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Amidst the flurry of activity and policy consideration playing out in relation to the Google Books Settlement in the United States, we consider the impact on European copyright law and policy and the online distribution of copyright works in Europe.

I. A U.S. ONLY SETTLEMENT?

At first blush, the Google Books Settlement does not have effect in Europe. Google has stated that it does not currently plan to launch Google Books outside the United States. In addition, readers outside the United States will not benefit from the service even if Google does reach a settlement because the service will not be available outside the United States.

But what about the European (or for that reason any other non-U.S. national) authors who previously published copyright-protected but now out-of-print publications in the United States that Google now wishes to scan and make available to the public through the Google Books facility? Critics have suggested that Google Books will effectively create a de facto monopoly on digital access to a huge number of works, including those belonging to Europeans.

It was originally argued that European authors and publishers whose books have been scanned from American libraries may benefit from new revenue streams as American readers are made aware of and purchase their books. They could do this either by registering to control online access to their books or opt out (in the same way that America authors can do).

However, having come under fire for not providing adequate protection for foreign authors and publishers, Google recently stated in a European Commission hearing that it will exclude all European books that are still "commercially available." Therefore, such books will no longer be available to American consumers through a search on Google Books, unless the copyright owner has expressly agreed that the book could be included (under previous proposals, non-U.S. copyright owners would automatically fall within the scope of the Settlement unless they actively opted out within a specified time frame, effectively creating a compulsory licensing scheme). However, books that are out-of-print can be made available via

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Google Books even if the respective copyright owners have not expressly agreed but have simply not actively opted-out. Therefore, although the exception for books that are still "commercially available" is considered to be a positive step in the right direction, European authors, publishers and national governments alike still have concerns.

Overall, as Marybeth Peters, register of copyrights for the U.S. Copyright explains, the Google Books Settlement "could affect the exclusive rights of millions of copyright owners, in the United States and abroad, with respect to their abilities to control new products and new markets, for years to come."

II. EUROPEAN RESISTANCE

The main opposition against the Settlement in the United States has focused on claims that the terms violate copyright and antitrust law. However, in its criticism of the Settlement, the United States also addressed concerns about the inadequacy of representation to protect the interests of foreign rights holders. Of most concern are U.S. trading partners, for example, France and Germany. France has filed a formal objection to the case in New York. As Nicolas Georges, the Director responsible for books and libraries at the French Ministry of Culture opined "The right of Google to digitize orphan works in American libraries, but coming from around the world, gives them an unequal licensing right for exploitation in the future, a monopoly."[2]

Germany has also filed an opposition to the Settlement citing multiple reasons why the current Settlement proposal is not acceptable for German authors and should be rejected in its entirety. As a counterproposal, the German government suggests changing the Settlement so that it works entirely on an "opt-in" basis or, at least, excludes German and other international authors and publishers from its scope.

According to the (former) German Minister of Justice, Brigitte Zypries, the German government's primary aim is to inform the court about the transatlantic implications of the Settlement:

> The Settlement's effect would clearly go far beyond the U.S.A. It would affect German rights holders and suppliers of comparable online services as well. The Settlement provides that without the consent of the rights holders, Google may make only out-of-print books available online, and may do so only in the U.S.A. But we all know that the Internet knows no boundaries. Although German IP addresses are blocked, access from Germany is possible without major effort."[3]

The German government points out that the Google Books Settlement violates essential principles not only of German copyright law but also of international copyright law as expressed in the Berne Convention and World Copyright Treaty ("WCT"), which—apart from narrowly defined exceptions—grant the author exclusivity and therefore require a license whenever rights of use are granted to a third party.

[2] Reported in Bloomberg.

[3] Press Release of the German Federal Ministry of Justice dated September 1, 2009.

In addition, according to the German *amicus curiae* brief, the proposed Google Books Settlement does not provide for adequate privacy protection of the authors', publishers' and users' personal data so that the proposed Settlement violates well-established national and international privacy laws.

