

# Comparative Perspectives: Google Books Settlement with Copyright Holders in Japan

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I. INTRODUCTION.....	1012
II. GOOGLE BOOKS SETTLEMENT .....	1012

## I. INTRODUCTION

Unlike its United States (U.S.) counterpart, Google Japan<sup>1</sup> is not yet part of the Google Book Search copyright class action settlement. In fact, the publishing industry in Japan did not really concern itself with the possible implications of the settlement until February 2009 when the settlement administrator in charge of the copyright class action settlement placed a legal notice in vernacular publications in Japan, declaring that book authors, publishers, and other copyright owners of books in Japan could also be affected by the copyright class action settlement reached between the Authors Guild, Inc., the Association of American Publishers (AAP) and Google, Inc.<sup>2</sup>

## II. GOOGLE BOOKS SETTLEMENT

The notice essentially stated that all right holders have originally three months to opt out of the settlement before 5 May 2009.<sup>3</sup> It is noted that a sizable collection of in-copyright, Japanese language books held at U.S.

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1. See Google Japan, available at <http://www.google.co.jp> (last accessed Feb. 17, 2010).
2. Tomoko Otake, Google Books leaves Japan in legal limbo, *The Japan Times Online*, July 22 2009, available at <http://search.japantimes.co.jp/print/nc20090722a1.html> (last accessed Feb. 17, 2010).
3. *Id.*

libraries have actually been included in the Google Book Search Library scanning project.<sup>4</sup>

After the release of the notice, strong negative feedback from the Japan Book Publishers Association (JBPA) and Japan Writers' Association (JWA) were released sometime in April 2009.<sup>5</sup> In order to assuage the negative sentiments of the Japanese publishing industry, Google requested representatives of the AAP to visit Tokyo and have direct meetings with the concerned groups in the Japanese publishing industry to explain the conditions and terms of the settlement, and background of the then proposed settlement agreement.<sup>6</sup> The representatives also clarified that works circulated only in Japan would not be considered out of print.<sup>7</sup>

JBPA and JWA seemingly changed their negative views after the meeting by "supporting" the settlement, but the real factor behind the change is that staying within the settlement would actually give the organizations more control over the works as opposed to opting out and completely releasing all of their rights over the said works.<sup>8</sup> Some members of the industry were likewise quoted as saying that since they see little chance to go against a big entity like Google, they had no choice but to join the settlement.<sup>9</sup>

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4. *Id.* (While there is the general perception that many in-print books that circulated only in Japan could be considered out of print in the U.S. and therefore available for commercial use by Google, it is noted that nowadays anyone can buy such in-print Japanese books via online bookstores (e.g. Amazon.co.jp) as well. This leads to the issue of whether such in-print books are likewise "available" in the U.S. already.)
  5. The Japanese Book Publisher Association, an industry association of 464 publishers, has outlined five options for rights holders last April 2009:
    - (a) Participate in the settlement by taking no action;
    - (b) Opt out of the settlement, in which case rights holders must notify settlement administrators by Sep. 4;
    - (c) Raise objections on the terms of the settlement by Sep. 4;
    - (d) Participate in the settlement, then ask for out-of print books not to be displayed online;
    - (e) Participate in the settlement, then ask Google to erase all information about their books from the online database.

*Id.*

6. *Id.*

7. Otake, *supra* note 2.

8. *Id.*

9. *Id.*

Another organization strongly against the Search project is the Japan P.E.N. Club, which is the Japanese branch of the International PEN Club, an organization of writers. The PEN Club released a statement last 24 April 2009 concerning the settlement agreement and cited three main observations:

- (1) that the settlement would lead to a clear violation of the rights of reproduction under Japanese Copyright Law and that the settlement's acceptance of the fair use doctrine is not acceptable in Japan;
- (2) the adoption of the opt-out method in which the publishers' and authors' rights are protected only if they specifically request for it, will serve to weaken the position of the rights of the authors and publishers and violate the rights granted under the Berne Convention; and
- (3) the monopolization of information distribution.<sup>10</sup>

It is argued that allowing Google to take the lead in this project will lead to Google having a *de facto* monopoly over the publishing industry and adversely affecting the diversity of information distribution.<sup>11</sup> The creation of such a database by a single private corporation makes the information dependent upon the policies or existence of that corporation, and this could undermine the foundations of publishing culture itself. There is also the fear that monopolistic centralized management of copyright holder information in the registry set up with Google will result if the publishing industry abides with the settlement.<sup>12</sup>

It bears stressing that under the present Japanese Copyright Law,<sup>13</sup> there is no fair use exception for the use of copyrighted works of others. Japanese courts have likewise not adopted or recognized the fair use doctrine under American jurisprudence. Certain limitations to copyright are expressly provided, such as, among others, reproduction for private use;<sup>14</sup> reproduction in libraries, etc.;<sup>15</sup> quotations;<sup>16</sup> reproduction in school

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10. Takashi Atoda, The Japan P.E.N. Club's statement concerning the settlement agreement for the Google Book Search lawsuit, Apr. 24, 2009, *available at* [http://www.japanpen.or.jp/en/statement/japan\\_pen\\_clubs\\_4.html](http://www.japanpen.or.jp/en/statement/japan_pen_clubs_4.html) (last accessed Feb. 17, 2010).

