

The Revised Google Settlement: An Improvement, but Big Questions Remain Unanswered

PRESS STATEMENT

“It may be a complicated legal case and under US jurisdiction, but the BA believes the Google Settlement will have a significant effect on the digital bookselling landscape and how this might unfold here in the UK”, commented Tim Godfray, Chief Executive of The Booksellers Association. “For this reason, the Settlement is being considered by the BA extremely seriously and it is why the Association sent a formal submission last September to the New York court expressing its concern over a number of issues.

“Version 2.0 of the proposed Settlement is an improvement on Version 1.00, but some big difficulties still remain.

“The BA had hoped that in Version 2.0, all European titles and all Orphan Works [titles in copyright but with the rightsholder(s) unknown] might have been excluded. What is now proposed is that all titles published in hardcopy in the US, UK, Australia and Canada before 5th January 2009 and all Orphan Works will still continue to be included. Another key difference is that the Publishers Association in the UK has ended its neutrality and has now come off the fence by actively supporting the Revised Settlement”.

Undermining European copyright

There are still some big issues remaining, says the BA. The UK is covered by European copyright legislation covering the whole of the European Union. Yet the Revised Settlement treats the UK as separate to the rest of the European market.

Moreover, if Google had tried to set up a Registry here under European legislation, it would have had to obtain the permission of the copyright holder before scanning. Version 1.0 of the Settlement allowed Google to scan and sell Orphan Works in the US on an opt-out basis - titles only being excluded if the rightsholder then objected. Version 2.0 still permits Google to operate on an opt-out basis, giving Google exclusive access to a market segmentation that virtually everyone else would still find impossible to enter. So the American proposals seem to be at loggerheads with the European copyright framework.

Version 2.0 an improvement

But the BA is pleased that a number of significant concessions have been made.

In the BA's submission to Judge Chin, we urged Google to enable booksellers to have access to Google's electronic book repository and Orphan Works, and then for the booksellers to have an opportunity to purchase and re-sell the material, at trade terms, which would produce a profit for the rightsholders, for Google and for booksellers.

"The BA was therefore delighted to find that Google has proposed to allow book retailers to sell on-line access to the books covered in the Settlement", commented Sydney Davies, the BA's Head of Trade & Industry.

The definition of *Commercially Available* has improved as well, something the BA had been pressing for at the recent EU Hearing on the Settlement in Brussels. Commercial Availability now means: "*for sale new, from sellers anywhere in the world, through one or more customary channels of trade to purchasers within the US, Canada or Australia*". By default, Google will not display the content of any commercially available titles in their offers under the Settlement. "This is good news for booksellers", said Sydney Davies, "especially with Nielsen Book and Bowker helping to determine what is commercially available".

"It is pleasing to note that Print on Demand has now been limited to non-commercially available books", said Tim Godfray "and it seems that Google will not be able to make money from Custom Publishing and Abstracts, Compilations and Summaries' models. This was one of our worries".

The BA also argued that if the Settlement was going to go ahead, then European representatives should be on the board of the Registry - this request has now been granted. The Association had also pressed for the Registry to have the freedom to licence other parties without extending the same terms to Google - the Settlement proposes to make provision for this new arrangement.

Concerns

The court papers say that the Settlement is "only available to users in the United States". However, UK consumers are already able to purchase from US retailers and despite any restrictions that are put in place, inevitably in a digital world it will be easier and cheaper to buy electronic material – there will be no freight charges and (presumably) no custom checks.

Of concern to UK and Irish booksellers will be the fact that under the new proposals, Google will now have an unlimited right to discount the List Price of Books under their Consumer Purchase programme (so long as Google continues to pay 63% of the undiscounted list price to the Registry).

Finally, it is proposed that the Registry will also be able to increase the number of free terminals at a public library building. This is likely to increase tensions between libraries on the one hand that want citizens to have free access to information, and rightsholders and booksellers on the other, who make a living from the creation, development, promotion and supply of Intellectual Property.

Conclusion

In conclusion, the BA would have far preferred UK titles and Orphan works to have been excluded, but as it seems this is not going to be the case, the Association is pleased that a number of considerable concessions, at least, have been made following our representations. But there is more work for us to do. The BA will continue to talk to Google, the PA and the Society of Authors, to try and ensure that a fair balance exists between booksellers and the other interested parties as the Settlement discussions continue.

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Note to Editors

A copy of the Association's submission dated 2nd September to the New York Court on the Google Settlement can be obtained on request and will be supplied in a PDF.

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