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INFORMATION NOTE

from :	General Secretariat of the Council
to :	Council
Subject :	Google Books - Information from the Commission

Delegations will find attached an information note from the Commission on the above subject entitled "The Google Books Settlement (GBS) - Impacts from a European perspective". This item has been put on the provisional agenda, under "other business", for the forthcoming Education, Youth and Culture Council meeting on 26 and 27 November 2009.

The Google Book Settlement (GBS) –
Impacts from a European perspective

Information from the Commission for the Education, Youth and Culture and for the Competitiveness Council

27 November 2009

1) Background

Both the Education Youth and Culture Council of 12 May 2009 and the Competitiveness Council of 28 May 2009 dealt with the Google Books Settlement (the "Settlement" or the "GBS"). Member States invited the Commission to assess possible impacts of the GBS on European owners of copyright, cultural diversity and competition in Europe and to report back in due course.

This note responds to the Council's request. Since then, the parties have revised their initial Settlement. An amended agreement was submitted to the US District Court, Southern District of New York on November 13, 2009. The Court will set a new timeline, which will likely include a fresh notice period and a new objection period. A Final Fairness hearing in now expected for early 2010.

2) The Google Book Settlement

The GBS is a US class action agreement reached on 28 October 2008 between the Authors Guild and the Association of American Publishers and Google. It stems from a 2005 lawsuit brought against Google by US publishers and authors on the grounds that Google was infringing their copyright by digitising and showing snippets of books contained in US library collections without seeking their prior authorisation (Google Library Project). The aim of this project is to create a vast distribution platform for the books contained in these libraries' collections, many of them out-of-print, by making them searchable and available online.

Under the terms of the Settlement, Google will compensate right holders whose works were scanned and pay rightsholders 63% of revenues earned from the commercial uses Google makes of the books. Google will also fund the creation of a Book Rights Registry. The total initial cost of the Settlement is estimated at 125 million USD.

The terms of the Settlement give authors and publishers the possibility to either "opt-out" of or "stay in" the Settlement. However, the revised Settlement has been significantly narrowed in scope. Under the terms of the November 13, 2009 revisions, only right holders who either registered their copyright with the U.S. Copyright Office or published their book in the U.K., Australia, or Canada by January 5, 2009 are a member of the settlement class and are able to benefit from the Settlement's provisions. Thus, the Settlement essentially concerns Anglo-American right holders although those European right holders that registered their works with the US Copyright Office would also be covered.

Right holders who published books in these four countries (United States, United Kingdom, Australia, and Canada) who opt out are removed from the Settlement and Google cannot continue to use or digitize their books. Right holders in the above mentioned jurisdictions can stay in the Settlement either by doing nothing - which means they are automatically covered by the terms of the Settlement - or they can actively choose from the various options available under the Settlement terms and decide what Google can do with their works. For its part, the Settlement would allow Google to continue to use and digitize books from these countries and make them available through various subscription models.

For it to be binding on the parties, the Settlement must be approved by the US District Court, Southern District of New York. A Final Fairness Hearing is expected to be scheduled by the Judge Settlement in early 2010.

3) EC meetings on the Google Books Settlement

At a hearing on the Settlement organised by DG MARKT on 7 September 2009 as well as in a series of bilateral meetings on 8 September 2009 between Commissioner Reding and key stakeholders, the representatives of the publishing industry, the ICT sector, reproduction rights organisations, libraries, Member States delegates, civil rights and consumer organisations expressed their views on the Settlement.

At the hearing, Google and the other parties to the Settlement explained the main features of the GBS, including the remuneration structure for right-holders and the functioning of the proposed Books Rights Registry which is effectively a new collecting society administering the Settlement on behalf of right holders.

Libraries welcomed the deal as allowing access to previously unavailable material and stimulating interest in printed books. In this context, they invited the European Commission to clarify the legal status of orphan works at European level. These organisations would welcome uniform EU rules on when and how such works can be scanned and distributed online.

Criticism of the Settlement was voiced by authors, booksellers, publishers- and IT industry associations. Apart from concerns about adequate representation of foreign rights holders, these groups fear the monopolisation of online access to digitised books. Libraries' and civil liberties' associations raised possible shortcomings of the Settlement that could lead to problems in terms of privacy, censorship, and over-pricing.

