

**Google Book Search Settlement**  
**European Commission Information Hearing**  
**Submission of the Open Rights Group**

**24 August 2009**

## **1. Foreword**

This submission is primarily concerned with privacy online, consumer rights, international developments and diversity of provision. With regard to user privacy, the Settlement is light on safeguards so the Commission is advised to intervene promptly to ensure the protection of fundamental rights and enforcement of EU law. In terms of digital rights management, we call for the Commission to raise the basic 'floor' of consumer rights to ensure users are not unduly restricted in performing lawfully permitted activities. In respect of international development and access to knowledge, the Commission should seek to ensure that the service is made available to institutions outside of the US, particularly in developing states, and at appropriately discounted subscription rates. We also recommend that the Commission encourage competition between Google and others in providing digital books, and considers solutions such as compulsory licences.

We should however make two additional, preliminary points. Regulators should conduct further periodic reviews of the Settlement's implementation, presuming it comes into force and there will be unintended consequences that cause collateral damage to related creative industries. In addition, the Commission should make it a priority to clarify the effect of the Settlement outside US legal territory, which remains shrouded in confusion.

## **2. Context**

The Open Rights Group (ORG)<sup>1</sup> is a grassroots digital rights advocacy concern based in the UK. It aims to increase awareness of digital rights issues, help foster grassroots activity and preserve civil liberties in the digital age. It is funded by individual donations and small grants.

ORG supports a broad interpretation of 'fair use' or 'fair dealing' in copyright law, and believes that such provisions are not properly described as 'exceptions' or 'loopholes', but form an integral part of the statutory scheme of copyright in a given jurisdiction, including the European Union. The litigation between Google

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<sup>1</sup> <http://www.openrightsgroup.org>

and certain representatives of authors and publishers in the US<sup>2</sup> raised important questions about the scope of fair use under US copyright law. It is hoped that the Commission will help ensure that European law on permitted uses continues to be assessed and considered as to strike a fair balance between the rights of creators and users, including users who are themselves creators through sampling, parody, remixing, and the like. We would, in principle, support the ability of indexers, intermediaries and others to make appropriate uses of protected works in order to make a valuable contribution to the information society.

Our support for fair use, though, does not mean an automatic preference for either side of the original US litigation, and our focus in this submission - in accordance with the Commission's request - is on the details of the Settlement and the relevance of certain aspects for European authors, readers, consumers, publishers and others. We note that, as the Settlement would apply to those that possess a 'US copyright interest', which encompasses the holders of copyright in EU states due to the operation of the Berne Convention, this Settlement would, in practice, have an immediate effect on the European creative industries. We also strongly welcome any initiative that makes it easier for individuals to access knowledge through the Internet with as few constraints as possible, and aspects of the proposed Google Book Search service (GBS) certainly appear to fulfil this role. Indeed, as we argue below, one of the key issues that the Commission should consider, as has been indicated at the fifth 'issue for discussion' in its call for comments, is how GBS could benefit researchers, consumers and others in Europe. Therefore, ORG does not make a general objection to the proposed Settlement, but calls for clarification and amendment where appropriate, including in the situations set out below.

In the first instance, though, the proposed Settlement is primarily designed to resolve this particular litigation, and it remains our view that many of the matters purportedly resolved in the Settlement should be resolved through legislation, where public representatives, individuals, interested parties and civil society more generally could play a full role in the consideration of the important and unresolved matters pertaining to digitisation, monetisation, orphan works and international distribution. We would urge the Commission to press the point that copyright litigation between private parties (particularly where it is a 'class action' under US law, meaning that it has broader implications than conventional litigation) should not be an alternative to the legislative process. The complexity and power of this Settlement mean that it resembles a detailed legal prescription, but only for one particular player. Class actions, particularly under US law, have a broader social and economic impact than would normally be the case for private litigation. While there are undoubtedly benefits to this approach, Internet

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<sup>2</sup> US District Court (Southern District, NY) Case No. 05 CV 8136-JES

users must be assured that (a) their rights are not adversely affected by the 'deal' and (b) public authorities do not neglect their responsibilities to protect and vindicate user rights across the sector.

