

NATIONAL MUSIC PUBLISHERS' ASSOCIATION
****MEMBER ALERT****

UPDATED VERSION – 5/1/09
DEADLINES HAVE BEEN EXTENDED

GOOGLE BOOK SETTLEMENT MAY AFFECT MUSIC PUBLISHERS' AND
SONGWRITERS' RIGHTS

The NMPA and HFA want to advise all of their members and affiliates of an important pending class action settlement with Google that may affect their rights and those of their songwriters. In 2004, Google entered into agreements to digitize books and other writings in the collections of some of the most prominent libraries in the United States. Known as the "Google Library Project" (or, GLP), Google digitized over seven million books. In response, the Authors' Guild and the American Association of Publishers filed a copyright infringement class action lawsuit against Google. The parties to the class action lawsuit agreed to settle the case in October 2008. The full settlement can be found at www.googlebooksettlement.com ("Settlement Website"). The Settlement Website also includes the official notice, a summary, and all the claim forms with instructions necessary to file with the Court. We strongly recommend that your legal counsel review the material on this website.

The class action settlement, if approved, will bind a Class consisting of all persons who have a U.S. copyright interest in a Book or Insert (as defined in the agreement), whether currently in print or not, prior to **January 5, 2009**.

The settlement specifically excludes "sheet music and other works that are used primarily for the playing of music." But both the definitions of "Book" and "Insert" include certain references to and definitions of music and lyrics that may, nevertheless implicate the interests of songwriters and music publishers.

A book satisfies the definition of "book" in the settlement if **NOT** more than 35% of the pages contain more than 50% music notation, with or without lyrics. To be clear, this limitation only involves lyrics to the extent that they are interspersed with music notation. Thus, books consisting almost entirely or substantially of lyrics alone would arguably fall within the definition of "books." "Inserts" are defined as excerpts from other works that are embodied or incorporated within a Book, including excerpts containing musical notation and/or lyrics.

Music publishers and songwriters must be aware of certain deadlines regarding the settlement because failure to act means that they may be a part of the settlement Class. If a music publisher or songwriter does not want to participate in the Class, they must complete and file an "Opt-Out" form by **September 4, 2009** (the Extended Opt-Out Deadline). The prior cut off date was **May 5, 2009**. A copy of this form, along with instructions, may be downloaded from the Settlement Website referenced above. Please note that the deadline of May 5, 2009 as the date on or before which a book must have been scanned in order to be entitled to a cash payment will remain the same.

Anyone who opts-out of the Class may pursue claims against Google on their own or seek to contract directly with Google. An opt-out election does not mean that Google will not proceed to digitize and use their work in the GLP, only that they will not be a party to the class settlement.

If a music publisher or songwriter is interested in being a member of the Class but would like to object to certain portions of the settlement agreement, they must file an objection with the US District Court for the Southern District of New York by **September 4, 2009**. Instructions on how to proceed can be found on the Settlement Website.

While the settlement is complex and should be reviewed carefully, we highlight three areas of the agreement that warrant consideration.

First, Google plans to continue its digitization of library collections and other sources for sale of subscriptions to an electronic Books database, sale of online access to Books, advertising, and other commercial uses (as are later developed). In return, the settlement provides for a US \$60 per Book, US \$15 per Entire Insert and US \$5 per Partial Insert cash payment to all Class members whose books or other works were digitized prior to **January 5, 2009**. No matter how many times Google digitizes the work, Class members will only receive one payment per work, not per copy digitized.

Second, the settlement establishes a not-for-profit Book Registry to represent the interests of the Rightsholders (Class members are referred to as “Rightsholders” with regard to the forward-looking settlement agreement aspects) in connection with the settlement and in other commercial arrangements. The Book Registry will maintain a database of Rightsholders, collect their contact information and information regarding their requests with respect to uses of Books and Inserts, and identify, locate and coordinate payments to Rightsholders. The Book Registry will be managed by a Board of Directors made up of Author and Publisher representatives. This Book Registry and the Board have not yet been formed and a Rightsholder should be cognizant of the ongoing progress related to its establishment.

Third, the settlement requires that disputes be resolved through a Dispute Resolution Process set out in the agreement. In all but very limited circumstances, this means that Rightsholders will have to settle their disputes with other Rightsholders, the Book Registry or Google through a binding arbitration governed by the terms set out in the settlement agreement.

The settlement must be approved by the Court, and a Settlement Fairness Hearing will be held on **October 7, 2009** (the prior heading date was **June 11, 2009**) at 1 p.m. in Courtroom 14C of the United States District Court for the Southern District of New York, United States Courthouse, 500 Pearl Street, New York, New York 10007. If comments or objections have been received, the Court will consider them at that time.

If the Court approves the settlement agreement without revision, the Class (including the objecting music publisher or songwriter) will be bound by its terms. This means that if music publishers or their songwriters are part of the Class, they must file their claims before **January 5, 2010** to participate in the settlement payment and to ensure that their works are being exploited only in accordance with their explicit instructions. These claim forms can also be found on the Settlement Website.

The settlement requires Rightsholders to make certain elections regarding the use of their works, such as display and non-display uses and removal of the work prior to **April 5, 2011**. If Rightsholders do not act they will be deemed, in most instances, to have granted Google the right to use their works for its current and future purposes. All Rightsholders should understand Google’s rights if they fail to act. If music publishers and songwriters do not file claims by

January 5, 2010, their only remedy will be to adhere by **April 5, 2011**, to the removal provisions of the settlement agreement.

Music publishers and songwriters should review their catalog and licensing arrangements, **such as exclusive sub-publishing agreements**, to determine whether and to what extent their works may be impacted by the settlement agreement. Older publications and licensing arrangements should also be reviewed because out of print and/or commercially unavailable works are covered by the settlement.

The information and explanations offered by NMPA in this member alert should not be used in replacement of independent legal advice. Furthermore, this member alert does not constitute the provision of legal advice, counsel or opinion of any nature. NMPA assumes no responsibility for actions you take based upon the contents of this member alert. You should exercise care in applying any information provided to you in this message to your specific circumstances and should secure independent legal counsel before drafting any legal conclusions.

We have been informed that the Justice Department has opened an anti-trust investigation of the Book Settlement. Congress has also expressed concern and a number of law firms may file objections on behalf of music publisher and/or songwriter groups. Critics of the Book Settlement have raised serious anti-trust concerns, as well as a concern that the settlement is an “orphan works” bill in disguise. NMPA will be posting updates on these developments on its website at www.nmpa.org. Please direct any inquiry regarding this class action to Jay Rosenthal, NMPA General Counsel, at jrosenthal@nmpa.org.

Key Dates

January 5, 2009	Books/Inserts offered for sale before this date will be included in the Class
September 4, 2009	Last Day to Opt-Out of Settlement Last Day to File Objections to Settlement (If Opting In)
October 7, 2009	Class Action Settlement Fairness Hearing
January 5, 2010	Last Day to File Claim for Cash Settlement Payment
April 5, 2011	Last Day to Request Removal of Books from Google Library Project