

Google Book Settlement – under the EU Microscope

The review of the Google Book Settlement in the EU reached a new stage on 7 September 2009 with the Commission's Internal Market services holding a public hearing.

The hearing was largely inspired by a request made by the German Government for the Commission to investigate the IP and antitrust implications of the proposed Settlement. The Commission will in the next few weeks deliver a number of oral reports to various meeting of the Council of Ministers and follow up with a written report to the Council in October. The October report will reflect the views of the Commission as a whole which means that services other than DG Markt will be involved in its drafting, including DG Comp, DG Education and Culture and, above all, DG Information Society.

The hearing was attended by around 250 people, representing many rights holders and others involved in the book trade, as well as by representatives of most of the EU Member States, the press and a variety of other bodies such as ICOMP and the Internet Archive. Google was represented by Dan Clancy (Google's lead spokesperson at the hearing) and Daphne Keller (Google's other representative). The Authors' Guild was represented by Michael Healy.

The format of the hearing was focused upon Google and the Authors' Guild. There were four panels of 6 or 7 speakers, each given 6 minutes to make a presentation. Following each panel, Google and the Authors' Guild were given around 30 minutes to respond and to answer questions from the floor. ICOMP spoke on the third panel, dealing with the Book Rights Registry.

The panellists and those asking questions overwhelmingly agreed that the proposed Settlement is seriously flawed in terms of the copyright issues (it reverses the default legal position by requiring opt-out rather than opt-in) but also in relation to the establishment of a private monopoly for digital books. The harmful effects in related markets such as search and search related advertising were covered in less detail.

However, despite these IP and competition concerns there were a substantial number of organisations who seemed to think that the proposed Settlement is either a good starting point, or the best deal on offer. Outright opponents were fewer in number, with the French Ministry of Culture, the German Book Publishers, ICOMP, the Internet Archive, individual authors and the photo/fine art interests standing out.

The Press was present in reasonably large numbers at the start of the hearing and press coverage has been fairly extensive. ICOMP issued a joint press release (which can be found at <http://www.i-comp.org/media/press-releases>) with the following organisations:

- Börsenverein des Deutschen Buchhandels (German Publishers' and Booksellers' Association).
- CEPIC (Coordination of European Picture Agencies Press Stock Heritage) – an ICOMP member.
- Internet Archive / Open Book Alliance

- EBLIDA – European Bureau of Library, Information and Documentation Associations.

The main points made at the hearing

The hearing started off with a recorded interview by a Commission official with author James Gleick. He emphasised that he was one of those who initially had problems with the proposed Settlement and that the scanning was a violation of the law but claimed that the Settlement solved all of his problems and was now a very good deal, mostly because authors retained full control” over what would be done with their work.

Following this opening, Google’s representatives made an opening statement including the argument that “right holders wanted us to develop a system which allowed them to sell out of print works”. According to Dan Clancy the proposed Settlement “is a US solution, not a European one; what is the appropriate solution for Europe is the purpose of today’s hearing”. He argued that the Book Rights Registry (BRR) would be completely independent, that the rights granted to Google were completely non-exclusive and that the proposed Settlement was a “solution for the past”.

The comments made by Dan Clancy and Daphne Keller were followed by a statement by Michael Healy, who spoke as the future executive director of the yet to be established BRR.

The comments made by the various parties appearing at the hearing can be summarised as follows:

The rights holders, which included the Boersenverein (the German Publishers' and Booksellers' Association), the UK Publishers' Association and their European Umbrella organisation the FEP/FEE (European Federation of Publishers) and a small number of individual authors (or their executors), all emphasised how the Settlement violated their copyrights, but most of them also emphasised that they were not opposed to digitisation if it was done in a way which respected their copyrights. The Boersenverein mentioned the German initiative to make in-copyright books available online, in a database the contents of which would also be offered to be included in Europeana. The FEP mentioned ARROW, their initiative to make orphan books available online.

The UK Publishers made the point that the knowledge society required not only new means of distribution, but also that authors' rights were respected. It saw “print-on-demand” as an important new way of making books available. However, it expressed concern that Google would be granted privileged access to orphan works and in particular saw a need for other search engines to be involved. It emphasised that there could be no similar solution to the proposed Settlement in Europe because of the absence of both class actions and the 'fair use' exception to the exclusive rights granted by copyright rules.

The FEP stressed that there had been no prior consultation with European publishers before the proposed Settlement was announced. The FEP said that European authors and publishers expected the issue of 'commercial availability' to be applied to their works in the same way it applies to US works. The FEP also addressed a question to Google about the contracts that had been concluded with the European Libraries who had made their books available for scanning. The FEP asked if these contracts included a clause reserving the right to search the database and the works they contained to Google and only Google. Dan Clancy admitted this and defended it by pointing out the investment they made by scanning

the books. The Boersenverein came back to this and accused the libraries, one of which was present at the hearing (the library of Ghent University) of offering books which had been bought with public money, to just one private party.

Julia Wright, speaking for the estate of her late father Richard Wright, complained that the authors guild had represented her and other authors without ever having asked for their position. A European author, Bernard Lang who also represented the French National Institute of Computer Science and Control, pointed out that the Settlement was a US-based solution and that solutions in other countries would almost certainly differ, thus making a mockery of the harmonised system that the Berne Convention had mandated.

