors in the scanning, archiving, searching and in presentation of books and inserts online.

And there's also been an argument advanced that the accessibility of this massive database that Google's created through its library scanning project will have impacts on the search market. There are several companies that claim that Google already arguably has monopoly power in that market and they're concerned about the impact of the settlement.

And then finally, pricing, another sensitive area in antitrust law, has been an area of great controversy. The proponents – the supporters of the settlement – have pointed out that the settlement provides that individual rights holders can set prices for uses of their works, like consumer purchases, for example, if they choose to. But nevertheless, concerns have been expressed that the terms of the settlement could encourage horizontal price fixing that violates antitrust laws.

Library associations, in general, have been very supportive of the settlement, but even there, because the settlement in their view creates unprecedented online access to books, but even some of the library associations have expressed concern about potential pricing abuses, particularly in the pricing of institutional subscriptions.

And then adding to the antitrust concerns are the provisions of the most favored nations clause in the settlement agreement. That's been quite controversial. For example, in the Yahoo brief, it was argued that the most favored nations clause guarantees that no competitor can effectively compete with Google for the first 10 years of the proposed settlement because of the restrictions placed on the terms that the Book Rights Registry can offer to a potential competitor.

Q: As I'm listening to you, Lois, I'm struck by just how this proposed settlement brings together the old world and the new world. You hear library associations in almost the same breath as Yahoo, and that's really I think at the bottom of all of this. It's the old world and the new world coming together and trying to solve some very pressing issues for the publishing industry.

Talk about now, if you would, the composition and the authority of the Book Rights Registry, which has been the subject of a lot of discussion.

A: Remember, the Book Rights Registry in the originally proposed settlement was envisioned as the intermediary between Google and the rights holders. It was going to be managed by a board that was to be comprised of an equal number of authors and publishers. And as originally conceived, it was going to have very broad powers, including the right to authorize Google to engage in future uses of the works and to agree with Google about the payment for those uses.

There have been some that have objected very strongly to this. In its filing, Amazon, for example, said that the Registry creates a cartel of authors and publishers.

Many of the objectors also have said that they feel they lack adequate representation on the Registry's board of directors, even though the Registry is the entity charged in the originally proposed settlement with negotiating prices and new programs with Google.

This is an area where the non-U.S. rights holders have been particularly vocal. Individual foreign publishers, individual authors and foreign authors, agencies representing those authors, reproductive rights organizations like V.G. Wort in Germany, organizations running the gamut from outside the United States have objected to the settlement on that basis. In fact, two countries, France and Germany, filed objections on behalf of their government on those grounds.

Another group that has expressed concerns are academic authors and also open access proponents. They are concerned that the Book Rights Registry, charged with the responsibility of setting prices and deriving financial benefit from the rights granted to Google, may not sufficiently consider questions involving broad and inexpensive access.

And finally, the interests of orphan works owners, according to some of the commentators, may be in direct conflict with those of the known rights holders who would be making up the Book Rights Registry directorship.

Based on all of these comments and some of the things we'll talk about in a few minutes when we get into the Department of Justice brief, I think we can pretty safely anticipate that the composition of the Registry's board of directors will be changed in any revised agreement that is proposed by the proponents.

Q: OK. And because the settlement is being resolved or attempting to be resolved through class action, that raises its own set of concerns. There are notification requirements and other legal requirements that must be followed. Talk about those.

A: Sure, I'd be happy to.

One of the more controversial areas here is that the original settlement as proposed authorizes future activity, and one of the arguments being made is that the future activities being authorized are activities that would clearly be infringing under current copyright law absent permission from the rights holders.

You can look at Google's past scanning activities and argue whether they were fair use or not, but the future activity, which includes the sale and access of entire works online, would pretty clearly be infringing without permission.

So one question that comes up is, can the class action mechanism be used to address and release future activity that hasn't even started yet? This is a point that was made by a number of the opponents. Microsoft, for example, stated that this would be an inappropriate use of the class action mechanism. So that piece of the settlement has been extremely controversial.

And it is true that typically, class action settlements involve a group that has a common set of grievances and damages, and typically a settlement addresses those grievances retrospectively. The class action settlement provides a release of legal claims arising from past damages and compensation for the activities that occurred in the past.

Both the plaintiffs and the objectors agree that this settlement is far broader in scope than a typical class action settlement, and they

both agree that plaintiffs and Google, if this settlement is approved, would be accomplishing certain goals that would not have been accomplished if the original complaint, with its specific claims of copyright infringement and its underlying issues involving fair use, if that original complaint had been litigated to conclusion.

The class action issues were really discussed in detail by an objector named Scott Gant, who's a class action specialist. He filed his brief relatively early in the process. He filed it in mid-August, well ahead of the deadline. And he does a very good job in summarizing the kinds of issues that come up with this use of a class action mechanism.

He asserts that this is predominantly a commercial transaction and that the result of it is to transfer intellectual property rights from the current owners to Google. His argument is that those rights and terms can't be imposed through the class action mechanism. He discusses the notice requirements in Federal Rule of Civil Procedure 23, the applicable law here, and says that they have not been met. He argues that the compensation provided is not adequate. And he argues that the class cannot be certified as it's currently comprised, and importantly, as it's currently represented.

Q: We've been talking about the class and the previous slide showed us how many people have raised concerns, some of the various potential parties here. What makes this proposed settlement as inclusive as it tries to be? Why are we talking about so many thousands – possibly millions – of rights holders?

A: Well, it comes from Google's original activities. Let's look at that for a minute.

The universe of works covered by this settlement have one thing in common, and that is that they were – or at least one thing in common – and that is that they were on the shelves of the academic libraries that participated as part of the library scanning project.

Since that's the common thread, the creators of these works comprise a very varied group. For example, they're not necessarily U.S. residents or citizens, even though their works were in the collection of U.S. libraries. The commonality of these works really comes from where the work was located, not where the author was located. That, as I mentioned before, has been a major issue for the foreign rights holders who find themselves swept into the scope of this settlement.

There's also questions about the definitions of books versus inserts that have been employed by the settlement, and that's raised concerns on the part of both authors and certain publishers. Many of those objectors consider their works to be unique and as a result, feel that the classification of all of their works in a single category isn't fair. The settlement has a potential significant impact on the viability of their markets and on their bottom line.

What's been very controversial, too, is the determination of whether a work is in print or out of print and what the ramifications are for the rights holder, and this has come up a lot in the objections. These terms, when coupled with the defined terms in the agreement of whether a work is commercially available or not commercially available, do have an effect on what Google can do with the work under the settlement agreement as it was originally proposed.

And these classifications all beg the question. Should Google alone have the sole right to make these determinations and classifications? And if you disagree with the Google determination as an author or other rights holder, what recourse do you have?

Our chart in this slide makes it look as though the lines are quite clear, but in fact, they're blurred and there's a lot of interpretation that's involved in determining where a work goes in that continuum.

The original settlement as proposed used an opt-out mechanism. If you didn't want to be part of the settlement but you were putatively part of the class, if you didn't affirmatively opt out, you're bound. We discussed that at length in the past.

It also imposed certain default rules based on whether a work was deemed to be in print or out of print. Google can only make certain uses of in-print works if the rights holder opts in. The reverse applies to out-of-print works. This portion of the settlement was the focus of a lot of the commentators. Most importantly, it was an important part, this opt-in, opt-out mechanism, was a very important part of the DOJ comments.

Q: That helps shed some light on some of the confusion -- indeed, some of the tension -- in determining what kinds of works are involved and ought to be involved. But as we've learned in the last few weeks and months, there are even tensions and confusion within the sub-classes here. Can you talk about those please?

A: Let's start with the authors. The settlement, as it was originally submitted, contemplates a single-author sub-class. The full classes of rights holders and then there's an author sub-class and a publisher sub-class.

There have been a lot of concerns expressed over the scope and the diversity of the author class and whether or not this particular set of representatives, the particular – the Authors Guild and the named individuals acting as class representatives – whether they could adequately represent the full author sub-class.

In his brief, Scott Gant, who I mentioned earlier, argues that the author sub-class is, at its most basic level, at least four separate classes, each with distinct interests and potential goals for this litigation. But actually, it's even more complicated than that.

When we take a closer look at what the individual filers said, we discover even more disparate interest groups – foreign authors, dissertation authors, comic book authors, nonfiction writers, academic authors. The point here is that they all have different interests and the reason this is important is that the judge has to make a determination that all of these disparate interests are being adequately represented by the named plaintiffs. Given the diversity here, given the complexity here, that could be a tall order.

And finally, there are also authors and other rights holders that felt completely left out of the settlement and some of them have filed statements with the court, the visual arts rights holders, for example, and also authors that have opted out of the settlement.

So I think one of the things we can look for going forward as we see what comes out of these negotiations we now know are going on is perhaps some changes in the class composition on the author side and maybe some changes in the representation on that side as well.

Q: I think that slide is very illustrative of the problem on the author side, the author sub-class side, and as director of author relations here at CCC, I can really understand why these various groups would want to raise questions.

Do we have similar concerns on the publisher sub-class?

A: There are certainly concerns on the publisher's side as well. The question has been raised by a number of commenters on the original

settlement agreement, the propriety of having all publishers represented by the five named publishers in the pending action.

The point's been made by some that all of the named publishers are participants in the Google Partner Program, the contractual arrangement between Google and individual publishers that gives Google contractual permission to use works in some of the ways that Google is seeking to use them under the settlement agreement.

Those individual named plaintiff publishers may or may not be intending to keep all of their works within the terms of the settlement. The settlement does provide for works to be removed and for rights holders to opt their works out of particular uses.

Microsoft and Yahoo, for example, have implied that these plaintiff publishers may have goals that are very different from other publishers. There may be other publishers who, for various reasons, may not have either the economic leverage or the economic resources to negotiate separate deals with Google. Yahoo in particular speculated that the terms of these separate deals, which are not public, may in fact be more favorable to the publishers than the terms of the settlement.

So the question arises, if these plaintiffs are not going to be subject to the terms of the agreement, how can they adequately represent the interests of the orphan work holders, orphan works right holders, or of other publishers.

And then there's the very significant question, which we've referred to before and we will again, of the foreign rights holders. Their works have been swept in because they're part of these academic library collections.

There is an argument being advanced that the terms of the settlement as originally proposed imposes the kinds of formalities on the exercise of one's rights as a copyright holder that are prohibited by U.S. treaty obligations and that the U.S. may therefore be put in the position of being in violation of those treaty obligations. We saw that argument made in the objections mounted by both France and Germany.

Q: I think that last point about treaty obligations gets to the heart of the matter. At the core of all of this, of course, is copyright law and public policy. We wouldn't be in court otherwise. So let's address at

the moment those issues, the matters of copyright law and policy and the questions about them that the settlement has raised.

- A: This has been a fascinating subject for debate and the commentary and discussion here really has been interesting to follow.

Many of the objectors have stated time and time again that in their view, the U.S. Constitution grants Congress and Congress alone the right to create copyright law and policy. Therefore, according to these particular objectors, this settlement, the matters covered by this settlement, are not the province of the judiciary, they're the province of Congress.

Mary Beth Peters, in her testimony before the House judiciary committee on September 10, stated this very clearly. I'm going to – she said, and I think I'm quoting exactly, that the settlement turns copyright law on its head. She talked about how it swept up the active and the expressed Congressional interest in orphan works legislation and swept it out of the way by eliminating the requirements in the pending orphan works bill that's been before Congress for some time now.

