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European Commission
To Tilman LUEDER
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Re : Google Book Settlement

Vienna, 24th of August 2009

Dear Mr. Lueder, dear Madam or Sir!

Literar-Mechana is a copyright collecting society. Business activities are focused on the administration of rights in literary works. The members of Literar-Mechana are authors of all sorts of literature, journalists, film script writers, authors of scientific works, and publishers. Among the rights transferred to Literar-Mechana by the rightsholders are, in particular, those of public recitation and performance, distribution by cable, use of works in school books, and the licensing of sound and picture/sound-carriers as well as that of handling claims to remuneration for reprographic reproduction of protected works and for the sale of blank tapes. Literar-Mechana is operated with the appropriate license, issued by KommAustria, the state authority that authorizes and supervises Austrian collecting societies.

Together with a representative body of Austrian writers (IG Autoren Autorinnen) and the Austrian booksellers association (Hauptverband des österreichischen Buchhandels) Literar-Mechana has committed itself to safeguard the rights of Austrian authors and publishers vis-à-vis the Google Internet platform. In doing so, the three organisations have intensified their contacts with partner societies and associations in Germany, Switzerland and elsewhere in Europe and talked about a co-ordinated strategy of European societies in the United States.

The request of the European Commission for comments in this matter is answered as follows:

Neglect of European rightsholders in the proposed Google Book Settlement

As early as 2004 Google started to produce scans of the inventories of American libraries. The Internet provider launched this so-called "*Google Library Project*" without obtaining the permission of those who hold the copyrights of the digitized material. Google claimed that producing scans of a work was an act of "*fair use*", an interpretation that followed the notion of permitted free uses in cases like, for instance, quotations; this quotation right is strictly limited, though. Even though five of the biggest U.S. publishing houses and the Authors' Guild filed complaints at court, the company continued to digitize millions of books without the consent of the concerned rightsholders. What followed were yearlong negotiations and costly lawsuits in the United States, which Google and two plaintiffs tried to end by filing a complex and jointly produced Settlement Agreement at the appropriate New York court on October 28, 2008. Although its terms and provisions affect European rightsholders, too, they had no opportunity to participate in the genesis of this proposed Agreement.

Biggest act of copyright violation in the history of copyright law

The proposed Agreement is an attempt to pay tribute – at least outwardly – to the rights of authors and publishers. Nevertheless it is a fact that – in order to make books accessible to Internet customers – the contents of more than seven million works have been digitized without the authorization of the respective rightsholders, and that the project is to be continued: in the end about fifteen million books will be available in electronic form. This makes Google the world’s biggest infringer of a law that vests authors and publishers with the right to be asked before their works are scanned and made accessible in digitized form.

Neglect of international conventions

Making works or parts thereof accessible for the public via Internet is subject to the authorization of the rightsholder. Such permission must be obtained prior to the exploitation of the work. This principle applies to the use of every copyrighted work, irrespective of its kind and irrespective of whether it is still in print or out of print or an “orphan works”. The proposed Book Agreement, even if approved of by the court, does not interfere with Google’s right to act in contradiction to copyright law and international conventions: According to the terms of the Agreement, Google would still be allowed to rightfully use a protected work as long as the rightsholder – who is not informed in advance – does not forbid such use. The necessity that a rightsholder who wishes to secure a copyright claim must do so within a certain period of time is understandable in the light of American rules of procedure; in the light of international conventions seems highly problematic, though.