Several stakeholders expressed concern about the limited geographical scope of the Settlement which would give US citizens and scholars a competitive edge over Europeans in terms of access to the information contained in Google Books. Most stakeholders' views in fact converged in that the Settlement widens the trans-Atlantic gap with respect to online access to scientific or educational materials and Europe's own cultural heritage. This situation highlights the urgent need to allow for similar projects to develop in Europe.

The French and German authorities have submitted an *amicus curiae* brief to the US Court, formally opposing the Settlement and challenging its compliance with the international copyright framework. France also voiced concerns at the hearing that the Settlement, by comprising all out-of-print and orphan works in a unique database, might be detrimental to cultural diversity.

4) Assessment of the effects of the Settlement on Copyright, Culture and Competition in Europe

Copyright

The Settlement only allows Google to digitise and use books within the **US territory**. With the revised Settlement, books published in the EU, with the exception of the UK, are now formally excluded from the Settlement class. Only works registered with the US Copyright Office or published in the UK, Australia, or Canada are within the scope of the Settlement and thus only titles registered in the US or published in these countries will be available on Google's services. It is assumed that the newly defined settlement class includes approximately 80% of English language works. It is only those works that will now be read and researched at American universities that subscribe to the Google Book Search services.

"*After hearing feedback from foreign rights holders, the plaintiffs decided to narrow the class to include countries with a common legal heritage and similar book industry practices*", the parties announced on 13 November. The message is clear: books published in countries of the so-called 'copyright' tradition[1] will be available in services spawned by the Google Books services in the US while the other (mostly European and Asian) jurisdictions will remain outside.

That does not mean that the Settlement has no effect at all on books published in the EU, with the exception of the UK. Anyone who either registered their copyright with the U.S. Copyright Office or published their book in the U.K., Australia, or Canada by January 5, 2009 is a member of the class. This still might include rights holders from countries other than the US, the UK, Australia and Canada, although the exact number of works registered by foreign right holders with the US Copyright Office is not clear.

[1] As opposed to the 'droit d'auteur' tradition.

The task of determining the precise contours of the newly defined class is complicated by the fact that US Copyright Office registration records are available in an electronic catalogue only from 1978 onwards
[2]. Prior registrations need to be searched manually in the Office's Catalogue of Copyright Entries (CCE)[3]. In these circumstances, it is difficult for the Commission to define precisely how many European right holders are still comprised in the settlement class;

Only members of US, UK, Australian and Canadian publishers will, in future, be represented on the board of the Books Rights Registry, the body that administers the terms of the Settlement (Amended Settlement, 6.2.(ii).). In light of the ambiguous scope of the newly defined settlement class, this raises new issues of adequate representation.

Publishers or right-holders from countries other than the US, UK, Australia and Canada (who either did not register in the US, or did not publish in the UK, Canada or Australia), will now have to negotiate individually to become part of Google Books Search Services. "*Rights holders who are not members of the amended class can't be part of the Settlement*", the parties declare. These right holders must now negotiate inclusion in the services generated by the GBS with Google directly: "*Google remains interested in working directly with international rights holders and organizations that represent them, including those in countries excluded from the Settlement, to reach similar agreements to make works available worldwide*".

Commercial Availability, the term which was subject to several renegotiations (only books that are *not* commercially available can be shown in full online without prior authorisation), is now limited to "one or more then-customary channels of trade into purchasers within the United States., Canada, the United Kingdom or Australia" (Amended Settlement, 1.31).

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2 http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First

3 The Copyright Office printed the *Catalog of Copyright Entries* from 1891 through 1978. From 1979 through 1982, it was published on microfiche.From 1979 through 1982, it was published on microfiche.

As E.U. publishers (except those in the UK) are no longer covered by the Settlement, there is no longer any formal written engagement to consider EU channels of trade in order to determine whether a book is commercially available. In consequence, there appears also no more corresponding engagement to consult E.U. databases in order to determine the commercial status of books.

Under the terms of the revised Settlement, in order to determine whether a book is 'commercially available', Google will now only undertake to "use third-party databases from a range of United States, Canadian, United Kingdom, and Australian sources that can be obtained on fair and commercially reasonable terms" (Amended Settlement, 3.2.(d)). It appears that these arrangements supersede a commitment letter negotiated with E.U. publishers[4], although some ambiguity on the validity of the commitment letters persists. The Commission is engaged in clarifying the precise status of the commitment letter with the settlement parties.

