



European Writers' Council AISBL
Fédération des associations
européennes d'écrivains
Secretariat
Rue du Prince Royal 87,
B-1050 Brussels
Tel. +32 (0) 2 5510 893
EWC-Secretariat@inter.nl.net
www.europeanwriters.eu

THE EUROPEAN WRITERS' COUNCIL ON THE US GOOGLE BOOK SETTLEMENT AGREEMENT

Information Hearing
European Commission
DG Internal Market D1
Copyright and Knowledge based Economy Unit
Brussels, 7 September 2009

This response is submitted by the **“European Writers’ Council” « EWC » / la “Fédération des Associations Européennes d'Ecrivains”- AISBL.**

EWC is the federation of national and trans-national associations representing authors (writers and literary translators) in 33 European countries, including Belarus, Iceland, Norway, Switzerland, and Turkey.

We thank the European Commission for giving authors the opportunity to contribute to the Hearing. We shall focus on the question of the scope of the Google Book US Settlement Agreement (the "Settlement") in relation to the quantity and status of European published works covered by the Settlement.

I. The Scope of the USA Legal Framework versus the Member States’ and European National Legislations and the Copyright Directive.

First, we need to stress that considering the legal context of the procedures, as well as the legislative terms and conditions under which the United States District Court case has been established, we conclude that the Settlement is or should be valid for the USA, but not for Europe.

Both the Google digitisation acts and the Settlement procedures go against the rights of authors and rights holders in the Member States and Europe at large; namely, against our right to decide and to establish, through our contracts, whether we grant or not authorisation before publication to digitise our works and make them available.

On the one hand, the economic dimension of these rights are ruled by the Copyright Directive; on the other hand, the “moral rights of rights holders should be exercised according to the legislation of the Member States, and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty.”



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Moreover, the notion of “fair use” is not applicable in the European system, since the copyright exceptions are dealt with in the 2001 Copyright Directive.

In most European countries, the copyright law states that it is the moral right of the authors and/or rights holders to decide where, when and how their works shall be published. The authors have to give their consent before publishing. Google's action of digitising and only thereafter asking for the consent of the authors is fully against European law. In short, Google has proceeded under these conditions with the digitisation of many thousands of European works in copyright currently existing in numerous USA library collections.¹

Another key element is that, as non-US authors and as European authors, we are unwillingly and in thousands of cases, unknowingly, directly affected by a legal settlement in which we have not been one of the parties involved, nor are we to be considered as the “absent class members”. The USA legal procedure of a “class action” is non-existent as such in National and European law systems; therefore, the “Author Sub-Class” under which we see ourselves submitted (it consists of “authors and their heirs, successors and assigns”) is legally out of scope. The “Settlement Class Membership” embraces all authors who have published on or before January 5, 2009.

Consequently, the scope of the proposed settlement is being imposed on European authors, affecting us directly at several levels, especially concerning:

- The new precedent that would be established in order to facilitate Google's appropriation of intellectual property on the basis of a past copyright infringement;
- the procedures to which we are subjected to “participate” in the Settlement, have been determined and negotiated by other parties, not by European authors;
- the terms of the Settlement aimed at authorising Google to sell and display our works are less than satisfactory and have considered European authors;
- the economic dimension of the agreement: namely, we have not been consulted on the conditions to make the “Cash Payment” applicable;
- the deadlines to “Opt-out”, to claim our works, to yield our rights, etc. which are imposed on us whereas we have had no opportunity to be a co-participant in any part of the formulation of the Agreement;

¹ As stated in the Notice Programme of the Settlement lead by the “plaintiffs” lawyers: “A class action lawsuit claims that Google violated the copyrights of authors, publishers and other owners of U.S. copyrights in books and other writings by digitizing (scanning) them, creating an electronic database of books, and displaying short excerpts without the copyright owners' permission.”



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- the lack of consideration of many authors who are not connected to the Internet and therefore have had no access to the information of the Notice Programme and relevant details.

Thus, while the legal scope of the Settlement is relevant to the USA rather than to Europe, there is evidence that Books and Inserts published in Europe are directly affected. This was highlighted for us by the Notice Programme of the plaintiffs' lawyers in their communication to 36 countries, where the warning is announced in the title:

*“Attention Authors and Publishers Outside The United States:
The Settlement May Affect Your Rights As Well”*

We are concerned that the “Notice Programme” did not state explicitly that the Google digitisation acts have already been put into operation to include works by non-USA authors, including by European authors. We believe that the true geographical scope should have been clearly stated and should have been directly disclosed and communicated to authors and publishers in Europe.

The extent to which the settlement puts much of the burden of identifying works in copyright ownership on rights holders is against the established European regulation and is highly worrisome.

The system that might result from the proposed Settlement for future uses on the basis of a remedial compensation does not correspond with the legal system both at European and national levels. It would force authors and rights holders to give up their rights after these have been infringed; we would have to abandon any future rights as well as our freedom to decide on the conditions of exploitation of our works **before** the digitisation is carried out.

The Settlement proposes to overturn a key principle of international copyright law, by requiring that authors will have to register their works with the new Book Rights Agency in order to retain and protect their rights in them. This is contrary to the principles of international agreements on copyright and intellectual property, and contrary to all custom and practice in the publishing industry, whereby each publication is the subject of individual contractual arrangements between author and publisher.