Moreover, Germany claims that the Author's Guild and the Association of American Publishers that are—apart from Google—the only parties to the Settlement, cannot adequately represent German authors or their interests. A German author is not allowed to become a member of the Author's Guild if their work has not been published by an established American publisher and membership to the Association of American Publishers is reserved to U.S. publishers only. How can such a Settlement claim to represent author's copyrights all over the world? How can an agreement settled among three private entities that has not been enacted by any legislative or industry body establish a whole new system on the digitization of books with a worldwide impact? According to the German government's opposition, the proposed Settlement is no more than a privately-negotiated, commercially-driven document formulated behind closed doors by only three interested parties.

The German government pleads that the proposed Settlement results in a *de facto* Google monopoly on information and an intensification of media concentration in Google as well. To competitors, a legal safe harbor such as the Settlement provides Google should only be available through legislation or litigation. The Settlement, as it is, gives Google a head start that can only lessen competition. In its opposition, Germany counters Google's argument that the social benefits outweigh the copyright interests of the authors and publishers in Europe. German and European initiatives to create non-commercial digital libraries, such as the "Europeana" or "German Digital Library" that are currently in development, demonstrate that the benefits to society that Google purports to bring from Google Books are not unique to the proposed Settlement. The German initiatives manage to advance even while complying with traditional copyright rules.

The German government is rightly convinced that the heavily cited social benefits can be achieved without the need to vest virtual monopoly power in a single private corporation. It argues that it is not justifiable that the Settlement empowers Google to exclude books from the available database at its own discretion. Google should, on no account, be given the power to censor written content that may be considered politically or socially sensitive or just against Google' own interests.

III. SPARKING THE EUROPEAN DEBATE

Besides stimulating discussion as to whether European rights are adequately represented and protected under the Google Books Settlement, another pertinent effect is that the debate has brought the digitization of materials to the fore in Europe and sparked rigorous discussion around how this issue should be handled. As expected, Google has taken a keen interest.

While the U.S. Department of Justice has been arguing that the Google Books Settlement should be rejected due to its potential copyright and antitrust violations in the United States, copyright and digitization have been hot topics on the agenda in Europe. Earlier this year, the European Commission held a series of meetings and hearings on the issue including a discussion of its own culture digitization program, Europeana, in which various interested parties, notably Google, have participated.

In addition, Google has reportedly been working in conjunction with libraries in the United Kingdom, France, and Belgium and with the Italian Government to consider the notion of digitizing books in Europe.

IV. THE POLICY BEHIND THE PROPOSITION

In a joint statement, Information Society Commissioner Viviane Reding and Internal Markets Commissioner Charlie McCreevy stated that the Commission was looking for a "truly European solution in the interests of European consumers." They seemed to favor an approach that was led and guided by the public sector, but also recognized the need for private sector support in both the development of new technologies and the time required to complete the digitization task. "It is therefore time to recognise that partnerships between public and private bodies can combine the potential of new technologies and private investments with the rich collections of public institutions built up over the centuries."

Obviously digitization has the great potential to improve public access to a huge body of knowledge. The U.S. Department of Justice admits "The Proposed Settlement has the potential to breathe life into millions of works that are now effectively off limits to the public. By allowing users to search the text of millions of books at no cost, the Proposed Settlement would open the door to new research opportunities," In addition there is a so-called "book famine"—only 5 percent of books in Europe per year are converted into accessible electronic formats. Visually-impaired people argue that they should have access to books and other protected materials on the same conditions and at comparable prices to everyone else. The preferred solution is for publishers to provide works at the outset which are in accessible formats that can easily be converted into Braille, audio, or large print.

However, there are concerns that this would effectively make a single entity the gatekeeper of all of this information, at the expense of copyright owners. Google's own technology has also been criticized as producing substantial inaccuracies, although we assume that these are merely teething problems that will be ironed out through use.

