



Opportunities and Risks: the Digitisation of Books and the Google Book Settlement

ALLEA Standing Committee on Intellectual Property Rights

connecting excellence



ALLEA Statement on Opportunities and Risks in the Digitisation of Books and the Google Book Settlement

ALLEA draws attention to the potential, but also to the risks, of current large-scale digitisation projects of books. In particular, it offers a number of recommendations to public authorities (EU and national) aimed at limiting the potential negative effects of the commercial Google Books project.

Even after the rejection of the Google Book Settlement (GBS) between Google and some publishers and authors in a New York court, the underlying problems of an erosion of basic copyright rules and of unsatisfactory access provisions remain unresolved. European citizens and Europe-based researchers risk being barred from access to the benefits of this private digitisation project, while competing projects (public or private) may find themselves without access to relevant public-sector content collections (libraries). It is also important that the digital files received by the libraries after digitisation of their books are suitable for advanced research uses in a digital environment

National Academies take an interest in this issue as leading representatives of Europe's cultural and scientific heritage – through their collections, libraries etc. -, as publishers, as authors and as end users.

I. Background and context

With the advent of the internet, researchers are able to access and distribute knowledge much more easily than in the past. Most scientific journals are available online. More and more academic institutions require their staff to put their publications into digital repositories that are searchable online. Similar approaches are being explored for research data. These new ways of sharing research output can give rise to copyright issues. For instance, some proponents of the 'Open Access' movement challenge certain restrictions to access in the traditional publishing model based on copyright law.

This ALLEA statement focuses on an internet-related issue of equal importance and interest to the scientific community: the digitisation of books¹.

II. Digital Libraries offer new opportunities for research and higher education to prosper in Europe.

Digitising books and making them available online holds the promise of an improved dissemination of knowledge. There is potentially a great benefit for researchers, in particular for those who live and work in remote locations or where the traditional libraries do not contain all the books they need.

With already more than 15 million digitised items (books, maps, photographs, film clips, paintings, etc.), *Europeana*² makes it possible to explore public domain materials of Europe's museums, libraries, and archives. Besides this European project, most national libraries have

¹ ALLEA is exploring the possibility to establish a dedicated Interest Group on access to scientific information (topics such as open access, sharing of scientific data, e-research infrastructures etc); ALLEA and its advisory bodies may prepare additional position papers on other issues raised by the digital world for the Academies and the scientific community.

² See: <http://www.europeana.eu/portal/aboutus.htm>

invested in the digitisation of their collections. Other digitisation projects are supported by private entities. Among them, the *Google Books* program³ offers the largest online library with more than 15 million digitised books, including works under copyright.

ALLEA's view:

1. **ALLEA welcomes all initiatives, whether public or private, that promote the digitisation of books** and their availability in favour of the general public and of the research community. The various digitisation projects should be further supported and coordination efforts should be made.
ALLEA supports the views expressed in the report by the Comité des Sages on bringing Europe's cultural heritage online (the report, commissioned by the European Commissioners responsible for the Digital Agenda and for Education and Culture is entitled "*The New Renaissance*").⁴
2. **Member States, the European Commission (DG INFSO and DG EAC) and cultural institutions** should make their funding for the digitisation of existing books and other documents sustainable and **ensure curation over time**.
3. Wherever possible, **ALLEA Member Academies should be encouraged to join** and support the available national programmes.

III. Risks for Europe-based research arising from the *Google Books* Project.

Currently, the Google Books project is essentially articulated through two strands, the “partner programme” and the “library project”. The “partner programme” defines the relationship with authors and publishers; the “library project” defines the relationship with traditional content curators such as libraries⁵.

Some aspects of the future online library proposed by Google are of concern to the research communities based in Europe.

a) Discrimination in the Online Access to Books.

In 2004, Google started to digitise books belonging to a range of large libraries. Around 40 libraries, including the New York Public Library, the university libraries of Harvard, Michigan, Stanford, the Bodleian Library of Oxford and the Royal Library of the Netherlands, are now part of the *Google Library Program*.

The agreements with the U.S. libraries allow Google to scan books in their holdings, whether they are in the public domain or still under copyright (but out-of-print). Books in the public domain will be fully available online. For books still under copyright, only extracts are made available online. According to Google, these arrangements amount to “*fair use*” of the copyright material as defined in the U.S. Copyright Act. Google does not ask for a prior authorisation from authors, publishers or other copyright holders of those books (no “*opt-in*”). Google only offers the possibility of removing a book under copyright from the online library *a posteriori* (“*opt-out*”). This is arguably in contradiction with basic copyright rules.

³ See: <http://books.google.com/intl/en/googlebooks/about.html> .

⁴ See: http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm (report dated 11 January 2011).

⁵ As of January 2011, the Google Books Project website lists the following European libraries as its partners: Bayerische Staatsbibliothek, Ghent University Library, National Library Barcelona, Bodleian Library Oxford, University Library Complutense Madrid, University Library Lausanne.