In that bill, there were provisions for the requirement of a diligent search. There were attribution requirements, there were reasonable compensation requirements. Her concern is that this settlement departs from those policy issues that were actually being actively considered by the Congress, and to some degree, supersedes them.

Mary Beth Peters also said that the settlement as originally drafted encroached on the responsibility for copyright policy that has traditionally been the domain of Congress. She acknowledged that there are potential public policy benefits from creating increased access to a broad range of copyrighted works, but she went on to say that that argument does not justify Google being given immediate, unfettered and risk-free access to the copyrighted works of other people.

She, in her testimony, characterized this agreement as it was proposed at that time, as a compulsory license imposed by the judiciary rather than Congress.

Another commenter who's discussed this at great length is James Grimmelmann, who is a professor at New York Law School. His brief was filed on behalf of the Institute for Information Law and

Policy at New York Law School. Professor Grimmelmann has been a thoughtful, focused voice on the settlement from the very beginning.

He concedes in his filings that the unavailability of orphan works, because of the difficulty in getting permission for their use, harms the goals of the Copyright Act and the Constitution. But he also goes on to state that the settlement agreement both serves and threatens the public interest in the mechanism it's chosen to make these works more available. He stated quite clearly that in his view, the settlement inappropriately attempts to solve a legislative problem through a class action settlement.

So, this raises some interesting questions. Will all the increased focus on the orphan works issue and this one proposed solution through a private agreement endorsed by a federal court, will that compel Congress to look more closely at orphan works? Is it possible it would act as an incentive to Congress to actually pass orphan works legislation? We don't know yet.

Q: Right. It's a good question and certainly a lot of what we're hearing here is on the one hand and on the other hand, serves, threatens and so forth, and it's obvious that Judge Denny Chin has a lot on his plate here, but this is a man accustomed to tough decisions. He sentenced Bernie Madoff just a few months ago.

Right now, we're going to look at the funding issues and some of the concerns there.

A: There have been concerns expressed about how the agreement's going to be funded. The objectors are claiming that the settlement is vastly underfunded, that the funds set aside for payments to rights holders and authors are insufficient and that they'll quickly run out.

Others have taken issue with the amount of the attorneys' fees and they've requested specific discovery and a full accounting to test those fees for reasonableness. There have also been concerns expressed about the adequacy of the funding for the Book Rights Registry, which will be supporting itself after its initial funding is exhausted by deducting monies from revenues that would otherwise be paid to rights holders.

And finally, it's very interesting that there have been five state attorneys general who have filed objections to the settlement. Connecticut, I believe, was the first but there are – actually, I'm

sorry. There are six. Connecticut was the first and there were five others.

In their filings, they claim that the settlement terms as drafted would result in a misappropriation of unclaimed funds and violate state law, particularly with respect to the way revenues from orphan works are treated. If those objections ultimately require a change in the way the book rights revenues are treated, that may exacerbate concerns about the funding for the Book Rights Registry. So we may see some changes there as well.

Q: Last on the issue of concerns, the public policy issues. What can you tell us about those?

A: Well, this has been a key aspect of the discussion. We've seen concerns expressed about privacy issues, about the necessity in the views of the objectors to safeguard and secure personal data about the users of this large database and about preserving the right for individuals to read anonymously. So those arguments have been advanced quite forcefully.

The library associations have been quick to point out that the class representatives insisted on measures to protect the security of the digital copies, but that the agreement is essentially silent on the protection of user privacy.

The library associations have also been somewhat concerned, though again, they have generally been supportive of the agreement. They've also expressed some concerns that the concentration of power in the Registry and Google could give those entities the ability to manage the content of the database and eliminate certain materials, and that could threaten the library's core values of access, equity, privacy and intellectual freedom.

And finally, one of the most important policy discussions has been around the potential advantages of the settlement for the print-disabled community. In a number of submissions, representatives of this community have argued forcefully that approval of the settlement would provide exponentially increased access for those individuals to the knowledge of the world. And this argument very clearly resonated with the authors of the DOJ brief because the DOJ brief mentioned that particular public policy implication in several places.

Q: DOJ – Department of Justice. You’ve just brought them up. But let’s conclude then with the executive summary that the U.S. Government’s statement of interest provided. And talk us through the points raised there.

A: As we’ve been conducting our conversation, Chris, we’ve been referring to this as the DOJ brief and it’s clear that the DOJ – the Department of Justice antitrust division – has been a leader on this. But the statement that was filed with the court is explicitly submitted on behalf of the U.S. Government by both the Department of Justice and the U.S. Attorney for the Southern District, and the discussion in the brief goes beyond antitrust considerations.

So the submission of this statement of interest and the content is a very significant event, and I think we can pretty safely say that it led directly to the motion that’s now pending before the court to adjourn the fairness hearing.

The brief acknowledges at the beginning that the only options, the only procedural options available to the judge right now are to either accept or reject the current form of the settlement agreement. Given those two options, the brief urges the judge to reject the agreement.

However, the brief also suggests that the judge provide guidance to the parties about how the settlement agreement might be modified and then goes on to itself provide some of those suggestions. So the clear implication is that the DOJ believes that some revised form of the settlement agreement might pass muster and might be appropriate for approval.

The brief also – and this is particularly interesting – at several points mentions the ongoing negotiations for modification of the agreement and it even describes some of the changes that are under discussion. And this is very significant.

There have been news and anecdotal reports about negotiations over changes to the agreement, but in this brief, we have both a confirmation of the fact of those negotiations and we’re being given a window into the content of those discussions.

Q: Right. Well, there are major concerns and very prominent suggestions for improvement the government has made. Can you go through those, please?

A: I will. First, the government focused very much on the forward-looking aspects of the agreement, and we've discussed this, the future uses that are enabled by the agreement. And the brief really tells a cautionary tale to the proponents.

It talks about how courts in the past have been reluctant to approve class action settlements that regulate or authorize future conduct. The brief also points out that these future-looking sections have the potential to exacerbate conflicts between class members.

The brief doesn't go on to suggest a specific fix, but there's a very clear indication that the current structure, which permits the licensing of entirely new uses and business models without re-notification – there's a very clear indication that the DOJ doesn't think that's going to work.

And what's really interesting too is the brief says – and I'm going to quote it. The parties appear willing to address this problem by limiting the future rights that may be controlled by the Registry and Google. So that's a really important little glimpse into what the parties have been discussing and it may give us some sense of the nature of the changes we'll see in a revised settlement agreement if one is ultimately submitted to the court.

The next point that the brief makes in some detail is the brief discusses the adequacy of class representation, and again, we've gone over this in some detail. But the brief really does spend some time talking about the difference in interest between the known rights holders who under the current structure would potentially benefit financially if other rights holders remain unknown and do not come forward.

And the brief points out, as we have, that the known rights holders are in a position to protect themselves from what the brief calls future uncertainties by, for example, opting out of certain uses, by removing their works. The brief describes these as structural issues and has made some suggestions about ways in which those conflicts could be minimized between the various components of the class.

The brief does talk about class notification. We touched on that, too. But here, what the Department of Justice really does is put the ball back in the court's court and says to the judge quite clearly, we don't think there's enough of a record here for us to make a judgment as to whether or not class notification has been adequate, and the Department of Justice specifically asks the court to

undertake what it calls a search and inquiry into the scope of the notice and encourages the court not to hesitate to order more efforts to be undertaken.

Finally – and this is the shoe we’ve been waiting to see drop – the latter portion of the brief goes into some detail about the antitrust aspects of the settlement. The brief in this portion begins by noting – by confirming – that there is an ongoing Department of Justice investigation. It makes very clear that that investigation is continuing.

But not content to leave it at that, the brief goes on to say that the DOJ’s views, on the basis of its investigation so far, are sufficiently well developed so that they can be articulated, at least preliminarily. And they go on to articulate those views to help the court and also to help the parties with their negotiations.

And the views that they articulate are striking. While leaving some room for further modification and refinement, this portion of the brief says that the pricing mechanisms in the current agreement are a horizontal agreement between authors and publishers as to the terms of sale and then goes on to say that that horizontal agreement could be a pro se violation of the Sherman Act, meaning that the violation would appear to violate the Sherman Act on its face. It’s a strong statement.

The brief is also no less critical of the other major area that has been the subject of a lot of discussion, and that is the position in which Google would have been placed if the current agreement were to be approved. The brief points out that the agreement as it was originally proposed does in fact give Google de facto exclusivity on the use of orphan works, since, as we’ve discussed, the Book Rights Registry will have the ability to grant licenses to Google’s competitors only where it has authorization from a known rights holder.

According to the Department of Justice brief, this creates a risk of market foreclosure, particularly for markets where only an equally comprehensive database could compete, like, for example, the library market.

The brief suggests that these concerns could be ameliorated if the revised brief somehow provided comparable access to the orphan works for Google’s competitors, but also acknowledges that that might not be possible. It might not be possible to do that and still

craft a settlement that complies with Rule 23. So it lays out a path, but it certainly doesn't lead the proponents to a clear solution.

Q: We've got about 10 minutes left in our hour program, Lois, and I would like to just take a moment to look ahead. We're at September 23. What's next?

A: Well, that's one of the things that changed yesterday. The judge has taken all of these submissions. It had ordered the proponents – he had ordered the proponents in writing to reply in writing by October 2 to the objections, to the various submissions, all in anticipation of the fairness hearing that was going to take place on October 7.

But the proponents beat their October 2 deadline, and yesterday afternoon, they filed the motion that we've been discussing, asking the judge to adjourn the hearing. In that motion, the parties confirmed what we know from the government's brief, which is that negotiations are going on now to revise the settlement agreement.

They told the judge that they're working with the Department of Justice and that they are no longer going to seek approval of the original settlement, and on that basis, they asked the judge for a status hearing to be scheduled for November 6.

This latest event leaves a lot of questions unanswered. The proponents did not make any predictions about when a new settlement would be submitted. They also wouldn't say whether the new version would require re-notification of the class, which would obviously take some time.

So what we know now is that we'll know more on November 6. We can make some assumptions about what the resubmitted agreement may look like, but we can't be certain.

And then another potential complexity is that Judge Chin – the judge who took the case over from Judge Sprizzo back in December of 2008 – he is likely to be nominated to the Second Circuit Court of Appeals. So whether or not that's going to result in another change in judge, which could potentially create some additional delays, we don't know yet.

Q: There's a lot we don't know, but we do know that you've done a terrific job, Lois, of sorting and sifting through a tremendous amount of information and I really appreciate that. We'll give you a chance to take your breath here with some time left. We've been

talking with Lois Wasoff about the latest news in the Google Book settlement case. We've had several hundred – in fact more than 350 participants on this call and I'm sure they appreciate the great work you've done, Lois.

They've also had a lot of questions for you and we're going to try to get to a couple of them right now. We'll see if we can give you a chance to show again your tremendous depth of understanding of the settlement here. There are some questions that are speculative, but you answer them the best as you can.

This one asks us, how substantial does the agreement need to be modified before opt-inners and opt-outers – I like that – are given another chance to review and decide whether to opt in or opt out? Is there a timeframe for that? Do we have any sense of whether we're going to get to go back for a second bite of the apple?

A: That's the whole question of whether or not there needs to be a re-notification and it's very hard to predict at this point what will happen. We can look at the objections. We can look particularly at the Department of Justice brief.

The Department of Justice brief, making specific suggestions for changes, is really instructive. The kinds of suggestions for changes that were outlined in the Department of Justice brief would really change some core assumptions in the structure of the agreement.

So, for example, if we look at questions involving breaking up the class into different sub-classes or bringing in representation for some other members of the class to participate in the negotiations, those kinds of changes would probably require a re-notification.