The revised Settlement does not contain clear indications on the fate of European books that were already scanned under the terms of the previous version of the Settlement. The Commission understands that no right holder whose book was digitized prior to the revised Settlement has received any compensation payments from Google. The issue of repayment therefore does not appear to arise. In addition, it has become clear that only right holders who remain in the settlement class can benefit from the 'remove' (Section 3.5.(a)) or 'exclude' (Section 3.5.(b)) provisions in the Settlement. This feature might put those European right holders outside the scope of the settlement at a disadvantage in relation to their UK

[4] Two important concessions to safeguard the copyright of European right holders were outlined in a commitment letter dated 4 September 2009 from the parties to the Settlement addressed to 17 European publishers. Firstly, European books, which are out of print in the US but are still commercially available in Europe, may not be displayed on Google Books services without the explicit consent of authors or publishers. In order to determine the out-of-print status of books Google will now also consult European databases that reliably reflect whether books are sold in the EU. In practice this means that European books sold in European channels of trade will also be considered as 'commercially available' within the terms of the Settlement. Secondly, two non-US representative right-holders will sit on the Board of the Books Rights Registry to represent the interests of non-US right-holders.

counterparts. For example, right holders that are now no longer part of the Settlement class cannot prevent snippet previews of their works in the United States (under the doctrine of 'fair use') while those in the Settlement can do so ('snippet preview' is a display use that can be excluded only by Settlement parties). On the other hand, right holders outside the settlement class remain free to litigate the precise scope of 'fair use' with Google in the US.

The Settlement now contains precise rules on how money collected on behalf of unknown or unlocatable right holders (orphan works) is to be distributed. The Settlement now also specifies that a portion of the revenue generated from such unclaimed works may, after five years, be used to locate rights holders, but will no longer be used for the Registry's general operations or redistributed to other rights holders.

In addition, the Registry may ask the District Court, after 10 years, to distribute these funds to non-profit rights holder organisations or the 'reading public', and may provide the non-distributable funds are given to the appropriate government authority in compliance with state property laws. The Registry will now also include a Court-approved fiduciary that will represent rights holders of unclaimed books, act to protect their interests, and license their works to third parties, to the extent permitted by law (Amended Settlement, 6.2.(iii)).

Concerns have been raised as to the compliance of the Settlement with international copyright treaties, in particular the Berne Convention, which requires that authors enjoy copyright protection irrespective of any formalities. An important issue in this respect is that the notification or registration procedures under the GBS arise under the terms of a private Settlement between the litigating parties. Apart from judicial approval of the Settlement, there is no state-imposed formality.

In addition, the question arises whether comparable Settlement agreements that may be concluded in other jurisdictions may restrict protection granted to US works and US right holders in line with provisions that the revised Settlement entails for non-US works and right holders.

Culture

GBS shows that new business models are evolving to bring more copyright protected works to an increasing number of consumers. It is therefore an important step in the digitisation and online accessibility of cultural content which in the US is promoted and implemented by a private entity. This goal is largely shared and encouraged by the European digital libraries initiative, an initiative led by public entities.

The Settlement, if approved, will bring several benefits to the US and to the US only. It will significantly increase the number of English-language books available to US users for online search and access, which were hitherto neither searchable nor generally accessible because of their out-of-print status. Secondly, the financial incentives of the Settlement and the obligations imposed on the Book Rights Registry may significantly reduce the number of (alleged) orphan works by bringing their right holders out of the shadows. It will also provide users with additional ways to purchase copyrighted in-print books, as well as an additional source of revenue for right holders for books which did not, until now, yield any revenue to them, in the absence of publication.

Because of the territorial limitation of the Settlement, the increased access to digital books, and in particular to out-of-print and orphan works, will benefit only US users. Also, because of the narrowed scope of the Settlement, the benefits will be restricted almost exclusively to resources in English. It is therefore crucial to step up efforts in Europe to make digitized material from libraries, museums, archives etc accessible online to European citizens. In that respect, it is essential to strengthen Europeana and ensure that the site also gives negotiated access to in-copyright and orphan works in order to provide online access to European users, thus taking into account the public interest dimension of access to culture and preservation of cultural heritage in Europe, in particular responsibilities for long term preservation of digitised culture and equity and promotion of cultural diversity.

Competition

The Settlement only operates *inter partes*, that is, between Google, publishers and authors. In theory, Google's competitors cannot avail themselves of the terms of the settlement in their relationship with authors and publishers. They would have to conclude a similar class action settlement to obtain similar terms.