Why the Google transaction falls foul of the „no formality“ requirement as laid down in the Article 5(2) of the Berne Convention (by Prof. Dr. Michel Walter)

According to Article 5(2) of the Berne Convention the enjoyment and the exercise of the rights referred to in paragraph 1 of this provision (national treatment and minimum rights as enshrined in the Convention) shall not be subject to any formality. Furthermore, such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work¹. However, pursuant to the third paragraph of Article 5, protection in the work’s country of origin itself is governed by domestic law. This principle of copyright protection free of any formality to be fulfilled applies also under the TRIPs Agreement which, according to Article 9(2) of this Agreement, stipulates the complying with all substantial provisions of the Berne as laid down in Articles 1 to 21, except for the author’s moral rights according to Article 6^{bis} of the Berne. This concept of indirect application of the substantial provisions of the Berne Convention is adopted by Article 1 of the WIPO Copyright Treaty (WCT) as well².

It follows from what was said so far that the principle of “no formalities” only applies in the international context, namely when protection is claimed in a Union country other than the country of origin³. This is the reason why national legislation may impose formalities for domestic works, a choice which was made by the United States of America when acceding to the Berne Convention in maintaining registration as a condition for any action for copyright infringement. Thus, formalities of whatever kind (eg registration) may still be provided for in US American copyright legislation with regard to works of US origin. Such formality requirement, however, shall not be imposed on the authors of works the country of origin of which is a foreign country. This is the reason why the United States adopted in 1994 the

¹ See article 5(4) of the Berne Convention.

² See Ficsor, *The Law of Copyright and the Internet* (2002) C1.16ff; *Reinbothe/Lewinski*, *The WIPO Treaties 1996* (2002) 35ff.

³ See *Lewinski*, *International Copyright Law and Policy* (2008) 5.55.

Uruguay Round Agreements Act⁴ in order to comply with the “no formality” principle as anchored in the Berne as well as – indirectly - in the TRIPs Agreement which, according to Article 18 of the Berne, applies retroactively⁵. This Act focuses on the renewal requirement⁶ as set out in the Copyright Act of 1911 before the Copyright Act of 1976 entered into force which adopted the Berne concept of protecting copyright works for a certain period of time after the author’s death (*post mortem auctoris*).

In the first place the “no formalities” principle extends to formality requirements to be fulfilled in order that copyright protection comes into existence⁷. However, in addition, the “exercise” of the author’s rights must in no case be subject to formalities either, a principle, which was already laid down explicitly in the 1908 Berlin Act of the Berne Convention. Therefore, “formalities” are to be understood in a broad sense so as to include any formal conditions with regard the coming into existence of protection as well as the enforcement of the rights vested in authors. Hence if an author is vested with rights but unable to exercise such rights without complying with formalities, the “no formality” requirement is not met⁸. Thus, as has been mentioned already, formalities must not be a prerequisite for the instituting of infringement proceedings⁹. This conclusion was confirmed recently with regard to the requirement of registration as a prerequisite to filing infringement proceedings as set out in the US Copyright Act of 1976. The Berne Convention Implementation Act, consistently, lifted this requirement vis-à-vis works of foreign origin, but retained it as regards works of US origin¹⁰. This holds true with respect to the requirement of “assertion” of moral rights under the UK Copyright, Designs and Patents Act as a prerequisite to enforce those rights as well¹¹. Under this perspective also the requirement of registration as a condition to claim statutory damages as laid down in the US Copyright Act¹² which, indeed, applies also to works of foreign origin appears to be inconsistent with the “no formality” requirement as set out in the Berne¹³.

Under the US American concept of class actions court decisions or transactions agreed upon on the occasion of a court proceeding may extend to third parties which are not directly involved in those proceedings. The application of this regime to copyright infringement cases as such appears to be questionable under the aspect of the “no formality” requirement in general. For authors who are not involved in the proceeding and who may not even be informed about such proceeding are deprived of their right to individually sue the alleged infringer for copyright infringement and must join such proceeding in order to being involved and in order to retaining the possibility of influencing the handling of the proceeding and its outcome at least marginally. These concerns extend to settlements in court all the more, since

⁴ Dated 8. December 1994 Public Law 103-465 Sec 512 108 Stat 4809.

⁵ See *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights – The Berne Convention and beyond 6.112.