On the details, then, we have specific concerns regarding privacy, consumer rights, knowledge and international development, a diverse marketplace, and the status of 'orphan works', which we set out below. Of course, we note these issues resound far beyond the scope of this Settlement and so urge the Commission to further discuss them with US and other authorities in their broadest context.

### **3. Privacy and the right to read**

An issue that is barely dealt with in the Settlement, but of particular concern to ORG, and no doubt to others expressing their views to the Commission, is that of privacy. By this, we mean that the personal data of those who make use of GBS will be collected, which clearly requires safeguards to be in place. The protection of the privacy of library users is recognized, in the context of the exercise of fundamental rights (particularly the right to receive information), as a sensitive matter. It is protected with great care by librarians, and attempts to facilitate disclosure of patron records, such as the recent legislative changes in the US that make it easier for a subpoena to be issued in respect of library records<sup>3</sup>, are criticised by library associations and human rights organisations. The application of the 'right to read anonymously' in the context of digital technologies and copyright management is indeed difficult<sup>4</sup>, but there is much at stake here that requires careful attention. It should therefore be the case that GBS, which will contain more books than many conventional libraries and play a critical role in facilitating access to information in the future, be treated in a similar way to a library for the purposes of privacy and disclosure. The implication being that users should be given similar protections as library patrons against misuse of their reading history.

From an EU perspective, it should be noted that personally identifiable information that includes information on books viewed through GBS would, in certain cases, be considered as sensitive under [article 8 of Directive 1995/46](#); for example, information that identifies an individual and their reading habits of political books could be used to deduce their political opinions or religious beliefs. In the context of the existing data collection activities of Google, which have prompted much comment, we call for inclusion of mandatory privacy protection in the terms of the Settlement. As the Chair of the Article 29 Working Party noted in

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<sup>3</sup> S Bowers, 'Privacy and Library Records', (2006) 32 *Journal of Academic Librarianship* 377.

<sup>4</sup> J Cohen, 'A Right To Read Anonymously: a closer look at 'copyright management' in cyberspace' (1996) 28 *Connecticut Law Review* 981

a letter to Google dated 16 May 2007<sup>5</sup>, it is necessary to consider Google's data collection and retention activities in the context of the applicable European legislative provisions (particular article 5 of Directive 2002/58 and article 6 of Directive 1995/46) but also of Google's '*market position and ever-growing importance*'. If the Commission were to seek action on this at this relatively early stage, subsequent problems with the enforcement of EU law may well be averted, with potential savings in the cost of monitoring and legal proceedings, as well as a benefit to users in that they are assured of the protection of the rights as soon as the settlement comes into force.

In this context, we would suggest that, by reference to the detailed analysis of the Working Party in its 2008 statement on search engines (opinion 1/2008 at [4.1.2]), it is possible that European law would apply to the activities of Google in connection with this project, and would encourage the Commission to make a preliminary determination clear, again so as to ensure that a high level of protection of the fundamental rights to privacy and to access information without surveillance spelled out in the EU's Charter of Fundamental Rights. It should be noted that, despite the expressed limitation to US commercial activities, some aspects of GBS are not so restrained (e.g. in the case of works in the public domain in a foreign country but not in the US), and Google's intention to expand to non-US jurisdictions is made clear by the agreement to notify the Registry 'if and when' books are used outside the US (17.7) and its public statement that GBS should be seen as a 'test bed for the development of similar services' outside the US<sup>6</sup>.

We fully support the proposals put forward in a public statement<sup>7</sup> and a letter to Google dated 23 July 2009<sup>8</sup> by the Electronic Frontier Foundation (EFF) in the US. The EFF recommends, in the context of US law, that additional concerns should be built into the settlement, including language to prevent or limit the disclosure of information (whether to public or private actors) about service users without a court order or warrant, a separation of service data from other information held by Google, suitably prominent and readable privacy information (including management tools), and appropriate anonymisation in various parts of the service. It would be advisable for the Commission to support these requests, as an interim measure, as ORG's view is again that a company-specific Settlement offer inadequate protection to users, and enforceable rights for users across jurisdictions should be secured, by law or other means. We note that Google has pointed out the difficulties in building a privacy policy for a service that is still the subject of legal proceedings<sup>9</sup>, but respectfully suggest that the view

