



Madame Viviane Reding
Membre de la Commission européenne
200 rue de la Loi
1049 Brussels

Brussels, 16th June 2009

Dear Mrs Commissioner,

We, the Board of the Federation of European Publishers and Presidents of national publisher associations who are members of FEP, would like to remind the Commission of the vital importance of copyright values in sustaining a dynamic publishing sector. We would also like to voice our support for Europeana and associated initiatives, including finding ways to clear rights for both orphan works and out-of-print works and building bridges between libraries and e-aggregators to allow internet users to make full-text searches.

As you are aware, the US Google Book Search Settlement, agreed by the Association of American Publishers, the Authors Guild and Google, is currently being reviewed by a US judge. The decision about whether to participate in the Settlement rests with individual rights holders. However, we are unanimously opposed to the prospect of the Settlement being extended to the territories of the European Union.

The industry is at present developing its own solutions through ARROW, which is co-financed through the eContent+ programme, to permit users to clear rights for orphan works and out-of-print works. In addition, users will be able to access in-print works through e-commerce platforms, e-booksellers or through publishers' own websites.

It is however critically important that the fundamental principle of prior consent is adhered to at all times, in order for works to be legally reproduced and made available, even in the form of "snippets". This principle must remain the foundation of EU copyright legislation.

Where publishers wish to collaborate with Google on a commercial basis, they are able to do so through Google's Partner Programme. If they prefer instead to allow users access through alternative platforms, they should remain free to exercise this right without having to first opt out of any agreements in which they have been included by default.

We are at the beginning of very exciting times for both publishing industry and the whole content market, and we sincerely hope that the Commission is able to work collaboratively with publishers to develop truly European solutions which benefit EU citizens and the wider community.

Yours sincerely,

Federico Motta, FEP President

Fergal Tobin, FEP Vice-President

Arne Bach, FEP Treasurer



Benedikt Föger, President of the Austrian Publishers Association
Jean Vandeveld, President of the Belgium Publishers Association (ADEB)
Rudy Vanschoonbeek, President of the Belgium Publishers Association (VUV)
Damyán Yakov, President of the Bulgarian Publishers Association
Vladimír Pistorius, President of the Czech Publishers Association
Voula Kokkinou, President of the Cyprus Publishers Association
Karsten Blauert, President of the Danish Publishers Association
Kadri Haljamaa, President of the Estonian Publishers Association
Sara Mella, President of the Finnish Publishers Association
Serge Eyrolles, President of the French Publishers Association
Gottfried Honnefelder, President of the German Publishers Association
Annie Ragia, President of the Greek Publishers Association
Irme Barna, President of the Hungarian Publishers Association
Kristjan B. Jonasson, President of the Icelandic Publishers Association
Alan Hayes, President of the Irish Publishers Association
Marco Polillo, President of the Italian Publishers Association
Lolita Varanaviciene, President of the Lithuanian Publishers Association
Dirk Sumkötter, President of the Luxembourgish Publishers Association
Geert Noorman, Director of the Dutch Publishers Association
Geir Berdahl, President of the Norwegian Publishers Association
Piotr Marciszuk, President of the Polish Publishers Association
Rui Beja, President of the Portuguese Publishers Association
Mitja Zupancic, President of the Slovenian Publishers Association
Pedro de Andrés, President of the Spanish Publishers Association
Kjell Bohlund, President of the Swedish Publishers Association
Simon Juden, Director of the UK Publishers Association

Explanatory memorandum

European publishers would like to remind the Commission of the vital importance of copyright values. Through their support for Europeana, they wish to build bridges with cultural institutions which provide online content so that, from a single search interface, the internet user can freely locate and consult digitised works in the public domain irrelevant of their nature. For works protected by copyright, the user can consult e-aggregators, such as Gallica2.bnf.fr or Libreka.de, which allow the user access to short extracts as well as the opportunity to purchase content.

European publishers work within the ARROW platform, details of which can be found at www.arrow-net.eu/, co-financed by the programme eContent +, to establish practical solutions for identifying works by a process which constitutes due diligence and therefore also allowing, by default, for the identification of orphan works.

1. FEP and the Google Settlement with US authors and publishers

- a. The Settlement is only binding upon the parties with respect to the territory of the United States of America.
- b. The Settlement only applies to books published before 5th January 2009 anywhere in the world, in a country that has ratified the Berne Convention for the Protection of Literary and Artistic Works.
- c. The Settlement, which must still be approved by a US judge in order to become binding upon all class members, is based on the US legal principle of class action, that all European works (books) which are protected in the United States are covered by the Settlement.
- d. European publishers would like to point out that the Berne Convention provides in Article 5 that '(2) *the enjoyment and the exercise of these rights shall not be subject to any formality*' and in Article 9 (1), it says: '*Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form*'.
- e. In signing this Settlement, Google *de facto* recognises that digitisation and making available are not covered by fair use. Google has not ruled out digitising works from rights holders who opt out of the Settlement, referring to fair use, nor books published after 5th January 2009.
- f. European publishers regret that the Settlement as a whole runs counter to the fundamental principle that prior consent is essential in order to legally reproduce works and make them available, even in the shape of "snippets". Prior consent to use protected works forms the basis of international and European copyright legislation.
- g. The agreement recognises two categories of works
 - i. Commercially available works which are by default excluded from display uses and sale by Google unless the rights holders expressly agree to display and sale;

ii. Out of print works which can be commercially exploited by Google unless the rights holders expressly indicate that they disagree with such exploitation.

h. Irrespective of their position on the agreement, European publishers would expect that works which are commercially available in Europe are treated similarly to works commercially available in the United States.

i. European publishers have on several occasions informed Google and the future Books Rights Registry (which will administer the Settlement if it is approved) that they consider that it is Google's and the BRR's duty to improve the traceability of the works to avoid that works that are commercially available be classified as out of print. Currently, the quality of the Settlement database is seriously questionable.

j. It is up to each individual publisher to decide whether he/she wants to stay in the class, or leave it (opt out). If he/she stays, then they can make the further decision on whether they wish their books to be removed (permanently), excluded from display uses, or sold by Google. If publishers do not react at least by claiming their works, they are still considered as being part of the agreement, but they cannot enjoy any of its benefits. The role of FEP is to inform its members of the consequences of each of the options open to them.

k. European publishers would oppose the extension of the Settlement to Europe.

2. FEP and Google Book Search

2.1. Partner Programme – Within the Partner Programme, European publishers are free to negotiate with Google on making books available online. In this case, it is the publishers themselves who provide Google with the books they wish to see displayed (in part) on Google Book Search.

2.2. Library Programme (both in the US and in Europe) –Google is not authorised to digitise and make available protected works unless they have obtained prior permission from the rights holders. European publishers note that in Europe, Google does not digitise protected works, but it reproduces and makes available only works in the public domain. However, Google digitise European copyright protected books which are contained in the collections of US libraries and make them searchable online and display snippets.. Digitising and making available on the internet without authorisation protected works, even snippets, constitutes an infringement of copyright. European publishers support their French colleagues, publishers and authors, in their procedure against Google for infringement of copyright and moral rights.