

European Federation of Journalists response to consultation on the proposed Google Books Settlement



11 September 2009

Dear Tilman Lüder,

The European Federation of Journalists represents, as you know, over 200,000 professional journalists throughout Europe. Many are of course authors of books; and all have a strong interest in the manner in which the proposed Google Books Settlement may set a commercial precedent for all forms of publishing including printed and broadcast news.

The European Federation of Journalists and its member organisations have strong concerns about many aspects of the proposed Settlement, including the implied potential for monopolistic control. Rather than repeat what others, including for example the governments of Germany and France, have said, we will at present restrict our comments to some matters not so widely aired.

The European Federation of Journalists has consistently argued that Europe should take collective pride in possessing the best available legal model for the information economy, in the shape of the tradition of *droit d'auteur*.

In particular, the fact that *droit d'auteur* is founded on the moral rights of authors to be identified and to defend the integrity of their work is the foundation of a guarantee to the end-user of a digital work that what they see or hear is what it says it is and that the author takes responsibility for it – a particularly important matter for the journalistic works that our members create.¹

It is a matter of great concern, therefore, that the proposed Settlement would advance toward world domination the US model that treats copyright as a mere commodity. The proposed Settlement is of course drafted under US law, which contains no recognition of moral rights².

1) The proposed Settlement threatens European authors' moral rights. As one example of this: it is our understanding of the proposed Settlement that when so-called "Display Use" of any work has not been forbidden, Google assumes permission to re-sell its digital version of that work, or portions of it, through its "Affiliate Programs".

Consider the situation in which an "Affiliate program" is set up with Google by The Evil Enterprise Inc for a website promoting itself. A journalistic author's work is presented at www.evilterprise.com in such a way that it appears³ to be an endorsement of the Corporation. The machinery thereby constructs a serious breach of journalistic ethics, as well as a breach of moral rights⁴. (Any use of a work as endorsement, even of The Very Cuddly Company, would equally be a breach of journalistic ethics.)

This is, of course, just one way in which the proposed Settlement could cause a serious breach of authors' moral rights. Others include the presentation of works without illustrations that are integral to the content and the presentation of early editions containing serious printer's errors.

The EFJ therefore recommends: that this is a further ground for finding the proposed Settlement's effect on European authors objectionable; and that any European equivalent to the Settlement must take the moral rights fully into account.

1 *Authors' Rights: Copyright in a Democratic Society* – see <http://www.londonfreelance.org/ar/EFJ-pamphlet.pdf> or <http://www.ifj.org/assets/docs/203/117/e691fcb-8cc6c75.pdf>

2 Except for works of visual art in editions of 250 or fewer, signed and numbered on a Tuesday.

3 The proposed Settlement specifies that work presented through Affiliate Programs shall appear as part of the Affiliate's online presence: see 4.5(b)v [page 57 of Settlement].

4 We assume here that the UK/Irish exemption of work reporting current affairs from moral rights does not apply.

2) The proposed Settlement is not transparent. The European Federation of Journalists proposes that in every case in which a corporation that exploits authors' work takes it upon itself to calculate payments due to authors (and other holders of rights) it should be compelled to provide a fully transparent accounting of those payments. The proposed Settlement provides only that the Registry may appoint auditors and send them into Google, at its own expense, not more often than annually, and not at specified times of the year⁵. This is not adequate transparency.

The European Federation of Journalists proposes that the Settlement be amended to provide adequate transparency; and that this be provided for in any equivalent European arrangement

The European Federation of Journalists is currently preparing a more detailed submission to the Commission on the need for such transparency.

3) The proposed Settlement undermines the principles of Authors Rights. It specifies that payments shall be made by the proposed Registry to publishers and that it shall be publishers' responsibility to forward to authors their share, according to contracts between them. It therefore encourages publishers to force "work for hire" contracts on authors, or to extract licences for all uses in media yet to be discovered and universes yet to be invented.

The European Federation of Journalists suggests that the copyright model is utterly doomed, since research shows⁶ that end-users are willing to pay for content if and only if they are assured that the actual, breathing humans who created that content receive a fair share. The Authors' Rights model offers them that assurance; the copyright model encourages the belief – in fact, the fact – that "piracy" is merely depriving a powerful corporation of income.

Any equivalent European arrangement must therefore ensure not only that authors and other creators receive equitable remuneration, but that they are publicly seen to do so.

If we think of a feasible amendment to the proposed Settlement within US law, given the primacy of contract therein, we will be sure to call you.

As a matter of general public policy – though one of particular concern to those such as journalists who are concerned with the accurate recording of information – we cannot help finding it strange that the Southern District Court of New York State, US, feels it is empowered to rewrite the definition of "library".

Once upon a time the deposit library was a key institution of our civilisation, the complete archive of everything published. This is the default position of librarianship, and its bulwark against political – and indeed commercial – interference in the historical record.

The Court's approval of the proposed Settlement would promote the notion that henceforth a library is to be instead a service to citizens, offering the largest portion of the historical record that is commercially possible or prudent.

As noted above, in this submission we merely raise, in some haste, particular concerns about the proposed Settlement which, as far as we are aware, have been insufficiently aired in the debate to date. We will submit a thorough list of issues and policy principles for any equivalent European arrangement. In preparation, relevant EFJ people will be in Brussels on *Friday 2 October* and that would be a convenient date for us to meet with you to discuss the range of our concerns.

Best regards,

Mike Holderness, chair, EFJ Authors' Rights Expert Group mike@holderness.eu

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⁵ See 4.6(e) [p59 of Settlement]

⁶ For example by the UK's ALCS: *Consumer attitudes to digital downloads* accessed via www.alcs.co.uk/Resources/Document-library/Research.aspx 11/09/09