If all that happens is that the future uses piece is dropped out and Google has significantly less rights to make future uses, maybe there's an argument to be made that re-notification wouldn't be necessary.

But it's a good question, it's a fair question, it's a hard question to answer because we don't know yet how extreme the changes will be or would be in a re-submitted settlement agreement.

Q: One more question, then. With all the objections to the current agreements, how likely is it the judge is going to reject it in whole and give guidance on what would be acceptable in a modified agreement? I guess that gets to the point, which is that we've had a

lot of voices here, a lot of votes for or against the settlement, but this is not up for a vote.

A: No.

Q: Because there's only one judge and he gets to decide.

A: Yeah, the majority doesn't rule. The judge does. But the judge really has made an effort to get a diversity of opinion before him. Let's remember that the reason we have the benefit of the government's thinking on this is that Judge Chin back in July told the government, I want to know what you're thinking. I know there's an investigation going on. I want some guidance about where you're going with this. Submit your statement on September 18.

So, the judge has been reaching out to get a broad range of input on this. But procedurally, the judge does not have a red pen. He can't make changes himself. If he does what the questioner is suggesting he do, he will be doing exactly what the Department of Justice asked him to do. The Department of Justice said, reject it, but reject it with some information, some guidance, some support. Give the proponents some idea what they would need to do to let them come back to you with an agreement that you did feel you could approve. And we can't – we're speculating here, but that does seem a logical next step.

By asking the judge to adjourn the fairness hearing and by asking him to schedule a status hearing – not another fairness hearing because there's no agreement right now for him to be ruling on the fairness of – by asking the judge to schedule a status hearing, the proponents of the agreement are giving him more time to make that decision.

So we'll know a lot more when that status hearing takes place, if the judge grants the pending motion, and we'll have a better sense of what the judge's thinking is then.

Q: Right. Well, this is Chris Kenneally, director of author relations at Copyright Clearance Center. I've been speaking today in the sixth of our series on the Google Book settlement with Lois Wasoff. I really want to thank her very much indeed.

I want to thank all the participants in the call, to the entire team here at CCC who has put together this remarkable presentation. I

have to say again, I can't emphasize enough, if you haven't seen the materials, we're talking about hundreds of pages that have been sorted through very carefully by everybody here. Thank you all for this.

Before you sign off today, if you're on the call right now with us, you have the chat box in the lower right hand corner of your screen. We invite you to submit questions. We plan on continuing this series at Copyright Clearance Center once we've heard more from the court or if other interesting developments occur.

Obviously, at Copyright Clearance Center, where we work with hundreds of publishers and authors – thousands, I should say – and have done for so many years, what's happening with the Google settlement is something that we will be following very closely. And we are also very proud to have brought onto the call here a global network of people, so we're not just concerned, as the settlement is with U.S. rights holders, but with rights holders around the world. And that's just one of the reasons why CCC is presenting this as a public service.

Thank you all again very much indeed. We have up on the screen – and this is I think very helpful indeed – where you can go for some of the court documents we've been discussing, various links directly to them, to a webcast for the Congressional hearing.

Other sources that are worth checking out of course. The Google Book settlement site itself, googlebooksettlement.com, the AAP's own site, publishers.org and the Authors Guild site, authorsguild.org.

Of course all of this and more at our own site, copyright.com, where you'll be able to re-listen again to the presentation that you've heard today and more. We go back, in fact, all the way to Google No. 1. This has been Google No. 6, as we call it here.

Again, thank you all very much indeed for joining us. On behalf of everyone at Copyright Clearance Center, Chris Kenneally wishing you a very good day.

**Google Book Settlement Amended:
Copyright Law Expert Lois Wasoff Highlights the Changes**

Recorded on November 18, 2009

Q: Welcome, everyone. My name is Chris Kenneally, and on behalf of Copyright Clearance Center I want to welcome you to a very special program looking at the latest developments in the Google Book Search Copyright Class Action.

On Friday, November 13, the parties in this historic case, The Authors Guild, the Association of American Publishers and Google itself filed a revised settlement proposal responding to concerns voiced by authors, publishers and the U.S. Department of Justice about their original proposal announced in October 2008.

For the benefit of our customers and rightsholders, Copyright Clearance Center welcomes back to our offices today intellectual, property and copyright law expert Lois Wasoff to speak with me about the most noteworthy changes in the revised settlement proposal.

Lois, welcome back. Good to see you.

A: Good to see you, too, Chris.

Q: It's good to have you back. We bring you back for all sorts of very good reasons and a lot to do with your extensive experience in copyright law and the publishing business. Tell people briefly that you were past chair of the copyright committee at AAP. For many years you were the vice president and corporate counsel at Houghton Mifflin. You've served on study groups that look at a variety of issues related to copyright law and libraries, and you're a frequent speaker in this country and abroad on issues related to the copyright practice in the book publishing industry.

And Lois, CCC began doing programs with you in April that have followed the twists and turns in the Google Book case. Over the spring and summer we conducted a pair of online seminars and several interviews with you and other key players. We're back again today because the parties have done something quite dramatic. They've amended their own proposal for a settlement, even before the judge has made any ruling on its merits.

So, for the sake of rightsholders in our audience with published works that are covered under the settlement, what are the major changes in dates and definition of terms that this new revised settlement makes?

- A: Well, Chris, there have been many very significant changes. But I think it's also important to keep in mind that the underlying structure of the agreement and many of the economic terms of the agreement have not changed. The agreement still provides for payments for past scanning, if claims are filed by a certain date. What's very significant for our listeners is that that date has been moved. The old deadline was January of 2010. The new date by which claims have to be filed in order to get payments for past scanning is March of 2011.

The agreement still authorizes future uses by Google, and it still establishes a Book Rights Registry that is intended to represent rightsholders in dealings with Google. So, if you think of the agreement as a tree, it hasn't been chopped down, it hasn't been replanted, the trunk's still there, but the branches have been pruned so that the shape of the tree has certainly changed in some very noticeable ways.

One of the key changes – one of the sort of gateway threshold changes that we need to talk about is that the amended settlement includes a new definition of Books and Inserts. Now that's very important, because as you remember, the class that is covered by the settlement, that is, the non-named parties that are going to be bound by the terms of the settlement if it is approved, is defined as Rightsholders of Books and Inserts. So if you change the definition, that underlying definition, you've changed the composition and the size of the class, and that is why the proponents have done.

Books and Inserts are now defined as U.S. works that were registered for copyright before January 5, 2009 and works published in the U.K., Canada and Australia as of that date. So the settlement class no longer includes rightsholders from other parts of the world. That is, obviously, a very significant reduction in the size of the class.

And as we've also discussed, Chris, one of the gateway definitions in the agreement, a key definition, is deciding when a book is commercially available. That's because if a book were not commercially available, under both the original and the amended settlement agreements, the default rule would be that Google could

make certain so-called display uses of the work. In the amended agreement, the initial determination of commercial availability is handled differently, as are the mechanisms through which a rightsholder can object to the classification of his, her or its work as not commercially available.

The effect of these changes is really to shift the burden in that area and to make it more difficult for Google to simply decide a work is not commercially available and start to use it for those display uses.

Q: Well, what seems important about that is something that started out as a global settlement is now slightly less than that, still very significant, of course.

What about the way money will change hands under the revised settlement?

A: Well, the basic pricing structure, the basic revenue sharing structure, hasn't changed. The split in the original agreement of 63% to the rightsholders and 30% to Google is the same in the amended agreement. There have, however, been extensive changes in how the prices charged to users will be calculated and in how much control the rightsholders will have over prices. The agreement now contemplates more individual price negotiation. It also provides that a rightsholder may choose to set a price of zero. Other changes related to economics are in the treatment of unclaimed funds, which are the revenues that are attributable to the uses under the agreement of works for which no rightsholder has come forward – the so called orphan works.

Under the old agreement, those revenues would've been kept by the Book Rights Registry if no claimant came forward. Under the amended agreement, those funds can be used after five years to search for rightsholders who have not yet come forward, and after 10 years they can be given to charity, but they don't go to the Book Rights Registry, which had been the original formulation.

And finally, another significant change in the agreement is that – as I said, it still contemplates future uses by Google and it still contemplates that the Book Rights Registry and Google may decide to add new revenue models, uses that aren't authorized to be made by Google as of the moment that the settlement agreement actually takes effect. And those uses, those new revenue models are still as they were in the original agreement – print on demand, file

download, which was called PDF download in the old agreement, and consumer subscriptions.

But there's been a really significant change here, as well. The language in the prior agreement made that list illustrative rather than exhaustive. In other words, there was language permitting the Book Rights Registry and Google to think of other new revenue models going forward and agree to those. That flexibility doesn't exist in this new version.

And registered rightsholders are given a more extensive opportunity to opt out of those specified new revenue models when and if they are added to the agreement by agreement between the Book Rights Registry and Google.

Q: Well again, some important limitations there in an agreement that many saw as very far reaching. And in September, when we did our last webinar, we highlighted the main objections from various parties, including authors, publishers and not least, the Department of Justice. How does the revised settlement respond to those objections that they made, and what kinds of amendments and changes have been made in the revised settlement that are most significant?

A: Well, it's very clear when you look at the settlement that the proponents carefully weighed the comments that were received. We also know that they engaged in direct negotiations with the Department of Justice. The Department of Justice brief, as you recall, contained extensive comments on the prior version of the settlement agreement, and I think it's clear that many of the changes made reflect an attempt on the part of the proponents to address those comments. The changes also address some of the many comments filed by others involved in the process.

When we talked about this before, we broke those objections up into certain categories. The antitrust concerns are the first category that we discuss, and the DOJ brief was certainly not the only place where those concerns were raised. Antitrust implications were extensively discussed by other commenters as well. The concerns raised by the Department of Justice and others related to, among other things, the pricing mechanisms in the agreement, the way, for example, the Book Rights Registry and Google would agree to prices was problematic for some commenters.

The “most-favored nations” clause in the agreement, which I’ll talk about in a minute, the role in composition of the Book Rights Registry was questioned by some of the commenters, and there was a lot of commentary on the potential impact on competition if Google were to be the only entity that could use the database and, in particular, the orphan or the unclaimed works, which are part of the database.

The amended agreement addresses each of these issues. The way that the algorithm for determining prices to users is going to be implemented has been changed. The rightsholders have been given more ability to negotiate individual prices and individual splits of revenues.

The “most-favored nations” clause, which could’ve had an impact on the Book Rights Registry’s ability to grant licenses to third parties, that clause has simply been deleted. It is not in this new version of the agreement.

The composition of the board, as you and I speculated back in September, has, in fact, changed. The Book Rights Registry board will now include representatives of U.K., Australian and Canadian publishers and authors.

And finally, following up on public statements that Google had made previously but which were not reflected in the actual language of the agreement, there is now language in the amended agreement that contemplates that Google will license the database to other resellers.

It’s not yet clear that these changes will go far enough to allay all the concerns expressed, but it’s clear that allaying those concerns was one of the proponents’ key goals.

Q: Right. And so far, at least, on the revised settlement, DOJ hasn’t spoken, so we’ll have to wait for that particular shoe to drop.

What about in class action rules and changes there?

A: Well, that was another area that occasioned a lot of comments. There were concerns expressed by the Department of Justice and by many others that the class definition was inappropriate and too broad, combined too many different entities that had conflicting interests. There was also a concern expressed that the original agreement went further in authorizing future activities instead of just providing a remedy for past actions than is appropriate for a

class action. And we've already discussed some of the changes that were made to address those concerns – eliminating many foreign works and rightsholders, limiting authorized future uses to those actually listed in the agreement, adding the new class representatives to the plaintiff groups – all of those changes were clearly intended to address those class action based concerns.

