

To the European Commission
Berlin, 03 September 2009

CEPIC – STATEMENT on the Google Books US Settlement Agreement –

CEPIC, Coordination of European Picture Agencies Press Stock Heritage, was founded in 1993 to have a unified representation in light of new legislation emerging from Brussels. Registered as an EEIG (Economic European Interest Group) in Paris in 1999 and achieving observer status at WIPO (World Intellectual Property Organisation) in 1997. As the first organisation within the picture industry to do so, CEPIC now represents over one thousand picture agencies and photo libraries in 19 countries across Europe, both within and outside of the European Union. Also a member of IPTC since 2005 and of ICOMP since 2009, CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries and museums. CEPIC has among its members all the big global companies like Getty and Corbis.

CEPIC's membership is directly affected by the Settlement as millions of books digitized by Google include photographs. A small part of our members licence illustrations for children's books – included in the Agreement – other will represent photographers who hold copyright in books. Sooner or later, Google will pursue all photographic rights and work out its conditions, as has been done for writers' rights in the present Settlement.

CEPIC is not opposed to general or special agreements between Google and libraries or universities.

As Google has the technology and the libraries own the content, working together could be a win-win situation. However, any agreement should be within the general legal working framework and not create a de-facto legal working framework. Both parties should respect the principles of copyright and authors rights and of fair remuneration. Special market conditions for special interests should not be created.

We believe that the present agreement does not meet these minimum requirements: CEPIC will not support any agreement that does not respect copyright and authors rights rules.

As photographs are not included in the present agreement, the Settlement is against the interests of our members. Photographic associations were not invited in the negotiations although the scanned books include millions of photographs without the consent of their rights holders. The integrity of many books depend on their photographic content. We believe that sooner or later Google will address photographic rights, imposing the same "opt/out" solution and thus creating orphan works.

We therefore want the agreement to be banished, to allow new negotiations to unfold and we are in favour of a public registry of orphan works, not a private one. The Commission has already done a lot of work with regard to the issues around mass digitization and orphan works. These efforts should be pursued at an international level. In particular, we wish to work together with publishers in order to solve the issues of photographic rights in books being digitized.

The Membership of CEPIC is made up of the following National Associations :
AEAPAF, Spain - APAAI, Portugal – BAPLA, United Kingdom – BLF, Sweden - BVPA e.V. , Germany – FNAPPI, France – NLimage, Netherlands – SAB, Switzerland – SBF, Sweden – SNAPIG, France
In addition CEPIC has 50 affiliates single member agencies in 19 European countries.

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Google Settlement

CEPIC's position Hearing of the European Commission 7.09.09

CEPIC, the Coordination of European Picture Agencies, is an international federation of picture agencies & libraries. CEPIC's membership includes over 1,000 large and smaller stock photo libraries, major news agencies, art galleries and museums. These picture agencies & libraries produce content, as copyright holders, collect and distribute rights on behalf of the photographers they represent, their agents abroad, and finally market this creative material at home and all over the world through a professional network for publications on-line, in advertising, in magazines and in book publishing, as book covers or as illustrations within the books.

Although images are excluded from the Google Settlement, many books digitized and put on-line by Google include copyrighted picture material. A small part of our members licence illustrations for children's books – included in the Agreement – other will represent photographers who hold copyright in books.

In general, we cannot accept the premises of the Google Settlement, which originating from a private company, is likely to have far reaching consequences for all categories of copyright and authors' rights, not just in the USA but worldwide. The Google Settlement goes far beyond usual out-of-court settlements which are meant to amicably settle past disagreements : it actually creates a working framework for the future.

What is happening here is that a search engine, searching for content, is setting the rules how the providers of this content are remunerated for their work, not to speak of their moral rights which are completely disregarded and not mentioned once in the 130-page agreement and its annexes.

Accepting the Google Settlement would be accepting a de-facto weakening of Copyright for all authors and copyright holders. In general : it hurts its basic principles. In particular : it excludes a complete class of rights, namely photographic rights.

