



WILLIAM MORRIS ENDEAVOR  
ENTERTAINMENT

A TALENT & LITERARY AGENCY

WME has advised its clients, to opt out of the Settlement for the following reasons:

We believe that our clients benefit from their stature, the negotiating power of the Agency, as well as long established precedent in our book contracts that other authors may not share. Our original memo was addressed to and meant for our clients alone. We give no advice to authors in general, and it might conceivably be in an individual author's best interest to not opt out of the Settlement. Our advice designed specifically to meet the needs of our clients.

The terms of the Settlement are interminable. The duration, in the absence of a subsequent court order, is for the term of copyright for each subject book. While an author may change his or her election to allow in- and out-of-print books to be sold under the terms of the Settlement, the overall terms and limitations of the Settlement cannot be modified by either party.

There is an important right that is relinquished under the terms of the Settlement that the Authors Guild does not adequately address. In addition to waiving their right to sue Google for infringement, they waive, again for the term of copyright, their right to have Google remove their work from its database if they haven't done so within twenty-seven months from the Notice Commencement Date. As of today, it appears to us that non-display uses constitute fair use, but it is impossible for anyone to predict that such use will always be the case. And if such inclusion is not fair use, there may come a time when the author or their heirs might wish to remove their work from the Google database for any reason. The authors waive that right, forever, if they do not opt out of the Settlement.

Few if any major publishers currently intend to make their in print works available for sale through the Settlement program. When it comes to in print works, the more restrictive instructions to Google from either the publisher or the author control. This means that if either the author or the publisher does not want an in print work sold through the program, Google will not have the right to sell it.

It appears that most major publishers will not allow their out of print books to be sold through the Settlement program either. In fact, we believe that most major publishers will take the position that none of their backlist is commercially unavailable as defined in the Settlement because the availability of on-demand and other electronic editions will constitute the works as being in print.

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The Guild is confident that the terms of the Settlement will not impede an author's ability to negotiate separately with Google. However, we believe that the license being given to Google to publish and display with impunity out-of-print orphan works (where the rights owner is unknown and estimated by the Financial Times to be between 2.8 and 5 million books out of 32 million books protected by copyright in the United States) will open the door to establishing Google as the most comprehensive database, potentially a monopoly, with unfair bargaining power. Under current copyright law, no one can publish a book without the express written consent of the copyright holder. If the copyright holder cannot be found, permission cannot be obtained. While there are those who say that for the public good orphan works should be available, to give Google and Google alone this right, as well as a release from all claims, is simply not in the best interest of authors. The only way for any potential competitor to obtain similar rights, absent new legislation, is to infringe, get sued, and hope to reach a settlement on terms similar to Google's. We believe that giving Google special treatment does not appear to be the way to foster a competitive market place to the benefit of you, our authors.

It appears that only the rights owners of reverted works, if anyone, will sell books through the Settlement program, and since those same authors will necessarily need to negotiate separate terms for books published on or after January 5, 2009, there doesn't seem to be a compelling reason to lock in the royalty rate provided by the Settlement at the high cost of the other tradeoffs of the Settlement.

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