Q: There are changes, as well, regarding copyright law and policy.

A: That's right, though objections were expressed about this, and addressing this concern is pretty difficult, because even more than the other objections, this goes to the underlying concept of the agreement. The basis of this objection is that this settlement structure is essentially private, orphan works legislation for Google and uses a judicial tool to achieve a goal that should be achieved through legislation.

The revised agreement does make certain changes to the sections describing the Book Rights Registry and makes it clear, although in fairness, it was clear in the old agreement as well, that the Book Rights Registry can license unclaimed works to third parties to the extent permitted by law. Whether that is seen as sufficient to pave the way for orphan works legislation really remains to be seen.

But the issue that Google will have a preferential position with respect to the use of orphan works really comes out of the basic concept that the agreement uses an opt-out rather than an opt-in mechanism, and that really hasn't changed.

We also in September discussed funding concerns that had been raised by some of the objectors, and there has been a very significant change in the way that revenues derived from uses of unclaimed work will be treated. Those changes address issues that were raised by several state attorneys general who were concerned that those funds were going to the Book Rights Registry instead of to the states under relevant state laws. And this, also, was part of some of the class action issues, as well. A number of commenters noted that there was a potential conflict of interest presented, because the Book Rights Registry would benefit if the orphan works owners were not found.

The amended agreement provides for an independent fiduciary to be appointed who will represent the owners of the unclaimed works, and for the revenues attributable to those works to be used, as we've said, only to locate owners or eventually for charitable

purposes. So this addresses many of the issues that were raised. It also deprives the Book Rights Registry of potential revenue source, but it does, I think, answer some of the questions that were raised about how revenues from unclaimed works were going to be used and how orphan works owners were going to be protected under the agreement.

And then there was our final category of objections – that was the public policy objections, and we grouped under there a number of concerns that came from different constituencies, and the amended agreement really does address some of those issues. I'll give you a couple of examples. The amended agreement provides for a possible increase in the number of public access terminals in public libraries. It had been set at only one per building. It also provides for the use of Creative Commons licenses that may permit broader free uses for works distributed under those licenses.

In response to complaints from privacy advocates, and consistent with some of Google's public statements, the amended agreement also now includes some specific requirements that Google protect the personal information of users.

I mean, these are early days for the newly amended agreement. We'll see if these changes go far enough to satisfy those who had concerns before, but clearly that was the goal of the proponents.

Q: Well, there's a lot here to cover. You've done a good job of summarizing it fairly quickly.

Are the revisions that you've discussed so dramatic in scope that they've taken this settlement back to square one? And with regard to all the changes, can you help our audience understand what steps the proposed settlement is going to have to go through to get to approval? From a legal perspective, what are we anticipating in the way of reactions and rulings from Judge Chin, whose court it is that this is all being heard in, the Department of Justice, the states' Attorneys General and so forth? Give us a quick look at all of that, a timeline and who we could expect to hear from.

A: I'd be happy to. Procedurally, the parties really have taken a step back. They're asking the court now for preliminary approval of the settlement and of the class, which is something that they had gotten for the prior version a year ago. But they've coupled that request with a proposal for a fairly aggressive timeline moving forward. So, though procedurally they seemed to have moved backward, they

really are still trying to maintain the momentum and keep this agreement review and approval process moving.

If the court takes the plaintiffs' suggestions about a schedule for going forward, the supplemental notice, that was included in the papers filed with the court, will be sent out in a smaller version of the notice program. The notice program, instead of being the extensive world-wide program with publication in periodicals and all that we saw back in the beginning of this year, would instead be more targeted. The notice would be sent to those who've already registered, those who've opted out, those who more generally are rightsholders reaching out to them through trade associations, RRO's. And that period would begin – the sending of that notice, if the judge approves the notice – would start a 45-day period running. In that 45 days, class members would have the option of opting in, opting out, perhaps withdrawing an earlier opt-out decision and deciding to join instead, or file objections. So depending upon what the judge says, we could be looking at our listeners having some decisions to make in the relatively near term.

Q: And then decisions they thought they'd already made, they're going to have to review.

A: Well, they're going to have to think about those decisions in the light of all this new information.

What the plaintiffs are also doing to try and keep this moving is that they're asking the judge to set a date for the Full Fairness Hearing that is three weeks after the end of the new notice period and to set a deadline for the Department of Justice, whose comments we are all awaiting, to provide comments to the court about two weeks before the Full Fairness Hearing is held. So, the Fairness Hearing that we had originally expected to see in October, when we were still looking at the original settlement agreement, we'd be thinking about in the early part of 2010. And the agreement to be considered is obviously the new agreement. The target date, I think, is in early February; the date I've heard is February 10, 2010. But it's premature, because as you and I are sitting here together recording this interview, we don't know yet if the judge is going to accept this scheduling proposal. If he does, we can expect a Full Fairness Hearing to take place sometime early in 2010.

Q: Well, thanks very much for all of that, Lois, and obviously today we've just scratched the surface of this very important, extensive, and it's not an inappropriate term, in this case, historic agreement.

So, we've arranged to bring you back. We're going to do this again. We'll be back together on Thursday, December 10 for a one-hour, online webinar at which we will provide a more detailed analysis of all the settlement changes, calling out important deadlines for rightsholders, and discussing, as well, the reactions of the affected parties.

We hope everyone listening to us today will join us for that free program. And to register, please go to www.copyright.com, or send an email to education@copyright.com.

We've been chatting today with Lois Wasoff, our resident copyright law expert. And Lois, thank you very much, indeed, for coming back and helping us with the latest in this very important case. And we look forward to having you back on December 10.

A: Thank you, Chris.

Q: And thank you, everyone in the audience. We, as we say, hope you will join us for our special one-hour webinar, free, on December 10. To register, go to copyright.com.

And in the meantime, to all in the audience, a very happy Thanksgiving.

My name is Chris Kenneally. Thanks for listening.

Copyright Law Expert Lois Wasoff Reviews the Amended Settlement

Recorded on December 10, 2009

KENNEALLY: Welcome, everyone today to this very special program from the offices of Copyright Clearance Center. My name is Chris Kenneally. I am director of author relations for CCC and we are very pleased, as we have been throughout this year, to have an international audience of authors and publishers with us on the call today. Welcome, and indeed welcome back to many of you, for I know you've been following this along with us since the settlement was first announced almost a year ago.

This is the definition of a continuing story, something I appreciate as a journalist but which I also know keeps me focused on the developments as a rights holder. We began our series in April and we've updated it periodically since then and we look forward to continuing to do so as the story progresses.

We are here today to discuss the amended Google Book settlement, and one of the questions has been what to call it exactly. The differences between the original settlement and the now-amended version involve many aspects of the agreement, but some of the analysts have indicated that it's not quite sweeping enough to be called Settlement 2.0, but perhaps GBS 1.1.

The proponents themselves who filed the documents in the case use the terminology Amended Settlement Agreement, or ASA, as you'll see in our presentation. So as a result, we will adopt that terminology in the slides and our discussion here today.

Over the past months, we've conducted this series of seminars with Lois Wasoff and other key players and as always, all of these programs are available on copyright.com and Beyond the Book, if you're in need of any kind of historical progression on this.

With all of that then, we're happy to welcome back to the program Lois Wasoff, and Lois, it's great to see you again.

WASOFF: It's good to see you, Chris.

KENNEALLY: It's always good to have you here at CCC and for all the sorts of reasons that have to do with your extensive experience in copyright law and the publishing business. We'll just remind our audience again that you were a past chair of the copyright

committee at AAP and for many years, vice president and corporate counsel at Houghton Mifflin. You've served on study groups that look at a variety of issues related to copyright law and libraries and you've spoken around the country and around the world, in fact, on issues related to the copyright practice in the book publishing industry.

So with that, we have in Lois just the right person to help us understand the implications of the current changes to the Google Book settlement. So for the sake of rights holders in our audience, Lois, with published works that are covered here, let's take a look at how all of this has evolved. What is so different? What's important about the amended settlement agreement?

WASOFF: There are a number of points that we really want to touch on today because I think they'll be particularly useful to our listeners. First, the deadlines that rights holders will be considering have been revised, so we'll be discussing those. The scope of the works covered by the settlement agreement has been narrowed. The treatment of unclaimed works has been changed, and we're going to go into that in some detail. The agreement still creates a book rights registry but now includes more details about how rights holders will be represented within that registry.

Additionally, there are some different economic terms employed and the revenue models proposed for future uses have been limited in some ways. And then there have also been some changes in the agreement that were obviously intended to address some of the public policy issues that were raised by the comments on the prior version.

And finally, the timeline for the progression of the lawsuit through the courts has changed, so we'll be discussing that.

But I think it's very important to keep in mind as we discuss those specific changes that the underlying structure of the agreement hasn't changed. This is still a settlement agreement settling a class action. Many of the original economic terms and much of the structure of the original agreement really hasn't changed.

The amended settlement agreement as currently proposed still authorizes future uses of the works covered by the agreement by Google. It still establishes the Book Rights Registry that's intended to represent rights holders in their dealings with Google.

If you think of the agreement as a tree, it hasn't been chopped down. It hasn't been replanted. The trunk's still there but the branches have been pruned. The shape has changed in some very noticeable ways, but it's still the same tree.

In some ways, the amended settlement agreement reads like a direct response to the blueprint that was set out by the Department of Justice filing, which we'll be discussing. I'll delve into some of those significant changes in more detail and I'll also try to illustrate how the crafters of the amended settlement agreement may have been addressing some of the points that were made by other commentators on the original agreement.

KENNEALLY: That's a good start. Why don't we go first to the aspects that affect authors and publishers who are on the call with us today. First, that would be regarding the deadlines that have changed, Lois. Talk about those.

WASOFF: I'll be happy to. We got together in October, Chris, for a webinar and in that webinar, we talked about the September 22 filing of the unopposed motion, the motion made by the proponents of the agreement to adjourn the fairness hearing that was then scheduled for early October.

At that point, the parties told the judge that they were working with the Department of Justice and that they were no longer going to seek approval of the original settlement agreement. They asked the judge to set a status hearing for early November. In our prior webinar, we speculated the judge would grant that motion, and we were correct. The judge granted the motion and set a date for a revised settlement agreement to be submitted to the court.

That date on November 13, the revised settlement agreement was in fact submitted to the court. With this new version, many of the other deadlines moved and changed, so we'll look at those.

The revised settlement agreement needed time to be considered by the court and triggered a period of re-notification of members of the class, so there is now a new deadline set within which rights holders can decide to opt in, opt out or object. And that's a key deadline for our listeners to keep in mind. That deadline is January 28, 2010. That re-opened the window for rights holders to consider what they want to do in relation to this agreement.

It's also important to note that although objections can be filed prior to that date, the judge has made it clear that he doesn't want to accept new objections to the original settlement agreement. He wants any objections to comment only on the revisions to the agreement.

You'll recall, Chris, from our conversations before that one of the important events in the process of the consideration of the original settlement agreement was the filing by the Department of Justice of a statement of use, and that was a critical document and we'll be returning to that document and its importance from time to time.

The judge is obviously contemplating, as are the parties, that the Department of Justice will have interest in the amended settlement agreement, so the judge's order setting this new time schedule set February 4 as the date for the Department of Justice to submit comments on the amended agreement if they have any.

Following close on the heels of the closing of the comment period and the Department of Justice comments filing, if that happens, is the new fairness hearing, and that's now scheduled for February 18, 2010.

