Response to European Commission call for comments on the Google Book Settlement

August 2009

Introduction

Publishing as a whole in the UK is the largest media sector, and the biggest creative industry. The Publishers Association (the PA) is the leading trade body representing consumer trade, academic and educational publishers in the UK. The PA’s members represent approximately £4bn (80%) of the £5bn turnover within these parts of the overall publishing sector. Collectively the creative industries – of which the copyright industries form the dominant part – contribute over 8% to the UK’s GDP.

The PA welcomes the European Commission’s engagement with the Settlement, which is notorious for its complexity, and the Commission’s efforts to assess its impact on European publishers. The PA also supports the submission which has been made by the Federation of European Publishers on this subject.

Specific topics

Scope of the Settlement

The legal scope of the Settlement is limited to the commercial exploitation, including digitisation and use, of books (ie written or printed works, excluding periodicals) by Google within the United States. The Settlement only applies to books published in hard copy on or before 5 January 2009 in any country that has ratified the Berne Convention for the Protection of Literary and Artistic works and which are contained, inter alia, now or in the future in the collections of the libraries partners in the Google Library program in the United States. For books published after 5 January 2009, Google is not released from any claims that may arise from its digitization and use. By opting out of the Settlement, rightsholders cede control over how their works are exploited.

The scope of the Settlement cannot be extended beyond the United States, by either the Book Rights Registry or by the judge. The Settlement, which is a private agreement between Google and rightsholders, could not also be used as a basis for legislation within existing international copyright conventions, in particular the principle of prior consent to make use of a copyright protected works and that of automatic protection, with no registration necessary to enjoy copyright protection: both essential foundations of our International and European copyright regimes. The Berne Convention establishes these key principles in Article 5 (2) that “the enjoyment and the exercise of these rights shall not be subject to any formality” and in Article 9(1) that “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form”.

The quantity and status of European works covered by the Settlement

It is not possible to calculate the number of works affected – nor, if Google were to share such information based on the data on their own systems, which they have not done to date, would this be possible to verify. In theory any book published in hard copy on or before 5 January 2009 is implicated under the Settlement, depending on whether it has been
The Registry
In theory the authorisations granted to Google in the Settlement are non-exclusive. In practice, whilst the Book Rights Registry will be able to license works to third parties, it will only be able to do so with the rightsholders’ permission. This means that if works are unclaimed, the Registry cannot license them to anyone other than Google, regardless of whether the work is thought to be an orphan, or out of print.

This means that, in effect, the Settlement grants Google an exclusive licence over unclaimed books and more specifically orphan works, which will remain unclaimed by definition. If a competitor wished to digitise these works and make them available for display and sale, they would be liable for infringement. Short of legislative reform in the US to the challenges posed by orphan works, prospective competitors would therefore be forced to arrive at an equivalent Settlement with rightsholders, again presumably via a class action.

Although the Registry has the potential to operate as a clearing centre, providing licences to third parties, it is not yet clear how that element of it will function, nor how straightforward it will be at an operational level for the Registry to acquire the necessary mandates from rightsholders. However, a “most favoured nation” clause granted to Google under the Settlement means that the Registry will not be able to offer third parties a deal that is more competitive than the rates Google enjoys. Unsurprisingly this provision, and the de facto monopoly over unclaimed works, means the Settlement is currently subject to an inquiry by the US Department of Justice on antitrust grounds.

The governance of the Registry is outlined in the Settlement documents, saying that the Registry will have “equal representation of the Author Sub-Class and the Publisher Sub-Class on its Board of Directors”. There is no provision for European rightsholders from either class to be represented. Given the importance of the Registry’s work and the degree to which European rightsholders are likely to be affected by the Settlement (see above), it is essential that European (and indeed all non-US) interests are represented on the Board. The PA has sought to negotiate with Google through the FEP on this point, and it is hoped that a legally enforceable agreement can be reached to ensure more balanced representation.

The notion of “commercial availability”
The Settlement defines a work which is to be classified as commercially available as one which is “for sale new through one or more then-customary channels of trade in the United States”. No definition of a customary channel is provided, and it is unclear whether the definition is intended to include, for example, European online bookshops, which are also a channel to market for US users. The Settlement also sets out that “Google shall determine whether a Book is Commercially Available or not Commercially Available based on an analysis of multiple third-party databases as well as an analysis of the Book’s retail availability based on information that is publicly available on the Internet”.

The significance of the commercial availability determination is that it governs the default display uses which the work is subject to under the Settlement. A commercially available book will be automatically removed from display uses until the rightsholder opts it in, while a commercially unavailable book will be included in display uses by default, and only removed at the rightsholder’s request.
European publishers expect that works which are commercially available in Europe should be treated similarly to works commercially available in the United States. But currently under the Settlement, where European editions of books are to be found in US libraries, a determination of their status against only US sources of metadata would be highly likely to return them as commercially unavailable, meaning that they could be made available without the rightsholder’s consent, despite the fact that the rights for publishing that work might not yet have been sold into the US market. There are clear and serious implications here for the infringement of territorial copyright. The only way publishers could exert control over this would be by claiming titles and challenging their classification on a book by book basis, a process which would be onerous and have considerable resource implications for publishing houses of all sizes.