<sup>5</sup> [http://ec.europa.eu/justice\\_home/fsj/privacy/news/docs/pr\\_google\\_16\\_05\\_07\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/news/docs/pr_google_16_05_07_en.pdf)

<sup>6</sup> <http://googlepublicpolicy.blogspot.com/2009/04/google-book-search-settlement-will.html>

<sup>7</sup> [http://www.eff.org/files/gbs\\_privacy\\_schmidt\\_letter.pdf](http://www.eff.org/files/gbs_privacy_schmidt_letter.pdf)

<sup>8</sup> <http://www.eff.org/issues/privacy/google-book-search-settlement>

<sup>9</sup> <http://googlepublicpolicy.blogspot.com/2009/07/google-books-settlement-and-privacy.html>

of the Commission on how these proceedings should be resolved should depend, in part, on the extent of the guarantees relating to privacy that can be secured. Certainly, the Settlement contains significant detail on a range of other factors (e.g. a range of pricing points at [4.2](#), or security breaches at [8.3](#)), and we see no valid reason why privacy would be omitted or dealt with in such a cursory fashion.

#### **4. Consumer rights and technological measures**

The role of technological protection of digital works, sometimes referred to as technological protection measures (TPMs) or digital rights management (DRM), is an important one. From the point of view of the digital consumer, these technologies are highly problematic, preventing acts permitted under copyright law from being carried out (with penalties for disabling measures in order to carry out a permitted act). ORG's longstanding position that 'DRM is not the future of online creative content services'<sup>10</sup> has been vindicated by the recent decisions of some players to remove DRM (e.g. Apple in January 2009).

Recently, we have become aware of further problems, where a provider either goes out of business or decides to discontinue a particular service, meaning that the purchased products are no longer useable. An example is that of Google Video, which did offer a refund but completely disabled the use of the purchased products<sup>11</sup>. Furthermore, the controversy over the decision of Amazon to remove (by remote means) good-faith purchases of digital editions of 1984 from the Kindle e-reader devices of users<sup>12</sup> highlights the unbalanced relationship between providers and consumers. These two developments should be a cause of concern for the Commission, under both the heading of consumer rights and also the development of vibrant creative industries.

It is in this context that the Settlement's plan to give significant power to Google merits further attention. Although the Commission and other authorities must not prescribe in every last detail the business model that Google and other players may follow, we note that the basic 'floor' of consumer protection law is an important and respected aspect of the corpus of EU law. Hence, we object, as the Commission should, when demonstrably inappropriate technologies - such as DRM - are used to define and delimit important and growing markets. Electronic books are a key aspect of the digital future, and their availability must surely be a part of the knowledge-based economy declared and promoted in the Lisbon Strategy and other key EU actions. If Google is to become a major player here,

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<sup>10</sup> [http://www.openrightsgroup.org/orgwiki/index.php/Content\\_online](http://www.openrightsgroup.org/orgwiki/index.php/Content_online) (29 February 2009)

<sup>11</sup> <http://video.google.com/support/bin/answer.py?hl=en&answer=74497>

<sup>12</sup> B Stone, 'Amazon Erases Orwell Books From Kindle' (*New York Times* 18 July 2009) <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>

with the approval of the US courts, then an appropriate set of consumer rights must be crafted. This scheme should not unduly burden Google but rather complement its commitments to corporate social responsibility and making the world's information accessible.