⁶ See for details *Walter*, Die Wiederherstellung des Schutzes gemeinfreier Werke in den USA (*Copyright Restoration*), ÖBI 1997, 51.

⁷ See *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights 6.101ff.

⁸ See *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights 6.104.

⁹ A French court as early as 1914 held that the prerequisite to the institution of infringement proceeding under French law to deposit copies of the work with the *Bibliothèque Nationale* was inconsistent with the „no formality“ requirement as laid down in the Berne and, thus, applied only to works of French origin.

¹⁰ See Report of the Ad Hoc Working Group on US Adherence to the Berne Convention, published in *Columbia-VLA Journal of Law & the Arts* 1986, 513 (569). Cf *Kernochan/Ginsburg*, 102 Years later: The US Joins the Berne Convention, *Columbia-VLA Journal of Law & the Arts* 1988, 1 (13).

¹¹ See *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights 6.104.

¹² Sec 412 of the US Copyright Act.

¹³ See *Lewinski*, International Copyright Law and Policy (2008) 5.57.

in the case of US style class actions third parties dispose of the rights vested in the individual author and exclusively owned by him or her.

As far as the content of the draft „Google-Book-Settlement“¹⁴ is concerned, the conflict with the “no formality” requirement under the Berne Convention appears to be evident as well. For under the terms of the settlement the author is forced to opt-out in order to enforce the rights he or she enjoys individually according to the minimum protection under the Berne respectively pursuant to the US Copyright Act. There is no doubt that the opting out requirement as laid down in the „Google-Book-Settlement“ is deemed to be a formality with regard to the exercise of the author’s (exclusive) rights in the sense of Article 5(2) of the Berne Convention. If the author fails to opt out in time¹⁵, he or she is deprived in particular of the right to seek injunctive relief or to order the destruction (deletion) of the copies of the works¹⁶ scanned by Google prior to 5 May 2009. Moreover, the author failing to opt-out in time remains member of the class concerned (authors) and thus may participate in the payments agreed upon in the settlement, but must mandatorily file a form with the Settlement Administration. Furthermore, if the author fails to opt-out in time, he or she, indeed, may apply for the removal deletion of “commercially available books and/or in-print books“ as well as of “not commercially available books and/or out-of-print books”. In addition, this requirement to apply for removal until 5 April 2011 at the latest is to be regarded as a formality requirement banned by the Berne Convention at least with regard to authors who have not actively joined the settlement but rather have become a class member for failure to opt-out in time.

Competitive discrimination of correct users

If approved, the proposed Agreement will put Google in a favourite position vis-à-vis its competitors: the company still has the possibility to rightfully exploit copyrighted works for the Internet platform as long as the rightsholder – who is not informed in advance – does not prohibit such use. Orphan works can, under the terms of the Agreement, be used by Google without liability for damages, whereas other Internet providers – for instance those in Europe – must not use such works or take the risk of being held liable for damages.

Bookshop and library monopoly; monopolized information

It is out of question that it is easier to launch a simply commercially oriented business model than to start, and keep going, a multi-medium museum like “Europeana”. And things are even easier if copyrights are neglected. Nevertheless, the example of Europeana has clearly shown that mass digitization (even of out-of-print works) and the acquisition of rights as well as individual licensing do not exclude each other. With the approval of the proposed Google Settlement by the U.S. court, the prospects of companies which handled, and handle, copyrights correctly, deteriorate. Even more important, however, seems the question to what extent we should tolerate a development where the world’s entire knowledge is monopolized and lies in the hands of a few private firms, who dictate the terms under which access to information is granted; this also leads to a monopoly in the selling and lending of books and libraries and thus to decisive changes in existing economic structures.

Translation deficits

German-speaking rightsholders, who depended on the official translation of the 36-page resumé of the proposed Agreement, did not know until more than six months after the

¹⁴ Submitted to the United States District Court, Southern District of New York, on 28 October 2008 in the proceeding *Authors’ Guild Inc et al v Google Inc*.

