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**THE CONFLICT BETWEEN GOOGLE AND THE BOOK
PUBLISHERS SHOULD NOT BE SETTLED BY A
UNIVERSALLY BINDING AGREEMENT IN A CLASS ACTION
CASE**

by

Ad van Loon *

Google's initiative to digitize the world's cultural heritage laid down in books is of major importance to society as a whole.¹ First and foremost, it has the potential of safeguarding and promoting access to cultural expressions, which might otherwise end up in oblivion. Digitized copies, in combination with a powerful search engine, not only make it possible to find publications which may turn out to be of interest to persons looking for certain content (they may come across publications, the existence of which they might never have suspected in the hard copy world), but it also makes it possible to provide instant access upon an individual demand. These advantages provide major benefits to society as a whole, and their importance should not be underestimated. It is a first major step towards collecting and making easily accessible the world's entire cultural heritage, since, given Google's ambitions, it is unlikely that their initiative will stay limited to the digitization of books.²

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¹ The project aims to digitize millions of books and in the process provide access to books that might otherwise be forgotten. See Eric Benson, *The Google Library Project Class Action Settlement*, 2009 EMERGING ISSUES 4150 (2009) (describing the Google library project).

² Google has evidenced this intention to branch out beyond books by beginning an initiative to digitize old newspapers. See Punit Soni, *Bringing history online, one*

It is very likely that Google will expand their efforts by creating databases of all kinds of music, video, film and television productions in the near future. The class action settlement is therefore likely to set a precedent for future new initiatives in related areas. Thus, it is very important that the approach is right from the start.

I THE IMPORTANCE OF GETTING IT RIGHT FROM THE START

Given the global impact of the Google Books project and the major public interests involved, the decision on the conditions under which the project can be realized should not be determined by a small number of private interest groups, primarily copyright interests. Clearly, given the public interest involved, a balance has to be struck between a number of other different interests, which are equally important to protect.

This article is partly dissenting from and partly concurring with the opinions expressed by my colleagues at the Institute for Information Law and Policy at New York Law School,³ (James Grimmelman c.s.), who wrote a ‘Brief of Amicus Curiae’ before the U.S. District Court for the Southern District of New York, which is the court dealing with the proposed Settlement Agreement.⁴ I dissent from their opinions, which I find too legalistic and one-sided. In their legal analysis, they ignore important other interests which are worthwhile to protect, such as the major potential benefits of the Google initiative for the society at large and for innovation. At the same time, I concur with their opinion that the proposed Settlement Agreement threatens the public interest by creating a dangerous concentration of power in the Book Rights Registry;⁵ but in

newspaper at a time, Sept. 8, 2008, <http://googleblog.blogspot.com/2008/09/bringing-history-online-one-newspaper.html> (announcing on Google’s blog page Google’s initiative to digitize newspapers).

³ New York Law School Institute for Information Law and Policy, <http://www.nyls.edu/iilp/> (last visited Feb. 9, 2010).

⁴ Brief of Amicus Curiae Institute for Information Law and Policy, The Authors Guild, Inc. et al. v. Google Inc., (S.D.N.Y. Sept. 2, 2009) (No. 05-CV-8136), *available at* http://www.nyls.edu/user_files/1/3/4/30/58/Public%20Index%20Amicus%20Brief.pdf

⁵ *See id* at 8 (describing how power is dangerously concentrated in the Book Rights Registry).

many cases where they criticize Google, it is really the Registry which will force Google to the behaviour which they complain about.

Moreover, this article concurs with the analysis made by Pamela Samuelson, a well-known expert in the area of copyright law whose work I admire, in her forthcoming publication.⁶

From a strictly legal point of view, Google should indeed have acquired prior permission from the copyright owners to start scanning books protected under copyright law.⁷ However, those with experience in the content business know that copyright owners tend to be very conservative: they stick too long to business models, which have become archaic and, in many cases, they try to block innovation.⁸ They will only move when challenged. They are not used to licensing their rights in the interest of and according to the wishes of the consumers; instead, they tend to push and impose their own business models and their own terms of service (even in cases where consumers don't want those kind of services anymore).⁹ This is the typical behaviour of market participants that can use their dominant positions (based on the exclusive rights

⁶ Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, SSRN, Jan. 13, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535067#%23.