Furthermore early indications suggest that the completeness and accuracy of the metadata which currently exists in the Registry’s database is at best limited, with a high margin of error evident in the classification of out of print books. Google has acknowledged that the database is in need of significant improvement.

Unless the definition is explicitly broadened to cover books sold through customary channels of trade outside of the US, and Google agrees that the Registry should consult explicit sources of metadata which cover these non-US channels, then European rightsholders risk finding their works systematically being considered as commercially unavailable. This means that, unless these works are claimed by their rightsholders and the work’s display uses turned off, the work will be included by default in all display uses. The PA has sought to negotiate with Google through the FEP on this point, and it is hoped that a legally enforceable agreement can be reached to ensure European sources of metadata are taken into account by the Book Rights Registry when making the commercial availability determination.

European publishers have asked that the database quality should be measurable and assessable by independent parties. European rights-holders should be sure that if one book is correctly classified in the information resources currently used in the book supply chain (such as books in print or other catalogues) then they can trust such books (and all the previous editions of the same books) are correctly classified also in the Google database.

**Consumer issues**

As far as access to books digitised and made available under the Settlement is concerned, only consumers and other users in the US will be affected. Users outside the US would need to infringe copyright by circumventing the blocking of IP addresses to gain access. Irrespective of this fact the provisions in the Settlement raise significant questions as to whether they are in the best interests of consumers and other users, particularly in the light of parallel solutions which are being developed in Europe.

The commercial, contractual basis of the Settlement means it differs substantially from the European digital libraries initiative. In addition the *de facto* monopoly granted to Google for unclaimed books generates similar concerns to those present in any sector where consumers are at the behest of a commercial offer provided under a monopoly market regime. That these issues should impinge on questions of cultural heritage, and public interest, raises further questions as to whether a commercial, contractual solution is in any way appropriate.

The monopoly concept creates specific problems – on pricing (Google will set the price of orphan and unclaimed works using an algorithm) and also cultural diversity and pluralism
(Google will be able to exercise its own discretion in the exclusion of books from display uses). In a competitive market, a book can often find another publisher. In a market where a large portion of the business – for non claimed books – is managed by a single player, the power of such broad editorial control is not likely to be in the public interest. The effect is exacerbated by the dominance Google enjoys in the search engine market, a position which could be abused in the face of any competitive book search offering.

These concerns contrast sharply with the Europeana model, which seeks to negotiate with cultural institutions to make their content available online, and is widely supported by European publishers as offering the best potential for diversity and consumer choice. This is complemented by EU member-specific initiatives, many of which take the form of partnerships between national libraries and publisher associations. Moreover the scope of these initiatives is generally much wider than the Settlement, as they cover access to future works. Publishers also have the option of entering into individual contracts with Google through the Partner Programme. This and similar competitive offerings will increase consumer choice and access where monopolies are destined to fail.

In addition there has been considerable discussion both within the High Level Group for digital libraries and elsewhere about the challenges posed by orphan and out of print works. Different European cultural sectors are developing, with the assistance of the European Commission, an infrastructure to facilitate access to orphan and out of print works. ARROW, the Accessible Registries of Rights Information and Orphan Works towards Europeana is an EU funded-project which comprises European national libraries, publishers and collective management organisations also representing authors.

ARROW supports Europeana by finding ways to identify right holders, rights and clarify the rights status of a work including whether it is orphan or out of print, by accelerating the “diligent search” process. ARROW will be a neutral technical solution that will help both identify the rights owners and minimise the problem of orphan works in the future. With a rights identification infrastructure in place, and legislation amended to give a legal safe harbour, RROs or other licensing bodies could issue licences for uses of orphan works. The licensing bodies may also be able to offer a due diligence search service as well. Once such clearance has been given, the way will be clear for libraries to legitimately digitise and make available those elements of their collections where rightsholders cannot be traced.

Conclusion
We therefore oppose any extension of the Settlement to the territories of the European Union, except on a voluntary basis via individual contracts with publishers. European publishers believe that the most effective way to improve access to works in Europe is to foster cooperation amongst stakeholders through projects such as ARROW. We therefore invite the European Commission to continue working on the development of European digital libraries with all relevant stakeholders and with the continuous aim to foster the creation of a legal, diverse, high-quality and sustainable offer of digital contents.

The European model for digital libraries is more advanced from a technological viewpoint, since it is based on distributed resources instead of a centralised database. It is more sustainable from an economic viewpoint, since it is based on a competitive principles with thousands commercial players and adequate space for libraries to provide their public services. It is more valuable from a cultural viewpoint, since it preserves cultural diversity and pluralism. Crucially it is more beneficial for European consumers and citizens, since they need not rely on one single gate keeper to access content.