¹⁵ The deadline was shifted from 5 May to 4 September 2009

¹⁶ See Art 16 of the BC.

Settlement had been filed, whether the proposed Agreement was of importance to them at all and, if so, what interests were at stake. Google had used electronic software for the translation and obviously failed to check the final version. In many parts the meaning was blurred or unclear altogether, and some of the details were simply wrong: a publisher (Verleger) became an editor (Herausgeber), and an author was given the epitheton „Unterklasse“ (subspecies or lower-class), to name just two examples of many. Therefore, many rightsholders would not see themselves as addressees of the Agreement. It needed several complaints until, in mid-April, the translation was revised and the most irritating of the mistakes were eliminated.

Lacking certitude about approval date and organisational requirements; fixed deadlines

The Agreement will not become legally effective until approved of by the court. The Fairness Hearing was postponed from June 11, 2009 to October 7, 2009. Then the court will decide whether the Settlement is accepted in the proposed form or whether objections are too severe to be neglected. At what date and in what form the case will be finally settled is still an open question; nevertheless, the deadline for claiming damages for misuse of copyrighted works is January 5, 2010. To file a claim – particularly for companies who administer rights collectively – requires long and expensive preparatory work (member information, formal assignment of rights to the collecting society, database installations, etc.). If the claim is rejected, time and expenses have been wasted; if, on the other hand, the court approves of the Settlement, the period within which the collective administrator must raise claims is extremely short. Many rightsholders are likely to lose their right of claim simply because it is impossible to set actions in due time, particularly in those cases where authors or publishers do not want a collecting society represent their interests.

Why libraries participate

Initially, the Google digitization project did not meet with enthusiasm on the libraries side. The restrictions imposed on libraries by the contracts Google had offered, the felt infringement of copyright laws, and lacking technical standards had nourished their reservation. The decision of libraries to finally participate in the Google project had various causes: very much in the foreground here was the financial aspect, as many libraries lacked own means to make their stocks available in digitized form. In our eyes, however, the scanning of inventories should be the original task of the library, as the service of an information monopoly and that of a commercial provider are mutually exclusive.

Insufficient data compilation

In its present form the Google database is insufficient and incorrect in many respects: many entries have no registration number at all; frequently there is no indication as to the year when a book was published; indicated identification numbers are wrong; titles, names of authors and/or publishers are misspelled or missing; many books appear more than once since the system obviously fails to eliminate double entries. Also wrong are indications as to the status of works (in or out of print): many books are said to be out of print although their availability is out of question and thus of relevance for uses and claims under the terms of the Agreement. Deficiencies of this kind will make it difficult for rightsholders to have works properly registered. And actually it will be difficult to find out for which work, and to which extent, payments were received (or not received).

Accessibility risks

According to the proposed Settlement, the security system of the Internet platform must reach a standard that excludes unauthorized access to digitized works from inside and outside the United States. Also libraries are expected to secure that standard. Considering the generally growing pace of Internet piracy and in view of the fact that the world of books is not spared,

access to digitized material is likely to happen also from outside the areas where the Google Book Settlement applies. This is another reason why digitization should by all means be subject to the authorization of rightsholders.

A promising business model

Nobody can foretell what payments a holder of copyrights is to expect if she or he submits to the Google Book Settlement and implements existing claims individually (i.e. without the support of an authorized collecting society). The Agreement provides that 63 percent of the income will be distributed among rightsholders according to a highly complex set of rules. Yet, the rightsholders have no opportunity to control whether payments were correctly calculated and whether their will regarding the use of a work was respected.

No effective means to fight the Google Book Agreement

In order to proceed against the proposed Settlement, the U.S. law system offers two instruments: filing notice of objection against the Agreement at court, and individual implementation of claims through court proceedings. In both cases the involved costs are extremely high. Up to now, more than 45 million U.S. \$ have already been spent to pay lawyers and court fees. For rightsholders who wish to assert their claims individually these options are not recommendable.

