

DRAFT

Information Hearing on Google Book Settlement, Brussels, 07 September 2009

CENL Response

The Conference of European National Librarians (CENL) is an independent association of the directors of the European national libraries, in which currently 48 libraries from 46 member countries of the Council of Europe are represented. Their aim is to promote co-operation between European national libraries for maintaining the national cultural heritage and ensuring the accessibility of knowledge in this field.

As the Google Book Settlement affects national libraries in many ways, CENL welcomes the opportunity to comment on this issue.

The role that national libraries have played through history is that of a public repository of works that comprise the accumulated knowledge, cultural heritage and collective memory of nations and peoples. The detail of their mission varies from country to country but broadly their role, often governed by statute, includes not only the collection of the national imprint, preservation and involvement with the development of national information policies, but also giving public access to the national memory.

Our role and mission is also pertinent to the digital world, and we see across Europe more and more libraries, including national libraries, putting parts of their collections online. In recent years National Libraries have also been active participants and supporters of various European digital library projects as wide ranging as i2010, Europeana, the European Digital Library as well as ARROW.

Our goal is one of providing access to knowledge, and unhindered access to information in the digital world. In this sense Google shares these self same goals. We believe that the academic, scientific and cultural benefits of providing online access to millions of digital texts will, if approached correctly, provide benefits for all stakeholders of the information society. While simultaneously respecting the interests of the book industry, authors and artists, we believe it is possible to bring to Europe also the huge benefits that any potential settlement will bring to American citizens. By doing this all Europeans can reap both the social and economic rewards that online access to a vast corpus of knowledge will bring.

Public Policy v Private Interest (Google Market Strength)

The European Information Society is at an historic fork in the road. The potential Google settlement and the norms it establishes will affect access to knowledge, culture and learning on the web, for the foreseeable future. The fact we are here today shows the extent to which the settlement is shaping the very landscape and contours of the information world.

The potential settlement reflects the American tradition of making public policy by private law suit. The choice that we face in Europe - the fork in the road - is whether we believe that broad access to knowledge, culture and learning is best left for parties in private to settle – in this case in a foreign country; or whether there are

other principles at stake which require that public policy intervention, reflecting specific European needs, is brought to bear.

Given the importance of information to society, particularly in a knowledge economy, we in Europe have over the last two centuries and more, recognised the long term societal and economic benefits that can be achieved from public intervention in information policy. The way that we have done this varies from country to country within Europe but has included many tools of public policy such as lower tax rates on books, state funding of certain types of publications, the establishment of public libraries, and the regulation of collecting societies in law etc. More recently and most pertinently we have seen in a few countries like Norway and France the public funding of mass digitisation projects.

Through the digitisation of what is estimated to be well over 10 million books - primarily in US libraries - the exercise of private contract with those libraries, and the settlement itself, the control of a vast body of knowledge is potentially in the hands of a single corporate entity. This is certainly the case in regard to the large number of public domain works that do not form, as such, part of the potential agreement between Google, AAP and the Authors Guild. Of more direct relevance to the settlement itself is what is being proposed for orphan works – to all intents and purposes a “Google specific solution”. The recent anti-trust developments in the US taken by the Internet Archive, Microsoft, Amazon and Yahoo also raise a wealth of public and private interest issues that we should take note of when considering any coordinated European policy response.

As stated earlier, we believe the settlement is of historic importance. The question therefore that Europe, and the European Commission has to ask itself is to what extent does a European response, given our different cultural and economic situation to the United States, require some level of public policy intervention?

Europe and the Settlement

Of course the first point that needs to be made is that this is an American settlement, under US law, potentially providing access to US citizens only. All that will be visible in Europe will be “snippets” of a few sentences at a time.

The decision to give access to the European public to the corpus digitised by Google in United States will lie in the hands of Google, the Book Rights Registry as well as the copyright and industry structures of each European member state. Without the possibility of making this, or a similar corpus available here, the universities, research centres and citizens of Europe will be disadvantaged in terms of access to knowledge. We must not allow ourselves to underestimate the importance of access to knowledge in the 21st century, as this is the life-blood of the knowledge economy.

Another important concern for European Libraries is that the range of works that comprise the Google corpus do not reflect Europe’s own cultural diversity. Clearly any response must address the online representation of Europe’s linguistic and cultural diversity as a matter of priority.

Copyright and the Settlement

There are too many issues relating to copyright law to mention them all in such a short intervention. However we wish to focus on just two that are of paramount importance to libraries – the issue of orphan works as well as that of differing national durations of copyright in the internet age.

A fault line of the internet age that the Google Book Project highlights is differing durations of term, jurisdiction by jurisdiction, yet one single access point – namely the web. Due to the longer duration of copyright in the European Union, Google is blocking an estimated 500,000 post 1869 books from being viewed in Europe. In the US all books published before 1923 are visible in their entirety. This means for example there are German or British books which are viewable in the United States but not accessible in their countries of origin. This disparity of historical access clearly needs to be addressed as part of any European online mass digitisation programme.

On the issue of orphan works, and akin to these the rights holders who are “non-active” and fail to register as part of the settlement (probably in the main non-American authors), the settlement appears to be establishing a *de facto* monopoly for the sole benefit of Google. It is estimated this may total as many as 6 million books. It is difficult to see how a similar corpus of works by a competitor or counterbalancing network of organisations can be realised, in the absence of orphan works legislation in the US, in the majority of EU member states, as well as at a European level.

It is of vital importance therefore that the Commission with speed and urgency builds upon existing initiatives like the 2008 copyright Green Paper, as well as projects such as ARROW, to ensure that a viable European alternative can be built. To this end we very much welcome the latest statement from the Commission on Europeana that states its intention of exploring a number of approaches to orphan works aimed at their facilitation and dissemination online.

It must also be mentioned that the dominant position of Google has been further strengthened, looking at the few publicly available contracts between Google and US libraries, by the fact that libraries, through the exercise of contract law, have seriously curtailed their own use of public domain works, while Google is free to use the digitised books as they wish.

A European Way Forward?

The question that faces us now is how the European knowledge economy chooses to regulate access to knowledge in a networked world. Do we leave it entirely to private concerns or, is there a public interest argument to say that some level of public policy intervention is required to ensure that online access to published material is for the benefit of **all** European stakeholders – that is to say both rights holders as well as users of content.

Building upon Viviane Reding’s recent Lisbon Council speech, we therefore believe it is incumbent upon the next Commission to actively ensure that as a matter of priority the **right** economic, funding and legal conditions are created to ensure that mass digitisation of all forms of creative expression, and the provision of this material online, can be conducted in a sustainable and coordinated manner.

In summary we therefore recommend to the European Commission that in approaching any deliberation on the settlement, the following three points are borne in mind:

- 1) The facilitation of the right legal and business frameworks to enable timely access to the historic corpus of works created by Google on terms amenable to both rights holders as well as the citizens of Europe;

- 2) Increased funding of European digitisation programmes like Europeana and ARROW, that will facilitate access to not only public domain works and orphan works but also lawful and remunerated access to in-copyright materials;
- 3) Through due deliberation of the US settlement, as well as building upon the Green Paper “Copyright in the Knowledge Economy”, the establishment of a modern and flexible copyright acquis that guarantees both greater access to knowledge online, while preserving rewards and incentives for creators.