⁷ See 17 U.S.C. § 106 (2009) (delineating "exclusive rights in copyrighted works" for authors in the U.S.); see also e.g., Barry Sookman, *Editions du Seuil v Google: what reasons did the French court give for holding Google liable for copyright infringement?* Jan. 11, 2010, <http://www.barrysookman.com/2010/01/11/editions-du-seuil-v-google-inc-what-reasons-did-the-french-court-give-in-finding-google-liable/> (describing the recent decision of the Paris "Tribunal de Grande Instance" on the implications of Google's library project in France); see also Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 28, 1979.

⁸ The monopoly afforded to copyright owners gives them the tools to dictate how and in what way their content will be exploited. This type of behavior is typical in one-sided monopolistic type contracts. See S.B. MARSH & J. SOULSBY, *BUSINESS LAW* 141 (Nelson Thomes 2002) (1995) (stating that an obvious inequality results when one party to a contract enjoys monopolistic powers. Typically if one wishes to acquire goods that the monopolist supplies, he cannot negotiate terms to suit himself. He must take the terms that the monopolist offers, or do without.)

⁹ See *id.*

which have been granted to them by the legislator).¹⁰ They are in a position to determine to an appreciable extent prices and other delivery conditions independently of the needs or wishes of users.

Unlike those who own or control copyrights, Google listens to consumers and is developing services that meet their demands; moreover, they do not seem to be unwilling to compensate the rights owners financially.¹¹ However, as those who have had the experience will be able to confirm, it is very difficult to negotiate with persons or organisations that have an exclusive right to permit or to prohibit the use of those rights, because they tend to dictate their terms of use one-sidedly.¹² This is especially awkward in cases where content is used in which many different rights components (rights of song writers, script writers, music composers, directors, actors, etc.) are combined, such as in audiovisual productions (movies; television productions). In such cases, there will be many exclusive right owners who will all have to give permission, which means that if one of them (even a person who has an exclusive right to the smallest possible element used in such a production) refuses to grant permission for a certain use, it will not be possible to use the production at all (even if all the other rightsholders have given permission). This places the small rights owner in a position of such a significant market power that allows him the ability to exploit this position financially by, for example, demanding a form of compensation which is unreasonable given the use made of his right.¹³

II ARGUMENTS AGAINST THE PRESENT SETTLEMENT AGREEMENT

¹⁰ Copyright owners can prevent others from using their works in many instances. *See* 17 U.S.C. § 106 (2009) (granting copyright owners broad rights with respect to their works, which allow the owners to prevent exploitation of their works that might be objectionable).

¹¹ *See* Amended Settlement Agreement, *The Authors Guild, Inc. et al. v. Google Inc.*, CIV. NO: 05-CV-8136 (S.D.N.Y. Sept. 2, 2009).

¹² *See* Marsh, *supra* note 8.

¹³ *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the transiktikon from Max to Markets*, 111 HARV. L. REV. 621 (1998).

The present settlement agreement is not right, for the following reasons:

- It creates a cartel of publishers that can determine how Google is to run its business; it even dictates Google's pricing policies. Under the agreement, a new dominant party of copyright owners is created in the form of the Book Rights Registry;¹⁴
- An Unclaimed Works Fiduciary will have the right to act as a fiduciary for orphan works.¹⁵ Google will have to pay a fee for its use of orphan works; a fee which will never be returned; not even if the rightsholders to orphan works have not been found after a long period of time.¹⁶ Those working in the industry know all too well that in the vast majority of cases, monies which are reserved for orphan works will never be claimed by anyone. Google will indeed have the obligation to come to terms with owners of orphan works whenever they become known, but no one could represent those unknown owners and then use the money collected for other purposes after the expiration of a certain period of time in which the compensation has remained unclaimed.

It probably would be a minimal risk if Google just used orphan works as part of their project, while at the same time committing itself to negotiate with all those who can show that they own the rights to works previously thought to be orphan works.