KENNEALLY: There's a lot to follow there. Are there other important dates that rights holders should be aware of looking ahead?

WASOFF: Yes, and one in particular I think is critical. Many of the people on this call will remember vividly that the cutoff date by which claims for works that were already scanned by Google had to be filed if the rights holder wanted to receive a payment in connection with that past scanning. That original cutoff date was January 5, 2010. Obviously, that date had to move, given all that has occurred.

The date set now, the cutoff for filing for those claims, is March 31, 2010. So rights holders have been given a breathing space to decide how and whether to claim their works.

KENNEALLY: The scope of the copyrighted works coverage has also changed dramatically. Let's talk about that. What has changed within the scope and why?

WASOFF: This is a very critical change, Chris, and one that we should talk about in some detail. Remember that in the course of its library scanning project, the project that triggered the original

lawsuit, Google had already scanned about 10 million books, books that were taken off the shelves of academic libraries and included in the Google scanning.

Now, the creators of those works were not necessarily U.S. residents or citizens. The common thread among those works was that they were in those libraries. And therefore, a lot of foreign rights holders were swept into the structure of the original settlement agreement, were part of the class defined in the original settlement agreement, and a number of those foreign rights holders and their representatives were quite vocally upset about that fact.

So one of the critical changes, a real threshold change, is that the amended settlement agreement includes a new definition of books and inserts. Now, that's very important, because as you remember, the class covered by the settlement, that is, the non-named parties that are going to be bound by the terms of the settlement if it is approved, are defined as rights holders in books and inserts.

So if you change the underlying definition of what a book or an insert is, then you've changed the composition and the size of the class. And that's exactly what the amended settlement agreement does.

KENNEALLY: Before you get to just how that class has changed, I want to be sure to emphasize something that we might have missed, and that is that all rights holders involved here have an opportunity to remove their works, is that correct?

WASOFF: Yes, they do. We can talk about that a little bit later, but it's a good point. That's another deadline that moved in the agreement. The rights holders deadline to remove their works from Google's uses has been extended from April 5, 2011 to March 9, 2012. And we'll return to that.

KENNEALLY: OK, fine. I just wanted to be sure for the audience involved here that there is still some time there. But back to the point about the class. What's changed there?

WASOFF: What's changed is that the definition of what rights holders are members of the class has been very significantly narrowed through that change I was discussing before in the definition of books and inserts.

Books and inserts are now defined as U.S. works that were registered for copyright before January 5, 2009 and also as works that were published in the United Kingdom, Canada and Australia as of that date.

Those three countries that are still in the settlement are all primarily English-speaking. They all have legal systems common to the U.S. Google sought to include them in the settlement and negotiated directly with representatives of authors and publishers in those three jurisdictions.

But by doing that, by creating that limitation to four primarily English-speaking countries as the definition of what's a book covered by the settlement, the amended settlement agreement now excludes from terms of the settlement agreement, from the class of rights holders that would be covered by the settlement agreement, most foreign works. This significantly reduces the size of the class. Some have estimated that as much as half of the original works that were supposed to be covered by the settlement will be eliminated from the revised settlement.

So it's clear that the objections raised by the governments of France and Germany, by objectors in China and India and elsewhere, were heard. They wanted out of the settlement and they've gotten at least part of their wish.

Foreign works may be included but only if the rights holder of the foreign work had taken the step of registering the work with the United States Copyright Office before that key date of January 5, 2009.

As a footnote to that, I think there's been some confusion about what this means for foreign works and I think it's good to keep in mind that Google's scanning of foreign works in those library collections will presumably continue. Snippets from those foreign works will presumably still be displayed in Google Search. The reduction of the settlement class is not resulting in the elimination of digital scans of those works, as far as we know.

KENNEALLY: So if we have an international audience here, it's not exactly as if people can walk away from this if they're not part of that limited class. They still really need to be very much focused on what's happening here.

WASOFF: Well, their works will not be covered by the terms of the settlement agreement, so in that sense, they are out of this. But I think it's a safe assumption that Google will continue to make use of those foreign works in their search product, for example, by arguing that that use is a fair use, which is the position that Google's taken all along. It's a position that has not yet been tested conclusively by the courts. It was the original basis of the lawsuit that led to this settlement, but because of the settlement, that legal question will never – if the settlement is ultimately approved, that legal question will not be resolved by this court.

KENNEALLY: At least by this court, right.

WASOFF: At least by this court.

KENNEALLY: Right. What are some other definitions that have been changed or otherwise clarified by this amended settlement?

WASOFF: These are important changes in the agreement and it's definitely worth going over. There were a lot of objections to the way works were defined as being part of or not part of the definition of books or inserts.

For example, comic books. There was some concern that comic books were being treated as books and should have been treated as periodicals and that that was an ambiguity in the original settlement agreement. So those kinds of issues, to some extent, are being addressed in some specific cases.

Two examples that we've highlighted are – the treatment of comic books is now clear. They're periodicals. And periodicals were always outside of the settlement agreement. Journals, for example, scholarly journals are not subject to the terms of the settlement agreement.

And again, keep in mind that that doesn't mean that Google didn't scan them. It just means that Google's uses of them going forward are not covered by this settlement agreement.

And speaking of journals and other periodicals, it is very common for, for example, a year's worth of journals to be bound into a single volume for convenience, and that volume ends up on a library shelf. There was an apparent ambiguity in the definitions in the original version. Is that a book or is it still periodicals? Now it's clear.

Bound compilations of periodicals are not books and therefore are not covered by the settlement agreement.

KENNEALLY: What about inserts? There's something special about those. Talk about that.

WASOFF: Yes, the definition of inserts has changed and that's important. And again, these were changes made for clarity and in response to concerns raised about ambiguity in the original definitions in the first version of the agreement.

Now it's clear that in order to qualify as an insert so that the use is covered by the settlement agreement, the insert itself must be registered with the U.S. Copyright Office as a standalone work.

The treatment of children's book illustrations in the original settlement agreement was criticized. It is now clear that children's book illustrations are not considered inserts.

And finally, the treatment of musical notation has been clarified so it's clear that musical notation is not considered an insert.

KENNEALLY: What about other terms that have changed or been redefined?

WASOFF: This is particularly important because one of the areas of controversy about the original settlement agreement had to do with the definition of commercial availability. Commercial availability is one of those gateway definitions. It's one of those threshold definitions when you look at the agreement and you think about how it will apply to your works.

KENNEALLY: It's critical.

WASOFF: It's important because the determination of whether a particular work is commercially available or not determines what Google can do with it as a default matter. If a work is not commercially available as a default, absent alternative instructions, Google can make display uses of it. If a work is commercially available, the reverse applies and Google has to get permission from the rights holder in order to make display uses.

And there were substantial concerns expressed at the earlier stages in response to the original settlement agreement that the definition of commercial availability was weighted in a way that favored

Google. It was not sufficiently clear in the minds of some of the objectors exactly what steps Google had to go through in order to determine if a work is commercially available. There were also comments that challenging that determination on the part of a rights holder was going to be burdensome and difficult.

And that's been changed. Rather than the rights holder having an affirmative obligation to demonstrate that a book is commercially available in order to get a Google initial determination that it's not commercially available changed, all the rights holder has to do now is to assert that the book is commercially available and Google will be required to change the status of the work to not commercially available unless and until Google prevails in an arbitration. So the burden of proof has kind of shifted.

In addition, the definition of how you determine whether a book is commercially available has been changed. It's now clear that if the book is available for sale new anywhere in the world to a buyer in the U.S., U.K., Canada or Australia, the work will be deemed to be commercially available. So it's both a higher burden in the first place and there is a mechanism that gives the rights holder better ability to question a determination of commercial availability. That's actually an important change for a lot of rights holders.

KENNEALLY: And because it's so important, that notion of commercial availability, what's happened with the amended settlement is that rights holders really spoke up, right? That's the source of these changes.

WASOFF: Yes. A lot of the objections to the agreement did come from rights holders who were concerned about their ability to protect and manage their works. And as we're going through this, I think it's fair to say Google and the proponents were pretty comfortable with the deal they proposed originally. They believed in what they had done. They felt it was a good deal for rights holders. They had accomplished something that they wanted to get support for.

So you can read all of these changes as responses. In some cases, some of these changes were more clarifications rather than responses to a problem, but in every instance, I think, Google, the Authors Guild, AAP, were listening to the objections and were attempting to accommodate them.

KENNEALLY: Right. There's also the matter of the handling of unclaimed or so-called orphan works. That was a source of concern

for many, and I remember that you told us that Mary Beth Peters from the U.S. Copyright Office said the settlement had, quote, turned copyright on its head. She wasn't alone in expressing her concern. DOJ itself had concerns about class representation of these unknown rights holders of unclaimed works. Has anything really changed in that regard?

WASOFF: Yes and no. There has been a very significant change. The agreement still gives Google the right to use unclaimed works. The significant change is that the amended agreement, the new version of the agreement, provides for an independent fiduciary trustee to be appointed who will represent the owners of the unclaimed or orphan works.

The revised settlement is very specific in designating that the representative will be neither an author nor a publisher, will be approved by the court and will be chosen by a super majority of the Book Rights Registry board. But the fiduciary won't be serving as a voting member of the board.

The other very significant change in the treatment of unclaimed works is how funds derived from the exploitation of those works are going to be treated. In the prior settlement agreement, the prior version, those funds were going to be – if rights holders didn't come forward to claim them within a certain period of time, the funds would have been used to fund the operations of the Rights Registry.

That was an extremely controversial structure and issues were raised by the Attorneys General of several states. A number of commentators also noted that that created a potential conflict of interest because the Book Rights Registry might not have an incentive to find these owners to get the money to those owners of the unclaimed works because if the owners remained missing, the money went to the Book Rights Registry.

The revised settlement agreement now dictates that revenues attributable to orphan works will first be used to locate the owners and then eventually utilized for charitable purposes, specifically for literacy initiatives in the U.S., U.K., Canada and Australia.

And the way that's structured is that the revised settlement now says after funds have gone unclaimed for five years, up to 25 percent of the funds being held can be used to search for the rights holder, and after 10 years, if the rights holder hasn't come forward, then the remaining 75 percent, upon approval – there's a process for

approving how the monies will be distributed and how the charities will be identified, but once that approval process is accomplished, the money can be used to support literacy charities.

KENNEALLY: What further impact does this have then on the Book Rights Registry?

WASOFF: Before we get to that, Chris, there's one other thing I did want to talk about and that has to do with how the fiduciary will be able to make determinations about the use of unclaimed works. This is a change and I think it's important to point out.

One of the hot-button issues in the structure of the agreement has been the advantage that it gives Google with respect to this body of unclaimed works. The agreement does include specific language now that says that the fiduciary trustee in his role as the protector of these unclaimed works will be able to make determinations about certain future uses of the unclaimed works to the extent permitted by law.

That's being read by many people as an invitation by the proponents of the agreement for Congress to act and give the fiduciary trustee some authority to make decisions with respect to these unclaimed works, to address legislatively the orphan works problem.

Now, the impact this has on the Book Rights Registry is that the Book Rights Registry is going to be deprived of a potential source of revenue. That's potentially a problem for the Book Rights Registry, but we don't know now how much money it will take, how much money the Book Rights Registry will be taking out of other revenues to support its activities.

KENNEALLY: We didn't even before, but it certainly is a loss of potential revenue there.

There are changes as well in the representation of rights holders that may impact the registry as well. Can we talk about that?

