



A GUIDE FOR THE PERPLEXED PART II: THE AMENDED GOOGLE-MICHIGAN AGREEMENT

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On May 20, 2009, Google and the University of Michigan (Michigan) entered into an amendment that expanded the 2004 agreement that allowed Google to scan books in the Michigan library for inclusion in Google's search database. The new agreement (the Amendment) addresses the provisions of the proposed settlement agreement between Google and the plaintiffs in the Google Book Search litigation. If the settlement is approved by the presiding judge, the Amendment will govern the relationship between Google and Michigan. The Amendment is followed by an Attachment A, which sets forth provisions that will apply to all of Google's partner libraries, not just Michigan.¹ Many of the Amendment's terms update the 2004 agreement to comport with the settlement.² This paper will focus on the features of Attachment A and the Amendment that represent important additions to those earlier documents. Because of the complexity of these new provisions, this paper will simplify them for ease of understanding, and will not contain all their caveats and limitations.

Attachment A

1. **Pricing Review.** Attachment A establishes a "pricing review" mechanism that allows those libraries partnering with Google to challenge the price of an institutional

¹ Attachment A is titled "Collective and Certain Settlement Agreement Related Terms." For purposes of this paper, Google's partner libraries are those libraries that will provide Google with in-copyright books for scanning (i.e., Fully Participating and Cooperating Libraries under the settlement).

² See Jonathan Band, "A Guide for the Perplexed: Libraries and the Google Library Project Settlement," November 13, 2008, <http://www.arl.org/bm~doc/google-settlement-13nov08.pdf> for a detailed discussion of the settlement. This paper will assume that the reader is familiar with the settlement's provisions.

subscription through a “designated representative.”³ To understand this new procedure, we must first review how the price of the institutional subscription gets set under the settlement. Google has the responsibility of proposing to the Book Rights Registry (Registry) an initial pricing strategy consistent with these objectives: “1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and 2) the realization of broad access to the Books by the public, including institutions of higher education.” The Registry and Google can then negotiate terms of the pricing strategy for up to 180 days. If Google and the Registry do not reach agreement, the dispute will be submitted to binding arbitration. Only Google and the Registry would be parties to this arbitration.

The new procedure described in Attachment A of the Amendment would occur after the price-setting process described in the settlement. Sixty days after Google first offers an institutional subscription to the higher education market, and every two years thereafter, a partner library can initiate a review of the pricing of the institutional subscription to determine whether the price properly meets the objectives set forth in the settlement agreement. Only one review can be conducted per two-year period, so if several partner libraries seek to review the price, they need to do so jointly. The pricing review will be conducted by “an independent, qualified third party” designated by the initiating library, subject to Google’s approval. A.3.c(1). Google will pay up to \$100,000 of the reviewer’s fees and costs for the first two reviews.⁴ Google must provide to the reviewer specified categories of information, some of which the reviewer cannot make directly available to the

³ If the partner libraries receive discounts on the institutional subscription similar to Michigan’s (see below), they may not have the financial incentive to pursue this new pricing review procedure—though the discount may afford them the financial resources to do so.

⁴ If the partner libraries do not initiate a pricing review, Google will donate the fee it would have paid the review to the National Federation for the Blind. A.3.c(1).

partner libraries.⁵ The reviewer will prepare a Pricing Review Report, which he or she will provide to Google and all partner libraries.

Ninety days after receipt of the Pricing Review Report, any partner library can initiate an arbitration with Google. The arbitration will be subject to the dispute resolution procedures in the settlement agreement, meaning that the arbitrator's decision will be final and non-appealable. Additionally, "[a]ny such arbitration will be the exclusive mechanism to resolve disputes between Google and the Initiating Libraries with respect to whether Google is pricing the Reviewable Subscriptions in accordance with the objectives set forth in ... the Settlement Agreement." A.3.c(2). Thus, if a partner library agrees to Attachment A, then it is forgoing the ability to request the federal district court judge presiding over the settlement to review the institutional subscription price.⁶

If the arbitrator determines that the price is too high or that Google is not achieving the broad access required by the settlement, he or she can order Google to adjust the price. The adjustment amount is limited to Google's net revenue (in essence, 37% of the subscription price). A.3.c(3).

2. Information. Attachment A requires Google to provide partner libraries with the following information:

- a unique identifier number for each work Google obtains from a library;
- whether Google is treating the work as being in the public domain in the U.S., and the factual basis for the determination;
- whether the Registry has objected to Google's public domain classification and the outcome of any dispute regarding its classification;

⁵ This information includes the number of institutions that have institutional subscriptions; a histogram showing the percentage of institutions that pay each price within a pricing category; and Google's list price for each pricing category. A.3.c(1).

⁶ In the comments submitted by ACRL, ALA, and ARL to the court on May 4, 2009, the library associations argued that "[a]ny library or other possible institutional subscriber must have the ability to request this Court to review the pricing of an institutional subscription." See <http://www.arl.org/bm~doc/googlebrieffinal.pdf>.

- whether Google is treating the work as a government work;
- whether Google is treating the work as subject to the settlement agreement (a work is not subject to the settlement if it is in the public domain, its copyright owner opts out of the settlement, it is not a “book” within the meaning of the settlement, etc.);
- whether the work is being treated as commercially available;
- whether Google is making the work available through revenue models such as consumer purchase, institutional subscriptions, or advertising uses;
- for public domain and government works, whether Google has received requests to exclude inserts; and
- whether the work has been registered with the Copyright Office.