The new service of the collecting societies

In the future, the administration of copyright claims under both the Google Book Settlement and the world-wide available Google Partner Program will be a service that Literar-Mechana is able to provide. In order to prevent that members are deprived of their claims because deadlines of American court procedures are tight or because they were not properly informed about the contents of the Agreement and failed to register in due time, Literar-Mechana – in cooperation with the German sister company VG Wort and Prolitteris in Switzerland – has expanded its offerings in the below described way. The new service will return to rightsholders the power to freely dispose of their digital rights.

Benefits of national administration of digital book rights

It makes sense when a collecting society is a long-familiar national institution and when the person to contact speaks the own language. To administer several sorts of copyrights within one particular society means to bundle the expenses and make administration definitely cheaper. Unlike in the case of the proposed Book Rights Registry, Austrian collectors are subject to supervision by national controllers. Copyrights administration on the national level also ensures the correct handling of non-exclusive rights while the Book Rights Registry acts as a super-size collecting machine that compiles, and disposes of, all the data of (European) rightsholders without their influence.

Scope of digital claims administered by collecting societies

The service Literar-Mechana – in accord with the sister companies VG Wort in Germany and Prolitteris in Switzerland – provides includes administration of the following rights:

- **Under the Google Book Settlement**
 - a) To collect remuneration payments for scans that Google produced until May 5, 2009
 - b) To collect remuneration payments for scans of inserts that Google produced until May 5, 2009 if contained in scientific books that were published after January 1, 1987.
 - c) To demand the removal of **out-of-print** works from the Google digitization program
 - d) To demand the removal of **in-print** works from the Google digitization program

- **Under the Google Partner Program**

- e) To license the digital use of **out-of-print** works
- f) To license the digital use of **in-print** works exclusively for the purpose of digital display of bibliographic contents via Internet.

To use the offered service, rightsholders must authorize Literar-Mechana in due form. **The mandate becomes effective when the appropriate order form is signed and returned to Literar-Mechana. Order forms were dispatched to members together with in-depth information on the Google Book Settlement in June 09.** The members are free to limit the scope of claims they assign to Literar-Mechana. The assignment extends to all similar cases where digitalized material is produced and used. The assignment of the right to license digital use of **out-of-print works** vis-à-vis the world-wide available Google Partner Program can be terminated by rightsholders at any time.

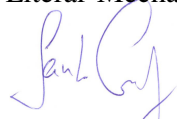
Because deadlines are so tight (January 5, 2010 for the submission of claims from unlawful digitization) the mandate must have been given to Literar-Mechana in writing not later than August 10, 2009.

Remuneration for the digitization of mere “inserts” can be claimed by Literar-Mechana only in those cases where inserts appeared in scientific books published since January 1, 1987 and where authors had them registered for reprographic remuneration. Other insert uses – and particularly that in works of fiction – are not in the files of Literar-Mechana. Claims under this title must be submitted by the author or publisher individually!

If several persons (authors and publishers) hold rights of one particular work and if one or some of them declare that Literar-Mechana should remove the work from the Google digitization program [item 1 c) and d)] whereas others do not, Literar-Mechana is unable to help implement the claim. In this case, author and publisher must claim their right of removal directly at the U.S. Book Rights Registry and, if necessary, resort to arbitration for settlement of a dispute. Payments for damages are collected by Literar-Mechana irrespective of whether the declarations were unanimous or not.

In June 2009, Literar-Mechana informed about 13,000 members in a letter about the details of the Google Book Settlement. Enclosed was the invitation to sign an assignment contract. To this day about 5,000 rightsholders have assigned to Literar-Mechana their digital copyrights.

Kind regards
Literar-Mechana



Dr. Sandra Csillag
Chief Executive Director