WASOFF: Sure. The Book Rights Registry is still a key portion of the agreement and it's still intended to fulfill the role described in the original agreement, which is to be the intermediary between Google and the rights holders. The management of the board in the original agreement was conceived as being equally divided between authors and publishers, but there wasn't further definition about who would be on the board.

Now, in the new agreement, it's quite explicit that on both the publishing side and the author side, there will be representatives – at least one representative from each of the four countries whose works are now clearly covered by the settlement.

And in addition, as we discussed, the independent fiduciary trustee will be working with the board. He won't be a voting member of the board but he will be involved with the board and there will be some representation of the interests of the owners of the unclaimed works.

What hasn't changed – and this is a set of objections that were not responded to in the amended settlement agreement – is among the objections were requests on the part of various constituencies for there to be representation on this Book Rights Registry board of open access proponents, academic authors, librarians, foreign authors. That hasn't changed. All those various constituencies still do not have representation on the Book Rights Registry board.

And I just think to note here as well, the Book Rights Registry board will have the ability to license some future uses of the works of registered rights holders – again, to the extent permitted by law – and that could also be read as an invitation for Congress to act here and clarify what this centralized group can do with respect to those rights.

KENNEALLY: Again, that's interesting because it gives us something further to watch, which is how Congress may respond to all of this.

What about the economic terms and additional revenue models here?

We are speaking with Lois Wasoff, and I should tell everybody we're about halfway through our special program looking at the amended settlement agreement in the Google Books case, and Lois, we're covering an important piece of all this, which is revenue. This is what this is all about, actually, so why don't you tell us how the amended settlement, the ASA, has potentially changed things there from what we knew before?

WASOFF: There have been some significant changes. I think I should preface what I'm going to say first by saying that the underlying structure of the agreement and that many of the economic terms of the agreement really have not changed.

But what has happened with the new agreement is that the amended settlement kind of pulls back the curtain a bit, and as we'll discuss, those changes were made very much in direct response to statements from the Department of Justice and objections that were filed by some of the rights holders.

First, to discuss settlement controlled pricing. The split hasn't changed. The split is still 63 percent to the rights holders and 30 percent to Google for revenues generated by uses of the works. But there have been some pretty extensive changes in how the prices charged to users will be calculated and in how much control the rights holders will have over prices.

The amended settlement agreement now contemplates more individual price negotiation and it also explicitly says that the rights holder will have the option of setting a price of zero, which is a direct response to some of the public policy advocates who were concerned that the agreement was too motivated by a desire to maximize economic return and perhaps, in their view, not motivated enough by a desire to maximize access.

The changes that have been made in how prices are arrived at, the algorithms, are extremely important because it's now clear that Google will be applying an algorithm in determining the prices for the works for which it determines the price. Rights holders can determine their own price or they can accept the Google-set price, and it's clear that that algorithm is going to be designed to stimulate market prices. That came right out of the Department of Justice filing.

That's clearly a response to the Department of Justice brief, which expressed a concern that the pricing mechanisms in the original agreement could be seen to be what's called a horizontal agreement between authors and publishers that could have the potential to restrict price competition and therefore violate the Sherman Act. So that was a pretty strong statement on the part of the DOJ and what we're seeing now is the attempt on the part of the proponents to address that statement.

Related to that is the part of the amended agreement that makes it clear that the Book Rights Registry is not going to reveal that algorithmically derived price, the Google-set price, for one book to rights holders of other books. The idea is to eliminate the potential and certainly the appearance of price fixing among books. That came directly out of the Department of Justice concerns.

What isn't in the pricing structure is something that was asked for by some of the public policy advocates, and that was court oversight and some reassurances about how prices for the institutional subscription, which is one of the major rights that Google will be exploiting under the settlement – how prices for that would be set. There were concerns expressed from the academic and library communities that Google could have such market power in that area that it could abuse its power and set unreasonable prices. We haven't seen that concern explicitly addressed on the institutional pricing side in the amended settlement agreement.

KENNEALLY: It is interesting to see how the parties have responded to the points that were raised throughout all this, and they've done so as well with regard to additional revenue models and provisions for future uses.

WASOFF: Yes, and this is an elegant response, I think, to a problem that was raised by a number of commentators, because it's in some ways a subtle change, but it's a very important one.

In the settlement agreement as originally proposed, there were three new revenue models that were given as examples, and that was print on demand, file downloads and consumer subscriptions. The idea in the original settlement agreement was that the Book Rights Registry and Google could at some time in the future agree to the terms under which Google could exercise those rights with respect to the works covered by the agreement.

In the original agreement, that list, those three uses, were illustrative rather than exhaustive. And by that, I mean Google and the Book Rights Registry could have thought of other things that Google wanted to do with the works and agreed to the terms and moved ahead.

That was quite controversial. The Department of Justice had issues with that. Many of the commentators who dealt specifically with class action issues and appropriate procedure for class action lawsuits were quite concerned about that. It is not unusual – well, I wouldn't say it's usual, but it's not unheard of for a class action settlement agreement to authorize future behavior, but the objectors felt that and told the court that authorizing future behavior in this very open-ended kind of a way meant that you were asking class members to agree to a settlement without giving them the ability to

understand really what they were agreeing to because so much was left to happen in the future.

So the solution to this in the amended settlement agreement is that this list is now exhaustive. There are no other – now they’re called additional revenue models instead of new revenue models – but there are no other additional revenue models authorized by this settlement agreement, so that built a bit of a box around it and made the future still not completely knowable because the terms are still subject to negotiation, but clearer for the members of the class that are deciding whether or not to opt in or opt out.

KENNEALLY: If I could put it this way, the original proposed settlement kind of left a lot to the imagination in this regard and so in this case, they’ve very much sort of limited it, as you say, put it in a box.

WASOFF: They’ve made it clear what their future intentions are with respect to the kind of rights they’ll be exploiting, but there’s still room for negotiation within this framework, yes.

Finally, the other place that we saw a change – and this is again a very specific response to objections made that related to antitrust considerations – is in the resale of consumer purchases. Google is now obligated to allow third-party resellers to sell access to books covered by the settlement through consumer purchase models.

This was a response to Department of Justice objections, objections from others, who were concerned about the potential monopoly position. And I’m using that word advisedly because I’m not opining on whether or not this is monopolistic. That’s for an antitrust lawyer to deal with and perhaps someday for a court to deal with. But the powerful market position that Google was going to have with respect to these works.

KENNEALLY: They were going to be the single source.

WASOFF: They were essentially going to be the single source for a lot of these works. So now Google had said publicly that they would permit resellers, but it wasn’t in the agreement. Now it is, so now Google is going to be contractually obligated to do what it had outside the agreement in the discussion period said it intended to do anyway.

But we need to keep in mind a couple of things. One, Google would still be the host of the digital copies. Google isn't giving away the database or access of the database. It would still be controlling that piece of it.

And quite importantly, we're only talking about consumer purchase here. Google has not said in the agreement or frankly, elsewhere, that it's going to let third parties offer institutional subscriptions or similar offerings for the entire database. That's an important point to keep in mind when you're thinking about whether this mechanism fully addresses the concerns that were raised.

KENNEALLY: There are still just a few other loose ends to take a look at. That would be, of course, the antitrust issues, which you've alluded to from time to time here. Talk about those.

WASOFF: There's one real lightning rod in the agreement called the MFN clause, the Most Favored Nations clause. And that was a clause that required the Book Rights Registry in certain specified circumstances to give Google a deal as good or better than the deal that it gave to third parties. It was a little more complicated than that. That was a fairly dense, single, not-that-long paragraph, and it was controversial.

This is a simple change. They literally just crossed it out. So the clause has simply been amended entirely, in its entirety in the new version.

There were other concerns expressed by a number of proponents that Google and the other proponents might claim in the future to be immune from further legal actions involving antitrust because they'd be operating under an agreement – we're positing now that we have a court-approved settlement agreement. There was a concern that the proponents might say, we're operating under an agreement that was approved by a federal court and therefore we cannot be sued for antitrust based on our behavior pursuant to this court-approved agreement.

That concern has been addressed now, not in the language of the agreement but in the new proposed final judgment and order of dismissal that was filed by the proponents of the settlement. That now provides explicitly that court approval of a settlement agreement will not be seen as conferring immunity on Google or the other parties for potential antitrust liability.

And that's an interesting nuance that may have an impact on what we see in the next month or two because this could give the Department of Justice the ability to hold off on making recommendations or even on commenting on the amended settlement agreement. This provision could let them adopt a wait-and-see attitude if they chose to.

Then finally, one of the areas that were criticized heavily had to do with the original notice procedure and the language of the original notice. Was the notice process adequate? Did the full class really get notice of this? Was the description of the agreement sufficient to let people know what issues were at stake?

As we discussed before, the class is now cut in perhaps half. In order to advance the next procedural stage – given the fact that this is a revised agreement, it's a new proposal for the class to consider – there needed to be a new notice process anyway. So that was covered in the request filed by the proponents and in the order that the judge issued setting the time schedule going forward. Now there's a revised notice procedure going on attempting to reach this much smaller and presumably more reachable class. There's outreach now going to all of the individuals and corporations that registered already at the settlement website and to those that opted out.

The notice process has begun again and as I said before, will end on January 28. And I just think it's worth emphasizing that to people. That's the deadline coming up for the rights holders on this call. What this new notice period ending January 28 does is give all the class members another opportunity to opt out if they didn't before or to change their minds after a prior opt-out, decide they're comfortable now and opt in.

But as before, if you do nothing by that cutoff date, if you're a member of the newly defined class and you do nothing by that cutoff date, you will be bound by the terms of the settlement. So as before, silence is consent.

KENNEALLY: Right. And the fact that this is a class action suit and therefore has drawn in so many more people than were actually in court those many years ago, has really drawn a lot of attention regarding public policy issues. The objectors raised some specific concerns and the amended settlement has attempted to address many of them, not all of them. Talk about the ways that some of

those public policy issues have been spoken to in this new settlement.

WASOFF: Well, there were some attempts to address some of the public policy concerns, though not as extensively as the antitrust and class action concerns were addressed in the amended settlement agreement.

On the privacy and security front, in response to complaints from privacy advocates, the amended agreement now does include some specific language that says that Google will not give any personal information about users of the database to the Book Rights Registry except as required by law.

Google has outside of the four walls of the settlement agreement indicated that it will use privacy policy that will be protective of user privacy, but that isn't part of the contractual obligations set out in the settlement agreement.

On the public access front, the agreement now provides that the Book Rights Registry will have the ability in its discretion to authorize more than one terminal per public library. As you'll recall, Chris, the original agreement required that there be one terminal in each public library that gave full access to the full database. That now will be within the discretion of the Book Rights Registry to expand the number. That has a revenue aspect too because printing will be charged for in those public library situations.

And finally, there were a lot of comments from academic authors and others who felt that the agreement was too consumed with generating revenue and not concerned enough with maximizing access. Commenter who pointed out that some authors don't care about being paid, they care about broad distribution. So the agreement does contemplate that a little more in two ways.

First, it now permits the use of creative commons licenses, which typically permit broader free uses for works distributed pursuant to those licenses. And as I mentioned before, it also lets the rights holder set the price of the work at zero if that's what the rights holder wants to do. This has the potential, obviously, to further reduce the funds available to the Book Rights Registry, but it does address some of those access concerns.

KENNEALLY: Well, Lois, that's a pretty quick but reasonably thorough review of the major changes here. We have just over five

minutes left in our program today and we want to just help people understand what the reaction has been to the amended settlement. It's still rather fresh, although there are deadlines fast approaching. It's only been just under a month since it came out. How have people reacted?