A number of potential competition concerns have been raised by, *inter alia*, the US Department of Justice, in particular with respect to possible pricing restrictions and the creation of a single, arguably unchallengeable, provider of access to digitised books (including orphan works).

To respond to the DoJ's concerns, Google has amended its proposed pricing algorithm which will now aim at simulating prices in a competitive market. Moreover, prices for books will be established independently of each other. Regarding access to orphan works, Google will be required to allow third parties (such as Amazon) to sell consumer access to books, with the reseller receiving a majority of Google's 37% share of the revenue split. However, it has been argued that under the US class action system, Google will be the only entity free from the risk of litigation by affected right holders (as defined under the terms of the Settlement) when exploiting digitised orphan works.

The settlement has not led to filing of a formal complaint with the Commission against Google by any of potentially affected parties (including Google's major competitors). The effects of the revised Settlement (and its future implementation) on competition in the EU appear limited although they cannot be entirely excluded at this stage. Therefore, the Commission is closely monitoring the market developments, including any arrangements deploying the Google Books project in Europe.

5) A European agenda for making books accessible online

First, although the Settlement is limited to services accessible in the US territory and excludes books either not registered in the U.S. or published in the United Kingdom, Australia or Canada, the Commission will continue to monitor developments with respect to the deployment of the Google Book Search Project in Europe.

Second, based on the above analysis, the Commission suggests increased efforts jointly with Member States to complete ongoing European digitisation initiatives. Efforts should aim to ensure that books published in all Member States are digitised and made available for the benefit of European users and rights- holders in full respect of European copyright legislation.

The Settlement highlights that European efforts to digitize books must be reinforced. Digitization of cultural products, including books, is a Herculean task that requires close cooperation between right holders and ICT companies, as well as between the public and the private sector. The Commission therefore supports approaches which are open to private-sector initiatives and to technological innovation that comply with intellectual property rights and are pro-competitive in nature.

Commercial projects alone cannot cover the public interest dimension of the digitization of cultural products. The Commission recalls that this is the reason why, already in 2005, it launched the project of the European Digital Library Europeana. The Europeana service currently includes 4.6 million digitized cultural objects, and the Commission expects this number to grow to 10 million by 2010. To this end, the Commission calls on all Member States to step up their efforts and contribute directly to Europeana. It is only by effectively making all books and other content digitised by the national cultural institutions accessible for use through Europeana that this very important goal can be achieved.

While public domain books can be digitised and made available online without prior consent, the digitisation and online dissemination of in-copyright books requires the permission of the relevant right holders. Identifying right holders and clearing rights necessary for inclusion in digital libraries in 27 Member States is often a complex task. Orphan works are a particular challenge because it is not possible to seek prior consent from right holders who cannot be identified or located by the cultural institution willing to digitise them.

The Commission therefore considers it important that immediate follow-up action should be taken including[5]:

[5] As already spelled out in the Communication on copyright in the knowledge economy, COM (2009) 532 of 19 October 2009 and in the Communication on Europeana: next steps of August 2009

(i) Defining suitable solutions to address the legal implications for large scale digitisation projects, in particular of orphan works, including establishing common standards on the level of due diligence in searching for the owners of orphan works and resolving the issue of potential copyright infringement when orphan works are used. The Commission is launching an impact assessment on the orphan works problem which will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works, including a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works or guidance on cross-border mutual recognition of orphan works.

(ii) addressing in close cooperation with the reprographic rights organisations, rights holders and cultural institutions, the clarification of the legal implications of mass-scale digitisation and possible solutions for the issue of transaction costs for right clearance. The Commission will examine in particular, collective licensing, which could be supplemented by an extended collective licensing system, whereby a rights manager is deemed to represent "outsiders" -- right-holders not formally members of the clearing system, and on the basis of a due diligent search. On this basis, the Commission will consider whether there is a need for further initiatives as part of the new strategy on intellectual property including the possible creation of a statutory exception for such digitisation efforts.

(iii) stepping up efforts to find practical solutions for easier rights clearance, in particular by interconnecting existing rights registries in Europe (work in this area has been initiated via the EU-co-funded ARROW project). ARROW, once its scope is extended to comprise all EU Member States, has the potential to serve as a basis for setting up a fully-fledged EU rights registry. EU rules might be necessary to guarantee equal access to such a registry and its affordable and transparent pricing. Rules on rights clearance and copyright liability may complement the use of works identified in a rights registry.