The major flaws of the Google Settlement are the following :

- Authors must have a chance to give consent before having their work copied – this right is not provided for by the Settlement. Rights holders lose the benefits provided by the Settlement, in effect their rights, if they do not claim the work within a very short deadline of a few months or, when the author is unknown, a delay of only five years. There is no obligation for Google to search for rights holders.
- Class actions are unknown in European jurisdictions – It is a particularity of the US legal system. Whatever its benefits in the US law system, class actions do not go well with the exercise of the individual rights of the authors.
- Pictures and their rights holders are not included in the Google Settlement unless the copyright owner of the photographs also holds the copyright on the book. The Settlement is partial because, although it potentially affect all authors categories, the benefits of the Settlement only go to a limited group of them.
- The Settlement does not only settle the case of the books unlawfully digitized in the past, it goes further by creating a Book Registry which will manage the rights of digitized works in the future. As such it creates a working framework for the future without any legislative supervision.
- By making it difficult for authors to claim their rights and not putting any obligation on Google to search for rights holders, the Settlement potentially creates orphaned works. Whether the works were originally-orphaned or created-orphaned, the Settlement creates a monopoly in favour of Google, all revenue remaining with them.

That being stated, we wish to answer the questions of the European Commission as set in its invitation to the hearing.

1) SCOPE OF THE SETTLEMENT

The main issue regarding the scope of the Settlement is that photographs are left out of its benefits but will be affected by its outcome without any possible influence.

Photographers associations in the USA were completely left out of the negotiations. As a consequence, the Google Settlement does not include photographs, but an exception for photographs¹. Image authors are included in the Settlement when they have copyright interests in the Book itself or when they licence illustrations in children's books. This represents a minority within our membership.

The fact that the agreement does not include photographs is not a relief but a matter of worry.

A first obvious concern is that if the Settlement is agreed by the court, it will retroactively legalize the infringement of million of works, including photographs, compensate the writers/ authors (part of the class action, aware of the agreement and who claim on time) with 60 dollars, but not the photographers although their work has been infringed too.

This is an obvious negation of copyright.

A second concern is whether Google will actually black out images. This has been asserted by different parties but is nowhere to be found in the Settlement. In fact, the definition of Books² in the Settlement covers books with or without photographs. In some cases, taking out the photographs and other pictorial/ graphic material out of the book, maps for instance, affects the integrity of the original work and make it unsuitable for sale. Considering the amount of images used in books, from the front cover to the inside illustrations, the complete blacking out of images does not seem practical in the long term. This makes us believe that, sooner or later, Google will be obliged to deal with rights attached to the pictures.

Photographic associations, who were not part of the first round of negotiations, will be in a very weak bargaining position to assert the rights of the authors they represent at this later stage.

- Any agreement including photographic rights should respect present copyright and authors rights laws. It should give each author the possibility to give consent in advance – not afterwards, once the work has been already scanned.

¹ I. Definitions 1.72 "...The term Insert does not include (l) pictorial works such as photographs, illustrations (other than children's Book illustrations), maps or paintings ..."

² See I. Definitions 1.16

2) QUANTITY AND STATUS OF EUROPEAN WORKS COVERED BY THE SETTLEMENT

This question is aimed at publishers or and libraries, whose books might be included in the Settlement.

According to early estimates, 50% of the in-copyright out-of-print works scanned by Google are non English/ non US works.

In view of the fact that many books will include pictures, we would like to provide some figures as to approximate >> direct sales / sales through agency network / % in publishing.

Pro. Dr. Glückler of the University of Heidelberg conducted a Survey on The Market for Image Suppliers in Europe (2007)³

It provides additional following figures:

- ✓ 20% of agents are located in the USA
- ✓ 16% of the share of turnover to media was in book publishing, whereas this share will be much higher for certain libraries

Images licensed are used both for covers and inside books..

In any case, the number of agents located in the USA is probably not essential since Google has scanned and will scan European works as well.

³ The Market for Image Suppliers in Europe by Prof. Dr. Johannes Glückler, University of Heidelberg

3) THE REGISTRY

Google will set up a “Book Right Registry” (BRR) which will manage the rights of the rights holders concerned by the Settlement.⁴ Google pays 34,5 million US dollars to set up the registry. From then on, 63% of the revenues generated will go to known rights holders while 37% remain with Google.

The work of authors who have neither opted out of the agreement nor registered with the Registry will be considered orphan, all revenue remaining with Google.