Therefore, the U.S. publishers and authors launched, in 2005, a copyright infringement action before a New York court⁶. Because of the uncertainties of this class action suit, the parties negotiated a settlement which was released in 2008. Through this so-called *Google Book Settlement* (GBS), publishers and authors, in exchange for some compensation, would authorise Google to scan, make available and sell all books (including out-of-print and orphan⁷ books) present in the participating U.S. libraries. Many foreign books available in the U.S. partner libraries would thus also be covered by the GBS. Indeed, in its second version the GBS would apply to the scanned books (i) published in the UK, Australia and Canada or (ii) registered with the U.S. Copyright Office (some publishers in other languages than English have registered a large amount of their books with the U.S. Copyright Office). The GBS would have allowed Google to make most of the out-of-print and orphan books fully available for reading and online purchase in the U.S. The effects of such a settlement, reached in a U.S. class action, would have been limited to the U.S. and could not have had effects outside the U.S. territory. As a consequence, some books published in Europe would thus have been made available online for the researchers based in the U.S., but their (European) authors and other European researchers would not have access to those online books if they work outside the U.S. Under the terms of the rejected GBS, research and education institutions in the U.S. would benefit from an online access that similar institutions in Europe and elsewhere are not allowed to offer.

The GBS was rejected on 22 March 2011 by the U.S. District Court for the Southern District of New York.

The U.S. District Court Judge Denny Chin found that the Amended Google Settlement Agreement were not "fair, adequate and reasonable" (a necessary condition for an approval of a settlement proposal submitted in a "class action" proceedings). The Judge justified the decision by referring to submissions made in the 500 or so "objections" and "amicus curiae" briefs filed against the settlement and in the fact that 6.800 "class members" "opted out" entirely. The Judge emphasized that the Court was not prepared to enable Google to exploit works against the will of those authors, who missed the deadline imposed by the "opt-out" principle, a consequence which would be clearly incompatible with the basic copyright principles.

Moreover, the Judge joined the assessment of the U.S. Department of Justice submission, namely: "This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription." Google, according to the Judge, would have "control on the search market." Finally, the Judge accepted that by the Settlement the interests of foreign authors would be affected and therefore they had to be taken into consideration.

Also after the rejection of the GBS the underlying problems remain unresolved. The parties involved will return to the negotiating table. This, and the fact that Google with the help of exclusivity clauses in partnership agreements with libraries is seeking to restrict access to

⁶ *Authors Guild Inc. v. Google Inc.*, S.D.N.Y., No. 05 CV 8136 (DC). In France, the Paris Tribunal de Grande Instance ruled on 18 December 2009 that Google Books infringes the copyrights of the French publishers and authors (*Editions du Seuil et autres v. Google*).

⁷ Orphan works are works —books, music, records, films, etc.— which are still under copyright, but whose owner cannot be easily or immediately identified.

content for other public or private digitization projects, makes it necessary to draw attention to the consequences of this project.

ALLEA's view:

4. ALLEA explicitly **welcomes the rejection** of the submitted Google Book Settlement by the U.S. District Court for the Southern District of New York.
5. ALLEA urges the negotiating parties to undertake all the necessary steps to bring the **settlement in line with the guidelines submitted by the Court**. In particular, any form of discrimination in the online access to books covered under the negotiated GBS has to be avoided.
6. ALLEA requests the **European Commission**, in particular **DG INFSO, DG EAC₂ and DG R&I** and the **EU Member States**⁸ to explore all possible avenues in order to **secure access on non-discriminatory terms**. In particular, research and scientific institutions in Europe and elsewhere must not be barred from access to the Google online library as this would seriously affect their ability to compete on equal terms with their U.S. counterparts. The Commission should actively ensure that a balanced agreement is quickly found. This could require that publishers and authors agree that a revised GBS extend beyond the U.S. the territorial scope of their authorisation to distribute online the digitised books, while at the same time **securing the rights of European authors** in line with standards set forth in the relevant international conventions and European laws.

b) Need for a European Law on Orphan Works.

The GBS would have undermined some basic tenets of copyright law and would have carried the risk of replacing, by litigation, legislation that is awaited on important issues (such as: orphan works).

ALLEA, in line with the court decision in the U.S. , draws attention to the possible long-term market distortion, if other public or private bodies undertaking to launch a digitisation project would enjoy inferior rights compared to those granted to Google under the GBS.

Under the Settlement Agreement, Google may not become the sole beneficiary to obtain copyright clearance for out-of-print/orphan books.

ALLEA emphasizes that a situation has to be avoided in which the online collections of *Google Books* would be *de facto* the sole undertaking allowed to scan and make available out-of-print/orphan books and offer a large online bookstore for new electronic books, putting Google in a position to set access prices at will.