11. *Id.*

12. *Id.*

13. Chosakukenhō [Copyright Law], Law No. 46 of 1984, as Amended.

14. *Id.* art. 30.

15. *Id.* art. 31.

16. *Id.* art. 32.

textbooks, etc.;<sup>17</sup> reproduction for preparing a textbook in large print;<sup>18</sup> broadcasting, etc. in school education programs;<sup>19</sup> reproduction, etc. in schools and other educational institutions;<sup>20</sup> reproduction, etc. in examination questions;<sup>21</sup> reproduction, etc. for the visually handicapped;<sup>22</sup> reproduction, etc. for the aurally handicapped;<sup>23</sup> performances not for profit making;<sup>24</sup> reproduction, etc. of articles on current topics;<sup>25</sup> exploitation of political speeches, etc.;<sup>26</sup> reporting of current events;<sup>27</sup> and reproduction for judicial proceedings, etc.<sup>28</sup> Furthermore, under Japanese Copyright Law, publishers do not have any neighboring rights over the books they publish — only authors have rights<sup>29</sup> and the authors are not responding to the settlement. The law clearly provides that the owner of the reproduction right (e.g. author of the book) may establish the right of publication in favor of a person who undertakes to publish the work in a writing or a printing.<sup>30</sup> Stated otherwise, the only way for publishers to have rights over the books is when the authors establish the right of publication in favor of the publisher.

Another significant difference between U.S. and Japanese laws is that Japan still does not have a class action system.<sup>31</sup>

Later, the opt out deadline was extended to 4 September 2009.<sup>32</sup> During that time, the remaining issues were not really on the digitalization of the books but the lack of explanation and information disclosure on the settlement.<sup>33</sup>

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17. *Id.* art. 33.

18. *Id.* art. 33*bis*.

19. Copyright Law, art. 34.

20. *Id.* art. 35.

21. *Id.* art. 36.

22. *Id.* art. 37.

23. *Id.* art. 37*bis*.

24. *Id.* art. 38.

25. Copyright Law, art. 39.

26. *Id.* art. 40.

27. *Id.* art. 41.

28. *Id.* art. 42.

29. *Id.* art. 17.

30. *Id.* art. 79.

31. Ikuo Sugowara, The current situation of class action in Japan, *available at* [http://www.law.stanford.edu/library/globalclassaction/PDF/Japan\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Japan_National_Report.pdf) (last accessed Feb. 17, 2010).

32. Otake, *supra* note 2.

33. *Id.*

As of 19 November 2009, however, books published in Japan and not filed with the U.S. Copyright Office are not included in the coverage of the court-approved amended settlement agreement. In the amended settlement agreement dated 13 November 2009, only works published in U.S., Canada, United Kingdom, and Australia or works registered at the U.S. copyright office — regardless of the country of publication — are included in the settlement.<sup>34</sup> While the publishing industry is likewise concerned as to how Google will treat the data of in-copyright Japanese books that were already scanned as part of the library project in the U.S., the non-inclusion of Japanese books published in Japan has raised similar concerns from the Japanese publishing industry. Since these books will not be part of the settlement, the publishing industry and representative organizations are currently conducting dialogue with representatives of Google in U.S. and Japan.<sup>35</sup>

To date, Google has implemented a procedure, which is independent from the settlement, for publishers in Japan who want to exclude their published titles from the scanning project with the U.S. libraries.<sup>36</sup>

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34. Amended Settlement Agreement, art. 1, 1.19, *Authors Guild, Inc.*, Case No. 05 CV 8136 (S.D.N.Y. Oct. 28, 2005), available at <http://www.googlebooksettlement.com/intl/en/Amended-Settlement-Agreement.zip> (last accessed Feb. 17, 2010) (This means that Japanese books can be included as well).

35. See Shinbuka Online, available at <http://www.shinbunka.co.jp//tokushu02/g-091118-01.htm> (last accessed Feb. 17, 2010).

36. See Google Books Japan, available at <http://books.google.co.jp/support/bin/answer.py?hl=jp&answer=43756> (last accessed Feb. 17, 2010) (Google is running the scanning project with Keio University — only for works for the public domain — and with publishers which joined the Partner Program as well. With respect to the latter, the exclusion process is for their in-copyright books which may have been scanned or will be scanned as part of the scanning project in the U.S.).