II. The scope or extent of the digitisation of full works and or part of a work by Google.

A “Book”

The terms of the Settlement as explained by the “Notice Programme” include the definition of a “Book” for a written or a printed work under three conditions published on or before January 5, 2009: The first condition refers to a work that was distributed or published and made publicly accessible under the authorisation of the work's US copyright owner. The second condition establishes that it needs to have been “registered in the US Copyright Office, UNLESS [sic] the work is not a ‘United States work’ under the U.S. Copyright Act,



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in which case such registration is not required”; and the third, that it is “subject to a U.S. copyright interest”. The above second and third conditions make the range of application open to include any or all European works. These terms can hardly be accepted.

We need to reiterate that as non-US authors, we are subjected by a Settlement in whose content and conditions we have not participated. Keeping in mind this situation and the fact that digitisation has happened before consultation with the authors, we also need to stress that the numbers of full works, chapters, and inserts by European authors which have been digitised by Google are significant. Think of the many US libraries specialised in a given culture and language, such as German, Lithuanian, French Studies, to give only a few examples, with their special collections and various numerous collections. Moreover, following the possibility given to authors to use the www.GoogleSettlement.com website to identify and claim their works, many authors throughout Europe have discovered that the digitisation is **not** limited to “works that are present in USA libraries.” If we consider roughly that each of the many thousands of European authors are in the Google list with five, ten, twenty, thirty, and more entries of full works or chapters thereof, the digitisation can be considered massive.

For an accurate set of indicators and actual figures about how many of our works are affected, we strongly recommend the Commission to investigate further and to launch a survey in which authors and rights holders in Europe can provide evidence, to quantify appropriately the true extent of digitisation of our works.

Commercially unavailable in the USA but commercially available in Europe

Equally worrying is the fact that what is understood as “commercially unavailable”, out-of-print, poses problems of territorial licensing that is not recognised by the Settlement. Likewise, works that are considered “not commercially available in the US”, but which are or may be commercially available in the present or in the future in Europe have also been included. It is astonishing to learn that authors are left only with the opt-out option in case authors are confident that future editions of our work will be published, or when there are prospects of film, TV and other adaptations to be entered into contractual agreements by them directly.

Work for hire in the USA and literary translators in Europe

Work-for-hire is not included in the Settlement and this raises a problematic exclusion of European literary translators and their rights in the all inclusive scope previously described. In the USA, translators do their work mostly as work-for-hire, and hold no copyright. In the majority of European countries, translators are rightly considered as authors and their works are protected by copyright law. For us, there is no legal ambiguity on this issue.



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III. Conclusion

In conclusion, the scope of the Google digitisation goes beyond the limits announced in the Settlement, both legally and in the extent to which works by European authors are swept into it.

Having described the ways in which the legal system of the Settlement should not be automatically applicable in our European contexts without consideration of all the existing national legislations; having shown that the Settlement has given no opportunity to European authors to respond, agree or disagree before the Settlement was defined; having shown that the amounts of digitised works by European authors is significant, we ask the Commission the following:

For European authors it is important to have concrete data on quantifying and analyzing the types of works digitised by Google (such as in copyright, and out-of-print), on a country by country basis. In this way we can have the mapping and actual numbers.

Authors in Europe, either collectively and/or individually, have made different choices regarding the settlement, and have reacted differently (e.g. Germany, France, Austria, Switzerland, and United Kingdom); EWC is monitoring their decisions at national level. Our conclusion in the current situation is that it would be very beneficial for the future of authors and their works that the European works be excluded from the conditions and terms of the Settlement, if the latter were to go through. If a Settlement would remain as the only solution, then European authors and rights holders should have the opportunity to settle their own agreements with Google, following the relevant national legislations.

On the issue of access, the Settlement establishes that the digitised works would be available only in the USA; in this respect, a word of warning must be said on how several dimensions of diversity may be threatened by the effects of the Settlement. Namely, The diversity of European cultures, and the diversity of literary genres, and the diversity of literary professions would be affected. Literature plays several roles in Europe. In terms of works, there is a huge variety of genres: academic and scientific literature, educational textbooks and works of popular sciences, drama, aesthetic works of fiction, etc.

Authors represent different categories. There are academic authors who do not earn money with their texts. Instead of money, they get professional recognition from their peers. There are professional full-time authors, who need the income to do their work. And there are part time authors who have another orientation for publishing their texts. We also wish to call upon the fact that the linguistic variety in Europe is vast. There are about 30 national languages in Europe. In several countries there are 'minority' languages that have a regional, linguistic, ethnic or other statuses. All these are used in literature. If many of these works have been digitised and will only be available in the USA under the conditions of the Settlement, Europe will not only experience a great weakening in the support to its authors and their works, but will also witness irreversible constraints and a maiming of many dimensions of the European cultural diversities.



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If the proposed Settlement Agreement goes ahead, the result will be far reaching. The Commission is advised to consider thoroughly the imminent legitimisation, privileging and subsequent emergence of Google as the largest monopoly for digital publishing at a global scale, which would transform the free and competitive market conditions of the book-chain, and would leave such an important part of our cultural heritage in the hands of one commercial stakeholder.

Sincerely,

Signed

Dr. Pirjo Hiidenmaa
President

Signed

Dr. Myriam Diocaretz
Secretary-General

The present statement also includes selected issues from the responses to the July-August 2009 EWC consultation with its members, with special thanks to the following organisations:

- The German Writers' Union (Germany),
- The Latvian Writers' Union (Latvia),
- The Norwegian Association of Literary Translators/Norsk Oversetterforening,
- la Société des Gens de Lettres (France),
- The Society of Authors (United Kingdom),
- Vereniging van Schrijvers en Vertalers (The Netherlands), and
- The Writers' Guild of Great Britain (United Kingdom).