Only legislation that would regulate the exploitation of out-of-print and orphan works would allow everybody (whether a public institution or a private party) to compete on equal terms. *Google Books* is a vast commercial project that could allow a single giant U.S. company to be

⁸ Following some national court decisions in Europe (Belgium, France) it appears that national law should be applicable to Google activities (for example search engines, news platforms, reproduction of works in cache form, and other communications to the public). Accordingly, the standard of the European Directive on Copyright in the Information Society should be the legal basis for the treatment of foreign works in the reformulation of the Google Book Settlement.

in a position to control the future global market for e-books⁹. This was among the reasons, why the U.S. Department of Justice and some countries, including France and Germany, had filed observations before the U.S. District Court.

ALLEA's view:

7. ALLEA endorses the recommendation to the European Commission, made by the "Comité des Sages" in their report "*The New Renaissance*", that "**EU rules for orphan works need to be adopted as soon as possible**".

ALLEA is of the opinion that all solutions should be considered, including a possible reduction in the post mortem duration of copyright.

8. ALLEA welcomes, in principle, the EC proposal for a directive on certain permitted uses of orphan works and would welcome the quick adoption of such legislation by **the Council, Member States, and the European Parliament**. However, prior to the adoption of the directive it will be necessary to consider the rules applicable to those cases in which items of publicly owned items of cultural heritage become part of exploitation arrangements with private corporations.

c) Need to Monitor the Agreements Between Google and the European Libraries.

It appears that at least some of the agreements concluded between some European libraries and Google are not balanced. Some of those agreements grant a 25-year exclusivity to Google. Those clauses could prevent any public programme, whether national or European, from including books from this library. Also, the partner libraries cannot fully search the digital files they receive from Google in exchange for the books they make available.

The libraries having consented to the digitisation of their collections should receive digital files which are amenable for research use and should not be prohibited by contract from contributing to digitisation projects initiated by other parties (in particular by public authorities).

ALLEA's view:

9. ALLEA invites **public authorities to monitor closely the conditions under which** collections in institutions that had been subsidized over the years **will be digitised** and made available. In order to ensure that future digital libraries will benefit all, ALLEA calls the public authorities, both at EU level and at national level, to help define an appropriate regulatory framework for the digitisation of books.

For instance, those rules should (i) prohibit long periods of exclusivity (or indeed ban any form of exclusivity altogether) and (ii) guarantee that the partner libraries and their users can adequately benefit from and apply all the value-added tools for indexing and otherwise researching the digitised files.

10. ALLEA recommends in general, that public authorities promote **balanced public-private partnerships** for the digitisation of the European heritage whether for access by the general public or by research communities the world over.

⁹ In December 2010, Google announced the launch in 2011 of its U.S. online bookshop, called *Google eBooks* (previously known as *Google Editions*). This new project that will arrive in Europe later directly competes with Amazon, Borders, etc.

Because the adoption of those rules could take some time, it is important that public authorities monitor the situation, for instance through the adoption of unambiguous public statements so as to alert the directors of public and university libraries about the risks of unbalanced agreements¹⁰.

IV. Conclusion

Digitisation projects have the potential to open up and advance access to the cultural heritage and to scientific knowledge for ever widening groups of citizens: equitable access must therefore be the objective of policies in this domain. By the same token, however, the digitisation of books must respect the rights of the authors and the existing legal framework (for instance: copyright and privacy rules).

Principles:

The rights of the publishers and authors should not be disregarded by presuming they have authorised the digitisation and monetisation of their works.

Public authorities should ensure that private monopolies do not replace public ownership of cultural and scientific heritage and do not obstruct the delivery of digital content in formats that are most amenable to scientific research.

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ALLEA Standing Committee on Intellectual Property Rights

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¹⁰ For example, the position adopted by the French Minister of Culture and the official Report (Rapport Tessier, Jan. 2010) commissioned by the Ministry of Culture arguably created some awareness in France of the imbalances in the agreements between large public libraries and Google.

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ALLEA is the Federation of 53 National Academies of Sciences and Humanities in 40 European countries. Member Academies are self-governing communities of leaders of scientific and scholarly enquiry across all fields of the sciences, the social sciences and the humanities. ALLEA therefore provides access to an unparalleled human resource of intellectual excellence, experience and expertise.

Member Academies operate as learned societies, think-tanks, grant givers, and research performing organisations.

ALLEA promotes the exchange of information and experiences between its members, offers European science and society advice from its Member Academies through its expert advisory bodies; and strives for excellence in science and scholarship and for high ethical standards in the conduct of research.

Independent from political, commercial and ideological interests, ALLEA's policy work seeks to contribute to improving the framework conditions under which science and scholarship can flourish both in Europe and beyond. Jointly with its Member Academies, ALLEA is able to address the full range of structural and policy issues facing nations and Europe as a whole in the fields of higher education, science, research and innovation.

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