When an author does not claim funds, there will be a delay of five years for the author to let him/herself known.⁵ After that date, the unclaimed revenues will go first to support the operations of the BRR, and then, after that, be used for charitable purposes consistent with the interests of publishers and authors.

In effect, the BRR will be acting as a new kind of collecting society with the major difference that the authors have never transferred the management of their rights to them but have been obliged to do so based on a de facto situation. It will be a collecting society, dealing exclusively with the rights of “orphan works” it has created by setting up the Registry in the first place. While collecting societies are bound by legal obligations, the contractual obligations for Google are at a minimum.

It is unclear how the 63%/ 37% share comes to be. The split between photo agencies and photographers is 60 – 40% or even 50 – 50 %. Some collecting societies spend as low as 10% of their income from fees to cover their administrative costs.

- No work should be considered orphaned unless an effort has been made to find the author. These efforts should be documented and real. The criteria can only be determined by law, not within a bilateral agreement.
- The delay of five years is too short considering that a great part of the authors are not American.

⁴ Article VI – Establishment and Charter of Registry

⁵ Unclaimed funds 6.3



4) COMMERCIAL AVAILABILITY

The Settlement permits “Display uses” (and therefore the potential sale of the book with all revenues going to Google) if Google :

- considers the work to be “non commercially available”⁶ after consulting its sources
- No right holders claims the work by January 2010 and request otherwise by April 2011

In general, a number of difficulties arise here :

- The determination of “non commercial availability” is left to Google
- A book which is not available for sale in the USA may be available in another country
- The channels of sales are limited to the USA, which makes the situation above even more plausible
- The deadlines are too short : many books may be considered “orphan” not because they are, but an artificial deadline has been passed
- Many rights holders will not claim their works for other reasons : lack of information, complicated and confused information, difficulties with databases
- Foreign authors are less likely than US authors to claim their work
- Book may be out of print , i.e. non commercially available, or unclaimed – but that does not mean that the works included in the books such as pictures are as well.

Concretely this means, that there is an important risk that books in-copyright and in-print may be considered as non commercially available in the USA and sold by Google which will retain the revenue to the sale – in addition to the revenue of advertising from the number of clicks on a page displaying the book. It is likely that the largest group of rights holders affected by this are foreign authors, who will both miss the deadline for opting out of the Settlement (January 2010) or not register with the Registry and whose books from then on will be considered “orphan”, not because they are but because Google considers them to be so.

Obviously this book may also contain copyrighted photographic material, but since this material has been left out of the Settlement from the outset, authors are refused a remuneration anyway.

- CEPIC thinks that a clear definition of commercial availability should be provided and without restriction to territory. The definition needs to be set up by all parties involved and not by the one party which gets the revenues.

⁶ * Definition of Commercial Availability 1.28 =

1) available new in the USA 2) available through customary channels of sales in the United States



5) CONSUMER ISSUES

Picture agencies are B2B businesses, except in the limited case of microstock, which reaches out to the consumer markets. Picture agencies are profit oriented companies, marketing pictures, and with this profit :

- Remunerate the authors of the works (photographers) and themselves as agents in accordance to contractual and legal obligations
- File, keyword, digitize pictures, archive the images, preserving them for the future

Google services will :

- Display snippets of the books in response to user queries
- Set the price of online access to consumers
- Sale books to individuals and subscriptions to institutions
- Put one single terminal in each library but with no possibility of copying or printing

The Google Book Project is very different from the projects of Europeana, the Gutenberg book project, or the BNF project where the content which is digitized is made available for free to the public. The Google Book Project does not provide content for free but for profit.

The Google Settlement shifts the revenues from the providers of the content to the engine searching this content. If the Settlement is up-held by the court, only Google will be protected from copyright liability, not its competitors. Future companies wishing to set up a similar scheme will be obliged to seek permissions one by one. The monopoly on orphaned works, would be irreversible but the revenue stream to Google secure. And finally, as a monopolistic private company, there is absolutely no way to ensure that Google will not raise its prices after a while, affecting the consumer market too.

- Regardless of the market reached, remuneration of all stake holders should be fair.
- Conditions of use for research purposes or on the consumer market should be determined in advance by the legislator in negotiations with all stakeholders.
- The same rules of competition should apply to all companies on the market.

THE END
03.09.2009