¹⁴ PublishersWeekly.com, *Book Rights Registry Closer to Launch*, <http://www.publishersweekly.com/article/CA6652829.html?rssid=192> (last visited Jan 31, 2010).

¹⁵ California Digital Library, *Highlights of the Google Books Amended Settlement Agreement*, (Nov. 16, 2009), http://osc.universityofcalifornia.edu/google/amended_agreement_highlights.pdf.

¹⁶ Miguel Helft, *Google's Plan for Out-of-Print Books Is Challenged*, N.Y. TIMES, Apr. 4, 2009, at A1, also available at <http://www.nytimes.com/2009/04/04/technology/internet/04books.html>.

Something similar, albeit on a much smaller scale, happened in The Netherlands.¹⁷ In 1996, after the introduction of neighboring rights, the cable operators agreed to periodically pay a certain amount of money to a collective rights management organisation that could be used as a compensation for possible future, but unknown, holders of neighbouring rights. After ten years, not a single claim had been received; consequently, the cable operators asked for reimbursement of the amounts that had been reserved, and got the money back.

- The Settlement Agreement also has the potential of restricting the free use of works that are already in the public domain.¹⁸

III WHAT SHOULD BE DONE INSTEAD?

It is important to widen the debate on the requirements to be imposed on Google in order to pursue their Project; it should involve individual authors, creators and performers, as well as the public at large. Governments should define the public interest that is to be protected (something which the French government has already done, since it is pursuing on a national basis its own project to collect and digitize cultural expressions).¹⁹ Perhaps Unesco would be the right place to define the public interest.²⁰

When determining the conditions under which Google can realize its project, the following issues need to be addressed:

¹⁷ P. Bernt Hugenholtz, *Chronicle of The Netherlands Dutch copyright law, 1995-2000* (January 2001), available at www.ivir.nl/publications/hugenholtz/PBH-RIDA2000.doc/.

¹⁸ Jonathan Band, *A Guide for the Perplexed: Libraries and the Google Library Project Settlement*, LLRX.COM, Dec. 14, 2008, <http://www.llrx.com/features/googleprojectsettlement.htm>.

¹⁹ Sophie Hardach, *France Joins Race to Digitize World's Books*, REUTERS, Jan. 20, 2010, <http://www.reuters.com/article/idUSTRE60K01H20100121?>.

²⁰ Eric Pfanner, *Unesco Puts World's Major Works Online*, N.Y. TIMES ONLINE, Apr. 21, 2009, <http://www.nytimes.com/2009/04/21/technology/21library.html>.

- Exclusive rights of copyright owners are not absolute; they are to be balanced against other interests which are worthwhile to protect, such as the cultural interests of society as a whole and the fundamental right of everyone to receive and impart information; the latter is important in a democratic society, the proper functioning of which depends on the ability of persons to contribute effectively to the democratic debate, which they can only do if they can access information sources to inform themselves properly;
- Then there is the interest of promoting innovation. Innovation is the engine of modern economies and the basis of the creation of greater wealth and well-being of the people;
- A fundamental principle of any market economy is the prevention of monopolization. In Europe, competition law is used for this. Under European competition law, it is illegal to engage in cartel agreements or concerted practices and if a company has a dominant economic position (which is more likely to be the case when a company has certain exclusive rights), the competition authorities will monitor whether such a position is not abused.²¹ In addition, concentration control measures attempt to prevent the establishment of dominant positions that are likely to create too much market power. The establishment of such positions can either be prohibited or be subjected to certain requirements to protect the public interest.

IV AN ALTERNATIVE APPROACH

A better way to protect copyright interests while taking account of the public interest involved and promoting innovation, would be to use competition law (or, antitrust law in the United States) to provide a basis for Google's operations.

First of all, there should be a compulsory license for the digital reproduction of books in order to allow Google to pursue its scanning

²¹ LENNART RITTER & W. DAVID BRAUN, *EUROPEAN COMPETITION LAW: A PRACTITIONER'S GUIDE* 135 (Kluwer Law International 2005).

activities.²² Such compulsory licenses are not a novelty in the media industry; for example, they also exist in the music business.²³ It does not mean that Google would not have to pay compensation for their scanning activities, but the level of compensation could then be established by law, taking account of all interests involved. To avoid misunderstanding, like in the music business,²⁴ there would be no obligation for Google to rely on the compulsory license; they could still choose to negotiate different terms.