WASOFF: I'll run through this pretty quickly because there have been, as one would expect, strong expressions of support from the major proponents. Richard Sarnoff is the co-chair of Bertelsmann Inc. and president of Bertelsmann Digital Media. He's a board member of AAP, he's been an architect of the agreement, he's a strong proponent of it. Dan Clancy is the Google Books engineering director for Google. He has been Google's public face on this. Paul Aiken of the Office Guild has been supporting it heavily.

And another real proponent of the settlement has been Paul Curran, who is the University of Michigan library. University of Michigan, you'll recall, was one of the first full participants in the library scanning project and they've consistently been supportive of the Google Books project and of the settlement.

There have been academic commenters on this. Jonathan Band, the first person listed there, is a lawyer in Washington, D.C., who does a lot of work with library associations. He's written several analyses of the agreement called *A Guide for the Perplexed*, and they are helpful. His most recent one is particularly – is a good summary of the changes in the amended settlement agreement.

And James Grimmelman has a website. He's a lawyer and faculty member at New York Law School who's been following this very closely from the beginning. He was one of the first to raise some of the antitrust objections. He's been doing analyses of these.

And Pam Samuelson, who's a law professor at Berkeley, filed with the court during the objection period on the original agreement on behalf of academic authors emphasizing – her major point was that academic authors care more about access than money.

All three of these people have been commenting on the agreement, not entirely favorably, not entirely critically, but have been expressing views and it's interesting to see what they have to say.

Mary Beth Peters you mentioned before. Mary Beth spoke – testified in front of the Judiciary Committee and expressed some real concerns about the agreement as being a usurpation of a legislative

function setting copyright policy by a judicial process. Mary Beth has not said anything publicly that I'm aware of since the agreement came out, the new version of the agreement came out. But since the portion of the agreement that deals with unclaimed works and the authority that Google will have to exploit those unclaimed works was the focus of her concern and that hasn't changed. I think we can make an assumption. I think her testimony in front of the Judiciary Committee is still relevant in looking at concerns about that aspect of the agreement.

I've listed a couple of other people here. Brewster Kahle of Internet Archive has consistently been concerned about the agreement and the position it gives Google with respect to particularly the unclaimed works, the orphans.

Robert Darnton, who's the librarian at Harvard, recently wrote a very interesting article for the *New York Review of Books*, his second on the Google Book settlement, and still, I believe, has some of the concerns he had with his first article that Google would have enormous authority in pricing over the institutional subscription.

Scott Gant was one of the first people to raise class action issues. He will probably file objections to this as well.

And then Amazon is still concerned and France hasn't given up. Nicolas Sarkozy said just the other day that he wants the European Union to do its own scanning instead of relying on an American company.

So the controversy is still out there. There'll be more comments.

KENNEALLY: As we say, it's the definition of a developing story. We're coming to the close here and would like to get in maybe one question if we can. But before we do, let's review the revised timeline so people have fresh in their minds when they finish the program what's ahead.

WASOFF: OK. What's ahead is, as I've said – I guess everybody's heard it by now. January 28, 2010. If you want to opt out, do it by then. If you want to file an objection, do it by then. And you get to reconsider whatever decision you made the last time when you were facing the other deadline. So that date's important.

The DOJ comments, we'll see. They may take advantage of that wait-and-see opportunity that they have now since nobody's waving

antitrust liability. But we'll see. If the DOJ files on February 4, it's going to tell us a lot about what's likely to happen.

And then, we have the fairness hearing on February 18 and that will be the opportunity for objectors to actually come forward, speak to the judge about their concerns, and that's the earliest possible date on which this agreement could be approved by the court.

KENNEALLY: I can imagine that between now and then, Lois, we're going to be back together to discuss some of the objections that may get filed and maybe some of the questions that rights holders and others have raised here today with us at this very special presentation and with the court itself.

There's one shoe left to drop that was important, and that of course is whether the Department of Justice is going to weigh in. Are you willing to do any speculation at all as to what they may say about this revised settlement agreement?

WASOFF: They do have the option now of remaining silent if they choose to. It's very clear that the amended settlement agreement was drafted not exactly against the blueprint that was laid out in the Department of Justice brief, but the Department of Justice brief was pretty clear in saying that they saw some good public purposes to be served by some form of this going forward, and there were some very specific – there was specific guidance offered to the proponents as a way of fixing the agreement in the Department of Justice's view to let the agreement go forward.

And it's pretty clear looking at these changes that the proponents were very aware of the Department of Justice's concerns, but they didn't address all of them, and you can map the changes against the DOJ brief and see where they don't mesh completely.

So I think it's fair to assume that the Department of Justice could have some comments. Certainly some of the issues they raised were either not addressed or were not addressed in the way that they suggested they be addressed. But on the other hand, the Department of Justice would not be foreclosed from raising objections later if the agreement is approved, and the earliest that could possibly happen in the most optimistic scenario is if the agreement is approved at the fairness hearing – unlikely, but if it were approved from the bench at the fairness hearing on the 18th – and if 30 days goes by – that's the period for appeal – and nobody files an appeal, then the effective date would be mid-March.

I doubt the judge will approve it from the bench on the 18th. I doubt that no one will appeal. I think there probably will be appeals. So the effective date of the agreement will probably be much further out. I think that's one of the reasons that the proponents picked March of 2011 as the date by which the claims need to be filed. I think they're hoping by March of 2011, they may have a fully approved and tested agreement.

And then to return to the Department of Justice, Department of Justice could wait and see what happens once this theoretically approved agreement takes effect and sees how the parties behave and could still act.

So I don't know which way they'll go, but they had to file in the first instance. They don't absolutely have to file now. So we'll see. We'll see what happens on February 4. It's going to be interesting to watch.

KENNEALLY: It certainly will be, and I want to just thank Lois Wasoff, intellectual property attorney, for joining us again in this continuing series of programs about the Google Book Settlement that we've been producing here at Copyright Clearance Center. My name is Chris Kenneally. I'm director of author relations.

We have up on the screen today some places you may want to go for further information if you have other questions, including where all of the court documents themselves reside, websites such as the Google Book Settlement itself. They have their own site explaining the whole class action case and everything involved there. AAP's own website, the Authors Guild website, something called the Public Index, and last but certainly not least, our own website, copyright.com, where all of our previous programs are indeed archived.

Your questions today – and there have been many of them, fascinating questions – will help us with our programs moving forward.

Let me just remind everybody briefly about Copyright Clearance Center and our own role in the rights licensing world. We were created more than 30 years ago by authors and publishers and today are the collective licensing agent for more than 30 million rights. We're part of an extensive global network of collective licensing organizations that you may have heard of. It's called

IFRRO, and in the last 15 years, we've helped to pay more than \$1 billion in royalties to rights holders here in the United States.

It's our work to include these rights from all of your organizations as well as from individual authors, and we certainly would be very interested in hearing how we can better help you with the value of your rights and how to manage them. If you have any questions at all about all of that, you're welcome to write to me, Chris Kenneally. My e-mail is chrisk – making it easy for you – chrisk@copyright.com.

Thank you again to all who have attended from the United States and indeed around the world. We appreciate your time and look forward to having you back on a future program.

Reactions to Google's Amended Settlement Agreement: Copyright Law Expert Lois Wasoff discusses the latest reaction and commentary

Recorded on February 12, 2010

On February 4th, another Statement of Interest was filed by the Department of Justice regarding Google's Amended Settlement Agreement (ASA). While acknowledging the potential public benefits of the ASA, the filing reiterates many of the same concerns raised in the DOJ's initial Statement of Interest. We talk again with Lois Wasoff to help sort out the latest reaction and commentary regarding the ASA.

KENNEALLY: A class action lawsuit of historic scope. An Internet Goliath. Thousands of authors, publishers and other rights holders. National governments and multinational corporations. These are the ingredients of a dish called the Google Book Settlement. First announced in October 2008, the Google Book Settlement returns to the table on Thursday, February 18 when the main course is served in judge Denny Chin's federal district courtroom in New York City.

Hello and welcome. For everyone at Copyright Clearance Center, thank you for joining me. I'm Christopher Kenneally, Copyright Clearance Center's director of author relations. And with me on the line is our house expert for the Google Book Settlement, Attorney Lois Wasoff. Lois, welcome back.

WASOFF: Hi, Chris. It's nice to be here.

KENNEALLY: It's wonderful to have you back, and as we have done from time to time over the last year, we've invited you today to join us to take another close look at the very latest developments in this case. It's a big meal ahead, so let's go straight to it then. Can you briefly bring us up to date, tell us what's been happening recently and what we can expect in days ahead?

WASOFF: Well, Chris, as you of course will recall, back in November, the proponents of the Google Book Settlement – Google, the Authors Guild and the Association of American Publishers – submitted an amended settlement agreement, the ASA, that incorporated changes from the original proposal that they had had preliminarily approved by the court more than a year before.

The ASA included changes that were very clearly intended to address some of the concerns that had been raised during the

objection period preceding the November changes. With the submission of the ASA, the judge set a new schedule for re-notifying the potential class members, for the filing of objections, for opting out of the class, and also for the Department of Justice – the DOJ – to submit comments on the ASA.

The cutoff for the comments, objections and opt-outs was January 28. The Department of Justice was given some additional time, until February 4, to file its own reactions to the ASA. All of those objections and comments are now before the court.

In addition, we've had a little bit of late-breaking news. We found out last night and this morning that the proponents of the settlement have filed lengthy papers, a couple hundred pages of briefs, with the court in further support of the ASA. The filing is an attempt to respond to some of the objections that were raised in this round about the ASA.

What we can conclude from this is that you are absolutely correct. That February 18 fairness hearing date that you referred to before is the next key date. There will be a hearing that day and we can conclude that the proponents of the settlement still very much intend to appear before the judge on that date and to urge its approval.

KENNEALLY: And certainly among all the documents filed, one of the most critical was the one that got filed February 4 by the Department of Justice, just a week ago. And everyone's attention in that document went straight to a line on Page 11, which I'll quote. "The United States believes that the court lacks authority to approve the ASA."

So for obvious reasons, that's proved to be the big sound bite for most observers. It is a fairly categorical statement and it strongly suggests the question, is the settlement dead? But I know you always want to look beyond the headline, Lois, so I look forward to your view. How do you see things, given what DOJ said? Dead or alive?

WASOFF: There's been a lot of commentary out there, as you've said, and a lot of speculation that the agreement is dead, and that makes great attention-grabbing headlines, but I think the situation is a lot more complex and nuanced than that. I wouldn't necessarily jump to that immediate conclusion.

The DOJ brief – the Department of Justice brief – is certainly critical of many aspects of the ASA, but it’s also conciliatory in some of its language. It recognizes the efforts made by the involved parties and it refers to some of the potential benefits to the public if a settlement can be made on some terms. It also suggests further discussions. It provides what one might describe as a roadmap for potential additional revisions.

But at the same time, the Department of Justice is quite adamant in the brief in dealing with what it characterizes as remaining core problems. We’ll have an opportunity when we get together again to talk in more detail about Google’s response to the Department of Justice objections, but what we do know sitting here right now is that there is a very complicated decision that will have to be made by Judge Chin.

If he does rule definitively on the ASA, either approving it as is or rejecting it completely, that will almost certainly result in an appeal, no matter what his ruling is.

KENNEALLY: About as safe a prediction as any in all of this.

Now, I know there were many objections filed, many of them submitted by original objectors. And even though those who had objected before were told that they couldn’t just restate their objections, they did raise some new issues in all of this. Is there anything of note that we can consider as net new objections in these documents?