Ultimately there is clearly a balance to be reconciled between the public and online users on the one hand and rights holders and the publishing industry on the other. The Commission aims to resolve these differences.

V. A DICHOTOMY

The latest communication to come out of Europe and the Commission on this issue, "Copyright in the Knowledge Economy" was published earlier this month. The aim was to

"examine how a broad dissemination of knowledge in the Single Market, notably in the online environment, could be achieved in the context of existing copyright legislation."

The paper showed that there is clearly a huge divergence between the interests of libraries and those of publishers. Libraries and universities want to prioritize the public interest and advocate a more "permissive" copyright system which they argue facilitates a more cost effective way of digitizing books on a mass scale, as opposed to obtaining specific consent for every individual work they will wish to digitize. This envisages a set of "public interest exceptions" which would enable libraries and similar institutions to enjoy a blanket exception to current rules thus allowing them to digitize their entire collections. Such exceptions would need to be defined by legislation

In the opposite corner, publishers, collecting societies, and rights holders argue that collective licensing agreements are the best solution to the issue, especially since they can be tailored to new technologies. In addition, they suggest that mandatory exceptions could "undermine economic rewards and encourage so-called free-riding," by creating unfair competition and discouraging publishers from investing in new business models. Instead, they see that the crucial issue should be to ensure that a good faith diligence search using existing databases is carried out in order to identify and locate the rights holders.

It is easy to see the issue from both perspectives and it will be interesting to see how the Commission investigates and addresses this issue going forward. At present it seems that both collective licensing and copyright exemptions are being seriously considered.

VI. ORPHAN WORKS

One of the biggest challenges facing digitization across the board is how to deal with so-called orphan works, i.e. those which are still copyright protected but whose copyright owner cannot be found. These reportedly make up a massive 90 percent of publications housed in European libraries.

Existing instruments such as Commission Recommendation 20-06/585/EC, the 2008 Memorandum on Orphan Works, and related guidelines have been criticized first because they are not binding acts and therefore do not provide sufficient legal certainty, and second because they do not address the issue of mass digitization.

The Commission recently suggested that one possible way of dealing with orphan works was to make them an exception to copyright law. Given that there is currently no definition of "orphan works" under European law and given the difficulties of determining at what point a work becomes "orphan," this may be harder to implement in practice.

In addition, due to the territorial nature of copyright law, it is likely to be very difficult to reach a pan-European settlement or licensing deal. There is also concern that obstacles to intra-Community trade may surface if each Member State were to adopt its own rules. A cross-border mutual recognition of orphan works may be more effective but will, of course, require international cooperation.

VII. LOOKING TO THE FUTURE—THE DIGITIZATION RACE

Overall, concern is rising in Europe across both sides of the discussion that, if it does not follow suit and digitize its libraries on its own terms and within the constraints of European copyright law, it will be effectively left behind by its forward-thinking counterparts in the race to digitization and that, as a consequence, Europe's reputation as a cultural hub could suffer in the future.[4] Paul Aitkin, Executive Director of the Authors Guild sums up:

> In Brussels this week the copyright wars are playing over there as they are here … so we heard the usual debating points. We also detected something new—a subplot of envy. Europeans are starting to size up what we nearly achieved and they like it. They think we are getting a significant advantage … No doubt they will be working hard to catch-up.

However, this could also be a classic case of the tortoise and the hare. The opposition to the Google Books issue and the time that it is taking to reach a settlement acceptable across the board in the United States creates the opportunity for Europe to take the lead and forge its own path with Europeana, perhaps producing a solution that will act as a blue print for digitization legislation on a global basis. The question remains whether Europe is prepared to step up and take the lead.

[4] "If we are too slow to go digital, Europe's culture could suffer in the future." Information Society Commissioner Viviane Reding and Internal Markets Commissioner Charlie McCreevy.