## **5. Knowledge and international development**

We urge the Commission to consider the consequences of this settlement for the global circulation of knowledge and information. While the settlement is expected to include within its scopes the overwhelming majority of works published in Europe (through Berne), many significant aspects of the settlement are restricted to the US. The plain language of the Settlement sets out how the commercial activities of Google (sale of books and database subscriptions) will take place in the US and does not, for the time being, cover non-US activities (17.7). Similarly, the commitment to making a (very) limited number of subscriptions available to public libraries and educational institutions (the 'Public Access Service') is explicitly limited to US-based institutions (see e.g. the definition of higher education institution in 1.66). Should this continue to be the case, the consequences for developing states are significant, in that those in the US, including students and researchers, will have access to a vast database of digitised books, which are not accessible to them. There is a problematic asymmetry associated with the inclusion of European works in GBS, but with no statement from the promoters of the project as to the availability of those works, or the works from any other jurisdiction, including the US, to European readers, and to readers around the world. At the very least, the Commission should question why US students, researchers and indeed purchasers should be able to access close to the entire corpus of the European written word, but European equivalents unable to gain access to European, US or other material. Paradoxically, this Settlement would mean that US-based researchers would have much greater access to out-of-print European works (defined as not commercially available *in the US*, which is important) than Europeans. The consequences of this are extremely serious. Furthermore, the role of access to information and intellectual resources being such an important component of international development, a solution that enables the works of developing countries to be accessible with such ease to the US, but with no countervailing opportunities for their own citizens to benefit from this project, can have serious consequences for those countries, and the Commission should see this aspect of the Settlement as having notable implications for matters beyond the strict application of international copyright law.

## **6. Diversity of provision and the orphan works problem**

The settlement will allow Google to commercialise books that are out of print,

subject only to paying just under two-thirds of the revenues from such activities to the proposed Book Rights Registry. The Registry will, in turn, make payments to rightsholders that register with it, after deduction of its own (uncapped) expenses. The difficult issue here is that, as this settlement prevents Google (but no other person) from being liable for copyright infringement in respect of its scanning, indexing and - crucially - sale and other profitable use of a significant proportion of all the books in the world, it means that Google will, for the time being, be the only body in a position to exploit the resource. Although creators may ultimately receive revenues via the Registry, consumers may be disadvantaged (and competition harmed) by the overwhelmingly powerful market position that Google will have secured to itself. There is, therefore, a significant potential threat to both cultural diversity (in terms of media concentration) as well as fair competition.

The question of 'orphan works' (a category that overlaps significantly with books out of print or not 'commercially available', in the language of the settlement) has provoked much comment to date. As is commonly known, a problematic issue with works for which the copyright holder is not easily identifiable or contactable is how this hinders both creativity and investment whilst the work is subject to copyright law. The Commission will no doubt receive many submissions on this point. There are two points to make under this heading:

(a) the Settlement should not facilitate or permit an effective monopoly on the provision of digital works to be secured by Google. As this Settlement is between private parties, others wishing to engage in conduct similar to that of Google will not be able to rely on the Settlement as a precedent, but will instead need to act as Google did - await the bringing of suit in similar terms to the original case against Google - and presumably seek a settlement or await trial for alleged copyright infringement. Therefore, the barrier to entry is a very high one. Google will, in accordance with the Settlement, have a licence that others cannot, without engaging in expensive negotiation or litigation, avail of, and of course for orphan works, such negotiations are impossible in many cases, and therefore others will have no assurance that they can ever be licenced to compete, putting them at an immediate and perhaps irreversible disadvantage.

(b) this Settlement should not be seen as a resolution of the problems associated with orphan works. As the 2007 and 2008 reports of the High Level Expert Group on digital libraries have set out in detail<sup>13</sup>, a range of actions are necessary; similar legislation has been introduced in the US on a number of occasions. The difficulties faced by a range of European actors in this context, where cultural or

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<sup>13</sup> [http://ec.europa.eu/information\\_society/newsroom/cf/document.cfm?action=display&doc\\_id=295](http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295);  
[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/copyright/copyright\\_subgroup\\_final\\_report\\_26508-clean171.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf)

economic development is hindered by the inability to locate copyright holders, will not be resolved by the availability of selected works through GBS. It is ORG's view that the Commission should continue its work on orphan works, and should pay close and careful attention to any aspect of the Settlement that could hinder a more sustainable solution.

In a related context, it is worth noting that the proposed Service could well be an essential facility that would fulfill the test in *Bronner* [1998] ECR I-7791 (and indeed, the digital availability of books bears some resemblance to the traditional role of newspaper distribution services) and, as Google reserves the right not to make books available through the Service, or to exclude parts of books, careful monitoring is necessary. If, for example, the institutional subscription plays the type of role in 21st-century libraries that appears likely, if the Settlement is approved, inclusion or exclusion will have significant cultural consequences as well as commercial ones. In any event, options including inter alia compulsory licensing should be considered to ensure the benefits of this resource can be commercially exploited and brought to consumers by firms other than Google.