WASOFF: As you said, Chris, the judge did make it very clear that he expected objections filed with respect to the ASA to focus on what had been changed. In other words, he wanted to avoid going over the same ground and wanted concerned parties to think about the new elements being proposed.

The proponents in their own filings in support of the ASA conceded that although changes had been made, the core structure of the ASA was the same as that proposed in the original version. But those changes, as we’ve discussed before, Chris, were substantial in some specific areas.

For example, the definition of the membership of the class changed, particularly with reference to foreign works. The goal there was to minimize the impact of the settlement on foreign rights holders, some of who had very strongly objected to the original version.

Another substantial change was that the mechanism for dealing with unclaimed works had been changed. An unclaimed works fiduciary was created in the revised version, in the ASA, as a way of dealing with objections that there were conflicts presented within the supposed represented class between the owners of rights to known works and the owners of rights to unclaimed works.

The unclaimed works fiduciary was also intended to address some of the objections that had been raised by state attorneys general about the treatment of unclaimed funds in the original version.

Some changes were also made in how pricing was handled and how future uses were authorized, in competitor access to the Google database. And all of these changes were really intended to placate some of the antitrust concerns that the Department of Justice and others noted in their objections to the original settlement.

And then finally, another change that was made was that the original settlement agreement as proposed included a most-favored nations clause that angered many of the commentators, and that was simply removed entirely.

So now we've got some of the same objectors filing, but they're filing objections with respect to these changed terms. For example, France and Germany filed objections before and they filed again now, expressing substantial concerns about the treatment of foreign rights holders in the current ASA, essentially saying that foreign rights holders are not as out of the settlement as a top-line reading of the agreement would indicate.

Amazon and Microsoft filed strong objections last time. They filed again, making similar legal arguments dealing with antitrust law and issues involving class action, but basing them on the new facts presented by the new version of the agreement.

Several of the states' attorneys general filed again, obviously not convinced that the changes made with respect to revenues attributable to unclaimed works would be adequate under the laws of their state.

So, we're seeing new objections, even if some of the objectors are not new.

Now, one thing that is helpful to us in analyzing all this is that the Department of Justice got an extra week. Everyone else had to file their objections by January 28. The Department of Justice had until February 4. So in its filing, the Department of Justice includes comments on and references to many of the other objections.

So without minimizing the importance of all of the various objections filed, each of them has some importance and has something to add to the discussion. The DOJ filing – the Department of Justice filing – really can serve as a useful summary for us of many of the other objections.

KENNEALLY: Right, and I think that’s an important point. Because we don’t have a lot of time right now, we’re going to sort of use DOJ as the lens through which to see all of this. To that point then, Lois, for our audience, you’ve read the DOJ statement through and through. What’s the tone and what are the major highlights?

WASOFF: The brief clearly recognized a certain promise in the proposal, and there was commentary about an acknowledgement of what the DOJ characterized as substantial progress having been made from the original settlement proposal. That progress is essentially the changes we just talked about, Chris, the changes in dealing with pricing and foreign works and unclaimed works.

But despite acknowledging substantial progress, the Department of Justice also stated unequivocally that it saw very substantial issues as remaining. Even in their original documents in support of the amended settlement agreement, the proponents themselves characterized the agreement as being substantially the same in its core, although they then went on to describe the changes they’d made.

It’s the analogy we’ve used before, that the tree is still the same. The amended settlement agreement changed the shape of it by pruning some of the branches. And according to the Department of Justice, because the core of the original settlement is the same, some of the core problems in fact remain.

KENNEALLY: A rose is a rose is a rose, so to speak.

WASOFF: So to speak. The Department of Justice, for example, went on at some length about its belief that the amended settlement agreement is an attempt to use the class action mechanism to implement a forward-looking business arrangement. The

Department of Justice also emphasized that the amended settlement agreement grants rights that don't square with some of the core principles of the Copyright Act, that in fact are inconsistent with some of the core principles of the Copyright Act, essentially because it uses an opt-out rather than an opt-in system, compromising the ability of copyright owners to control whether and how their works will be exploited.

The other points made by the Department of Justice – the core issues that they called out – included remaining concerns about possible anti-competitive advantages being conveyed to the single entity – Google – by the terms of the settlement.

There was discussion about Google continuing under the amended settlement agreement to have the exclusive ability to exploit unclaimed works without the liability risk that would be faced by others if they tried to do it. Although the pricing mechanisms, as we discussed, have been changed, the Department of Justice felt that the pricing mechanisms, even as revised, continue to raise antitrust concerns.

They're concerned that there's no major broader licensing system put into place and that the way the class action mechanism is being used is pushing it too far, that although some of the goals may be laudable, the particular means chosen in the amended settlement agreement, according to the Department of Justice, is not the appropriate way to achieve those goals.

KENNEALLY: That's a lot to digest, and a lot of it does sound pretty negative, especially if we remind ourselves of that statement, the United States believes that the court lacks authority to approve the ASA. With that in mind then, is there cause for hope at all? Is there really a path forward from here, possibly?

WASOFF: It depends on a lot of things, but the Department of Justice certainly outlined a possible path. Toward the end of the brief, it was pretty explicit in saying – in acknowledging that the court could disagree with the Department of Justice's conclusion that if the court lacks the authority to approve the agreement, that the court could perhaps, as part of that disagreement, recommend changes to the amended settlement agreement that would mitigate some of the risks and that would provide a basis for approval. And there were some specific suggestions made that I think are important.

Also, significantly, some of these suggestions were made by the Department of Justice – or similar suggestions were made by the Department of Justice – in its original filing on the original settlement agreement, and the proponents didn't pick it up for the amended settlement agreement.

So whether this is a realistic roadmap, whether this includes some elements that would just be non-starters for the proponents, we can only speculate.

But the Department of Justice's recommendations included, first, a recommendation that the agreement use an opt-in regime rather than the opt-out mechanism that's in there now, at least for the forward-looking aspects of the settlement, for the ongoing licensing aspects of the settlement.

It proposed that a meaningful significant waiting period exist before Google could commercially exploit out-of-print works without the permission of the rights holder.

It suggested delaying or conditioning the acceptance of the ASA until certain standards were set by the unclaimed works fiduciary and by the book registry that's created by the agreement that is designed to further reduce the volume of unclaimed works. There was a suggestion that there be a requirement that a reasonably diligent search be made for the rights holder by Google or the registry, and that the results of that search be publicly disclosed.

They suggested some changes in the definition of a book under the ASA. Significantly, they suggest imposing a term of years, of perhaps five or 10 years, on the exploitation. They wanted to see language that specifically required the parties to agree to comply with the terms of any copyright legislation enacted in the future. There were concerns expressed in the Department of Justice brief that the approval of the ASA could actually have detrimental effects on the likelihood that legislation would be passed that would create a more level playing field in this area.

And they also suggest examining whether there exists a means for other entities other than Google to get access to orphan works, rights on certain works, the unclaimed works, that would be consistent with Rule 23, with the class action procedures. And that again is an attempt to encourage the parties to work harder at finding a way to level this playing field and mitigate the issue that

the Department of Justice sees of Google having too unique, too powerful a position in relation to these works.

KENNEALLY: All right. We are recording this on Friday, February 12, ahead of that fairness hearing coming up next week, next Thursday, the 18th. And I just want to ask you to take out Lois' crystal ball there and see whether you have any hint of what the action's going to be like that day, and give us sort of a sense of what we can anticipate.

WASOFF: For those of us who are following this closely, it's going to be fascinating. Maybe not generally fascinating, but for those of us like you and I, Chris, who've been following this closely, it's going to be interesting.

There are about 30 different speakers, the neighborhood of 30 different speakers that have been recognized by the court as having the ability to speak at the hearing. The number is a little bit of a moving target. The overwhelming majority of those – more than five-sixths of them, by the present count, about 25 of them – are going to be speaking in opposition to the current amended settlement agreement. About five will be speaking in favor.

All of those speakers will be given only five minutes each, and the court has suggested that they coordinate their remarks to prevent too much redundancy. The judge has also said he's going to read all of the written submissions to the court, even if speakers have not been given an opportunity to speak or can't cover all of their points in their five minutes. So we know what Judge Chin will be doing for the next period of time. He has a lot of reading to do.

Following those individual presentations, there'll be a representative of the Department of Justice speaking, and then finally, the parties to the suit, the proponents of the settlement. Because at this point, Google, the authors and the publishers – or more properly, Google, the Authors Guild and the Association of American Publishers – are on the same side. Even though they were adversaries in the litigation, they're all the proponents. They'll be given an opportunity to speak as well.

The entire courtroom will be filled essentially only with people who are going to be speaking because there's that big a crowd who will be speaking. There's an overflow room that's been designated. There'll be a video broadcast. The Twitter feeds will be interesting. It'll be a very, very, very full day.

KENNEALLY: I'm thinking, Lois, that people might want to have it moved over to the Metropolitan Opera House. This sounds more like grand opera of Wagnerian proportions than it does a typical day in federal district court.

WASOFF: It certainly does, though usually at the end of the opera, somebody dies. I'm not sure that'll be the case here.

KENNEALLY: Well, hopefully not. Hopefully, though, they'll get through it all in a single performance. It's a lot to take in for the judge.

Next Thursday, February 18 is when that fairness hearing takes place,

Thank you very much, indeed, Lois Wasoff, our in-house expert on the Google Book Settlement, for joining us again.

WASOFF: Thank you, Chris.

KENNEALLY: For more information on that program, to register and to learn all about past editions of this Google Book Settlement series, please go to copyright.com/events or write to the educational services group, education@copyright.com.

For me, Chris Kenneally and for everyone at Copyright Clearance Center, thank you for listening and 'bye for now.

About Copyright Clearance Center

Technology has revolutionized the way people create, publish, use and share content. In this new, fast-paced information economy, content creators and users need simple ways to share knowledge while supporting the principles of copyright. This is what we do.

Experience & Expertise on a Global Scale

CCC was created in 1978 by a group of authors and publishers. Today, we represent tens of thousands of authors, publishers and creators from nearly every country in the world, and we license the rights to millions of books, journals, newspapers, websites, ebooks, images, blogs and more.

An international licensing expert, CCC works with other thought leaders, government agencies and policy makers to streamline copyright licensing across the globe. We are a founding member of IFRRO, an international network of reproduction rights organizations (RROs); we have mutual agreements with sister RROs worldwide; and we license individuals in more than 180 countries.

Licensing Solutions for a Changing World

From the most sought-after scientific material to the hottest user-generated content, CCC is constantly developing new licensing solutions for all types of media and all kinds of users. More than 20 million people at academic institutions and corporations around the world rely on CCC's annual licenses and pay-per-use services to share information with confidence. And in the last 15 years, we've distributed more than \$1 billion in royalties to the rightsholders we represent.

A Commitment to Education

Promoting respect for intellectual property has been a critical part of our mission for more than thirty years. Toward this end, we offer a wide range of educational programs and resources to help individuals and organizations gain a better understanding of their rights and responsibilities relating to the use and distribution of copyrighted material.

Partners Today and Tomorrow

As publishing environments continue to evolve, CCC will be there, creating innovative and powerful solutions to meet the needs of rapidly evolving markets and dynamic content users. Licensing is what we do. How can we help you?

Visit copyright.com to learn more.

About this Series

To help keep rightsholders fully informed and up-to-date with the latest developments in the proposed class action settlement between Google, the Authors Guild and the Association of American Publishers, the Copyright Clearance Center has offered a special educational series of interviews, seminars and presentations on the topic.

These are transcripts from six of these programs presented from April 2009 to February 2010 and featuring Lois Wasoff, Esq.

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