Secondly, the Department of Justice should decide if, given Google's market power, it should be subject to certain behavioural rules in the public interest until such moment that there is a sufficient level of competition. This approach is also not a new one. For example, in the European telecommunications sector, the regulatory framework obliges the national regulatory authorities (NRAs) to analyze a number of markets that have been identified by the European Commission as relevant product markets.²⁵ The NRAs will need to decide whether there is a company with significant market power (SMP) active in any of those markets.²⁶ If that is the case, the NRA has the obligation to impose remedies in order to prevent any possible abuse of such market power.²⁷ The remedies can vary from obligations to disclose certain information, to pursue cost-oriented pricing policies or even to make a wholesale offer to third parties which can then offer these services under their own name

²² In this sense, the author is referring to the act of reproduction; not for the subsequent act of communication of the works to the public by displaying them.

²³ See 17 U.S.C. §115.

²⁴ See e.g. Donald S. Passman; *All You Need To Know About The Music Business* (Free Press, 2009).

²⁵ Council Directive 2002/21/EC at L108/36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0033:EN:PDF>.

²⁶ 52 Official Journal of the European Union L337, (Dec. 18, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:FULL:EN:PDF>.

²⁷ *Supra* note 27 at L108/45.

in the retail market, in competition with the SMP operator's own retail services.²⁸

Following the example of the telecommunications sector, the behavioural rules which could be imposed on Google might be, for example, that Google should make its database of scanned books available to third parties on transparent, fair, reasonable and non-discriminatory terms or that it cannot refuse to include in the database, upon request, books which it would exclude if given a free choice.²⁹

In addition to the reproduction rights, the right to communicate the books to the public (by making them available online) should, of course, also be cleared with the rights owners, i.e. the publishers. Here, a possible rule could be that owners of exclusive rights will not be allowed to use their rights in such a way that works, after their first publication, are not available on the market for any extended period of time. Market foreclosure will not be allowed. Prices can be negotiated freely between the rights owners and the users, but excessive pricing should be avoided. The latter could be done by creating an expert tribunal or panel of which the members have the knowledge and experience to decide on fair pricing issues.

The above would, in no way affect the exclusive right of the creator or of the first owner of a copyright to decide not to bring the product to the market. The rules would only apply after the work's first lawful publication.

²⁸ *Supra* note 28.

²⁹ This approach would be similar to the obligations imposed by many European countries on cable operators to carry certain broadcast channels that are deemed to be in the public interest ('must carry obligations'). See EUROPEAN COMMISSION, DIRECTORATE-GENERAL INFORMATION SOCIETY, COMMUNICATIONS SERVICES: POLICY AND REGULATORY FRAMEWORK, WORKING DOCUMENT ON 'MUST-CARRY' OBLIGATIONS UNDER THE 2003 REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES (July 22, 2002), *available at* http://ec.europa.eu/information_society/policy/ecomms/doc/current/broadcasting/working_doc_must_carry.pdf. The consequence of such an approach would, however, be that the position of the owners of exclusive rights to works, which are subject to a statutory obligation to be included in the database, would be strengthened significantly: Google has no other choice than to include those works in their offer, but such a statutory obligation does not put aside the private rights of the authors; consequently, they can ask any fee that they like (unless the legislator puts a cap on it).

V CONCLUSIONS

The Settlement should not be approved. It is too one-sided in that it only protects the interests of the publishers who started the class action against Google, thereby ignoring the wider public interest of society as a whole. It does not recognize the fact that the deal sets a precedent by creating a powerful Registry of rights owners able to dictate pricing policies and other business practices of users that may potentially compete with them; moreover, the Settlement will have a global impact and should therefore be assessed in a global context. There are other, better, ways to allow Google to pursue its goals; these would lead to better results and would better respect the interests of copyright owners, users and the general public.