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NOTE

from: General Secretariat of the Council
to: Working Party on Intellectual Property (Copyright)
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Subject: Google Books
– Statement from the German delegation

Delegations will find in Annex, for information, a Statement by the German delegation relating to item 7 of the draft agenda for the meeting of the Intellectual Property (Copyright) Working Party on 11 September 2009 (CM 3176/09).

Google Book Settlement – Statement on behalf of the Federal Republic of Germany in the run-up to the working party on intellectual property (copyright) on September the 11th.

The German Government regards books as an essential part of the national and European cultural heritage and identity. In times of digitization it is therefore indispensable that books be not only accessible as printed versions but also electronically, especially in the Internet. This is why we appreciate the efforts of all those involved in this process. While we are open to new technological initiatives that facilitate access to information, such initiatives must comply with basic tenets of copyright law. In the context of the Book Search project, Google has, however, digitized millions of published works partly without the authorization of the rights holders. Insofar the German Government is concerned about this development.

The Authors Guild and the Association of American Publishers as plaintiffs have sued Google at the United States District Court, Southern District of New York, for copyright infringement. The lawsuit is a class action which means that the decision affects not only the parties to the legal dispute, but all other members of the class as well. The parties have negotiated a highly complex settlement agreement. This settlement would bind every member of the class including German and European authors and right holders once it is approved by the court. In our view, this settlement is not in line with internationally agreed principles of copyright and fails to provide a fair and equitable basis for Google's activities.

Under the German Copyright Act, as well as under the EU Copyright Directive, authors as right holders must give their consent before any literary work is copied or displayed. Digitization constitutes a reproduction and this is an exclusive right of the author. The World Copyright Treaty as well as the Revised Berne Convention for the protection of Literary and Artistic Works provide that the prior consent of the rights holder is mandatory before copyright-protected works may be utilized. Therefore, in the opinion of the German Federal Government, the settlement is in violation of these international treaties. At EU level, the Federal Government highlighted this issue on various occasions, for instance during a meeting of the Competitiveness Council by the German Minister of Justice Brigitte Zypries and on occasion of the Council of Culture and Media by State Minister Bernd Neumann, the Federal Government's Commissioner for Culture and the Media.

Upon the initiative of German Minister of Justice Brigitte Zypries, the German Government has therefore filed an *amicus curiae* brief in the legal dispute on August 31st. Germany as *amicus curiae* has apprised the court of the significant adverse impact that the proposed Settlement would have on German authors, publishers and digital libraries, in particular, and more generally on authors, publishers and digital libraries in the European Union.

Germany has asked the New York court to reject the proposed Settlement as a whole or at least to remove German authors and right holders from the class so that they are not affected by the Settlement. German right holders may then make their own decisions as to which rights, if any, they assign to Google.

The German government's primary aim is to inform the court about the transatlantic implications of the settlement. The Settlement's effects would clearly go far beyond the territory of the United States. It would affect German and European right holders as well as suppliers of comparable online services as well. While Google claims to make the digitized works available only in the United States, online services do not know boundaries. Although German or European IP addresses may be blocked, access from Germany or Europe is possible without major effort.

The proposed Settlement also raises a fundamental issue of fairness, causing concern that German and European authors may find their own voices unheard. Both plaintiffs, the Authors Guild as well as the Association of American Publishers, limit their membership in essence to US parties and therefore cannot adequately and fairly represent German (and European) authors and publishers. Despite these shortcomings, the Settlement would provide Google with use rights which it would never have received had it followed the proper procedure, i.e. secured the consent of the right holder in every case. Such a broad scope as provided by the Settlement must be clarified in an impartial proceeding which strikes an appropriate balance between the concerns of all affected authors and publishers as well as users, taking into account the national and international implications. Yet this purpose is not served by resolving the issue with a settlement concluded before a US-Court.

With the Settlement Google is acquiring a significant competitive advantage as well. This is because the digital copies are also used to respond to search queries from Germany and Europe. With this Google offers a service that pursuant to German or European law may be developed only following prior consent by the right holders. The proposed Settlement will have an immediate impact upon German authors, publishers and digital libraries by setting an industry-changing precedent that not only gives defendant Google an unfair advantage over all other digital libraries – including the European Digital Library (Europeana) – in the United States and in Europe, but will also flout German and European laws that have been established to protect German and European authors and publishers, including with respect to digital copying, publishing and the dissemination of their works.

As stated earlier, the German opposition to the Google books Settlement is not blindly directed against new technological developments. It aims to safeguard the necessary respect for copyright and to ensure an appropriate balance between copyright holders' interests in the safeguarding and exploitation of their intellectual property and the interests of the consumers and science in using the works of right holders and the interests of the public in access to the cultural content.

Therefore Germany requests the European Commission to analyse the impact of the Google book Settlement on European right holders and European online service providers and welcomes the recent announcements of the European commissioners Viviane Reding and Charlie McCreevy to this effect. If there is actually a need for amendments of the European legal framework, such amendments should be prepared in an open and transparent process with input from all concerned parties. International copyright rules cannot be changed in a settlement among US-Parties before a US-Court. Google should be prevented from establishing a new worldwide copyright regime without any input from those who will be greatly impacted – German and European authors, publishers, digital libraries and European citizens.