The publishers also stressed that the concept of "moral rights" was no-where to be found in the proposed Settlement.

The collecting societies of authors and other right-holders had a more difficult balancing act to perform. On the one hand their members were opposed to the violations of their copyrights that the proposed Settlement entailed and several pointed out that Google had started the scanning exercise completely illegally. Yet most of them will manage the rights for those of their members who decided not to "opt-out" and in this way they will have to work with Google and the BRR. Although VG Wort, the German collecting society therefore voiced some of the more general concerns, the British "Authors Licensing and Collecting Society" was one of the most outspoken defenders of the proposed Settlement.

For the booksellers, the European Booksellers federation criticised the Settlement in the strongest terms, pointing out not only that it violated copyrights, in particular article 5.2 of the Berne Convention, but also that it would give Google a de facto monopoly. The booksellers were not against digitisation and some booksellers were among the main parties currently making books available online. But the advantage that Google would gain made it impossible for them to compete on the same terms - any other scanning project would be at a huge disadvantage. The monopolistic position of Google would give rise to less choice, the risk of a price fixing cartel and a threat to the entire book industry. The fact that Google would have sole discretion as to which works were digitised was not a good thing.

The libraries were well represented and in addition to Ghent University included the International Federation IFLA and its European counterpart EBLIDA. The IFLA representative was critical and stressed the monopolistic nature of the project and the difficulties that any competing project would have to get off the ground.

The German National Library considered that it was very unlikely that any other competing entity would be created and that the competitive disadvantages of any competitor had to be avoided. The proposed Settlement had to be genuinely non-exclusive and would need to be subject to an antitrust audit. Otherwise it would strengthen Google's market power and give enormous power to Google and Google alone.

The Ghent University librarian saw only the positive side of the scanning arrangement with Google, which in their case only applies to books that are no longer in copyright (i.e., pre 1879). But she emphasised how at a recent event in the Netherlands all libraries present were very eager to have their collection scanned by Google. LIBER, the association of European research libraries presented a more balanced position. They recognised the restrictions resulting from copyright and wanted to see them upheld, but they were also

concerned about a situation in which US researchers would have easy online access to books from around the world while European researchers did not have the same possibilities.

The CCIA defended the agreement and refuted that Google would have even a de facto, let alone a legal monopoly on orphan works and that the most favoured nation clause (whereby the BRR cannot offer licences to third parties on more favourable terms than those it grants Google) clause had any significance, given that it was valid “only” for 10 years.

ICOMP stressed the need for solutions which promote competition in online services, recognise the balance between users and rights holders, and are clear and intelligible – particularly as regards European rights holders - as opposed to complex and opaque. ICOMP said that its concerns were not only about the effects the proposed Settlement would have on online access to and sale of books but also the effects on online search and search related advertising. The proposed Settlement would create a de facto monopoly for digital access to orphan works (including many European works which are not actually orphan works but which are merely not commercially available in the US); raise such massive barriers to anyone wishing to compete with Google that market entry can realistically be forgotten: give Google exclusive access to a vast amount of data for the purpose of its search and search related advertising businesses, placing competitors in search (and online advertising) at a huge disadvantage and that the exclusivity and pricing provisions would foreclose market entry and give rise to enduring harm to consumers. However much one favours the dissemination of knowledge and the digitalisation process, these results were unjustified, unnecessary and unacceptable. They would have considerable harmful implications for the Internet.

The Internet Archive / Open Book Alliance made a presentation in which they highlighted not just the competition and other concerns regarding the Settlement, but also indicated that there were alternative solutions which enabled digitisation, which they supported, but without the problems that the Settlement entailed.

The French Ministry of Culture was the only Member State to speak as part of a panel. They announced that the French Government had or was about to submit objections before the US Court which was considering whether to approve the proposed Settlement. These objections were couched in terms very similar to those made by the German Government with whom the French had closely co-operated. The Czech Government broadly supported these views and stated that it believed that the Berne convention laid down rules which needed to be respected.

The Google representatives made a number of statements during the hearing which need to be kept under review:

- Google would not set prices (Dan Clancy).
- The service would be fully compliant with EU data protection rules (Daphne Keller).
- Orphan work legislation would 'trump' the proposed Settlement (Dan Clancy).
- A very small percentage of the revenues generated would be from orphan works (Dan Clancy).

- The proposed Settlement would impact European rights holders but not European consumers (Dan Clancy).
- The BRR could licence third parties without any limitations whatsoever (Dan Clancy).
- The proposed Settlement would give Google no real advantage in relation to books in print or books to be published (Dan Clancy).
- Competitors to Google could digitise orphan works themselves using the fair use exception (Dan Clancy).
- Google's 37% share of the revenues would not cover its costs (Dan Clancy).
- Google was sceptical that it would have any IP rights in the works database (Daphne Keller) but if it did it would not assert them (Dan Clancy).
- "It really is about the cloud" (Dan Clancy).

These issues, and others, will come under increasing scrutiny as knowledge of the proposed Settlement becomes more widespread and as concerns grow. Over the next few weeks and months, the Commission and the Council of Ministers as well as individual Member States and stakeholders will need to take steps to ensure that the interests of European rights holders and consumers are adequately protected.