A.10.a. Google will disclose to the public whether it is treating a work as being in the public domain. The partner libraries cannot disclose to the public any of the other information listed above. A.10.g.

Google will disclose to the partner libraries through their designated representative its pricing strategies for the institutional subscription. The partner libraries may not share this information with third parties. A.10.d.

Additionally, in response to a request from the partner libraries’ designated representative, Google must provide information concerning whether a book is being excluded from any display uses for editorial or non-editorial reasons, and if for non-editorial reasons, whether the exclusion was for quality, technical, or legal reasons. A library may disclose to the public the identity of books excluded for editorial reasons. A.10.e.

Furthermore, Google must disclose to the partner libraries through their designated representative information that will enable the partner libraries to determine whether Google is meeting its obligations under the settlement agreement. This information includes:

- (i) the number of Library Scans made by Google at any time;
- (ii) the number of such Library Scans that are Commercially Available;
- (iii) the number of Excluded Replaced Books;
- (iv) the number of Not Counted Library Works;
- (v) the number of Display Books;
- (vi) the number of No Display Books;
- (vii) the number of Library Scans that are not authorized to be included in Institutional Subscriptions pursuant to the terms of the Settlement Agreement;
- (viii) the Required Library Services being provided for each of the Library Scans; and
- (ix) the number of Library Scans for which each of the Required Library Services is being provided.

Google will identify, if requested by the designated representative, the relevant specific books in each category above. This information cannot be shared with the public. A.10.f.

3. **Advertising.** If Google offers any higher education institution an institutional subscription without the display of advertising, Google must make a similar offer to every library where Google has digitized more than 50,000 books. A.7.
4. **Print Disabilities.** Google will provide the public with an accessible, searchable, online database listing which of the works obtained from libraries are accessible to people who have print disabilities. A.6.c. Google agrees to make public domain books available to people with print disabilities in the same manner as books under the settlement. 4.5.4.

Amendment

1. **Discount.** The Amendment requires Google to provide Michigan with a free institutional subscription for 25 years, assuming that Michigan meets certain conditions. These conditions include that Michigan makes its collection available to Google for scanning, and that its full-time equivalent (FTE) student body not exceed 60,000. After the 25-year period, Google will provide Michigan with a discount of the institutional subscription price of one FTE for each 50 books Google scanned

from Michigan's collection. 4.4.8(a).⁷ The Amendment also requires Google to provide Michigan with a discount to subscriptions that it may offer in the future that contain works proffered by Michigan but not subject to the settlement. 4.4.8(b).

2. **Library Digital Copies.** If Google digitizes more than 5 million works provided by Michigan, Google will provide to Michigan digital copies of books in Michigan's collection that Google obtained from another library. 4.4.2(b). This obligation applies both to books in copyright (and under the settlement) and books in the public domain (and thus not covered by the settlement). 4.4.4(a).

Michigan is permitted to provide digital copies of the public domain books to academic institutions and research or public libraries for non-commercial research, scholarly, or academic purposes.⁸ Before Michigan can provide it with a digital copy, the academic institution or library must agree in writing not to redistribute the copy to other entities (other than to scholars and users for educational or research purposes). The academic institution or library must also agree to use reasonable efforts to prevent bulk downloads of the copies, and to implement technological measures such as the robots.txt protocol to restrict automated access to websites where the content will be available. Michigan can provide copies of public domain books to other not-for profit and government entities on similar terms, provided that Google agrees. Google cannot unreasonably withhold or delay agreement. 4.4.4(b). In 20 years, Michigan can provide the copies of public domain books to any other entity, so long as the entity does not provide search or hosting services similar to Google's. 4.4.4(c).

If Google does not allow end users to search, view, and print the full text of a public domain book it has scanned, the restrictions listed above on what Michigan

⁷ Under this formula, Michigan would receive a free institutional subscription for providing a total of 3 million books to be scanned, a number that it has already exceeded. Thus, so long as it meets the conditions noted above, Michigan would receive a free institutional subscription.

⁸ Michigan can similarly distribute digital copies of books whose rightsholders have granted Google the right to make available the full text of the book without charge. 4.4.9.

can do with the copy of that book will not apply. However, Google is permitted to exclude a book from these displays for quality, technical, or legal reasons. 4.4.4(d).

If Google redacts any information such as photographs from the digital copies it provides Michigan, Google must inform Michigan of the location of the redaction. 4.4.5.

When Google improves a copy of a work provided to it by Michigan, Google must provide an improved copy to Michigan. To “improve” is defined as “to make changes to a Digital Copy that materially improve the viewability of text or the fidelity of the work....” Examples of improvements are to “make the text of a work easier to view by users with print disabilities and improvements to the Digital Copy from increased OCR accuracy.” 4.4.6.

3. **Beta Product.** Google must offer to Michigan an institutional subscription beta product, as authorized under the settlement. 4.4.9(e).
4. **Indemnification.** Google agrees to indemnify Michigan against third-party claims, including claims by the Registry for Michigan’s breach of its security obligations, except for breaches resulting from willful misconduct, intentional and knowing misconduct. 10.1(c).

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