



Submission to the Book Industry Strategy Group

January 2011



Overview

The Initiative for a Competitive Online Marketplace (ICOMP) welcomes the opportunity to provide a submission to the Book Industry Strategy Group.

ICOMP is an industry initiative for organisations and businesses involved in Internet commerce, including online publishers.

In recent years we have seen unprecedented change in online publishing, which have had significant impacts on business and online commerce.

ICOMP will be focusing its submission in the following areas detailed in the terms of reference:

- How the supply chain for trade, educational, scholarly, scientific and technical books has been and will be affected by digital technologies, taking into account the impact on authors, publishers, printers, wholesalers, retailers and consumers.

Digital books

A study from the Australian Booksellers Association estimated that within five years, e-books will account for 20-25 percent of all books sold. The figure as of 2010 stood around 5 percent.

Further, the Australian Society of Authors has indicated that e-books may become more attractive to authors because they can claim a greater share of royalties than they get from printed books.

These developments have led to an increased focus on digital technologies and the impact involving the online publishing industry.

There have also been several prominent international developments that have had a direct impact on Australian publishers and authors, including the ongoing case involving the Google Book Search settlement.

Google Book Search Settlement background

As the Book Industry Strategy Group is aware, through an aggressive business and litigation strategy premised on a narrow reading of copyright, Google currently engages in unauthorised copying and “snippet display” of copyrighted books. The latest version of its proposed private U.S. class-action settlement, submitted in New York in November 2009, would bind nearly every copyright owner of every book published in Australia, the U.S., U.K. and Canada -- an estimated 80% of all English-language books.¹

¹ See Council of the European Union, *The Google Books Settlement (GBS) -- Impacts from a European Perspective, Information from the Commission for the Education, Youth and Culture and for the Competitiveness Council*, at 5 (24 Nov. 2009), <http://register.consilium.europa.eu/pdf/en/09/st15/st15109.en09.pdf>



ICOMP strongly supports the goal of expanding online access to books in Australia. Yet the proposed settlement would sweep in Australian books into a digitisation regime engineered for Google's benefit and for which Australian rights holders, policymakers, and other stakeholders were neither involved nor consulted.

We also feel that Australian rights holders should be aware of the potential long term structural effect that the settlement could have on the emerging digital publishing sector, including in Australia, and in competition in Internet search -- a sector over which today Google yields overwhelming monopoly control.

We see four key structural issues for Australian book publishers and authors in the future, if the terms of the settlement are finalised:

- Google will essentially be provided with a monopoly in the sale and distribution of digitised 'orphan works' as a result of the settlement;
- Google dominates Internet search in Australia, with almost 90 percent share of all search traffic. As it does with other services, Google may profile its book services highly on its search platform, directing significant traffic away from other services;
- Google's existing library of more than 15 million books that it digitised without authorisation, combined with its own device agnostic eBooks store will provide Google with a scale in the digital literature that will be hard for other entrants to compete against and will certainly raise the barriers of entry to new providers; and
- Google's exclusive control over access to online copies of so-called "orphan works" will further solidify Google's monopoly position in search and strengthen its control over consumer access to all forms of online content and information -- to the clear detriment of both consumers and creators of content and information.

In a statement to the U.S. court where the Settlement is being adjudicated - the US Department of Justice noted similar concerns with the proposed amended settlement², including that:

- The proposed settlement would "confer significant and possibly anticompetitive advantages on a single entity – Google";
- The proposed settlement "purports to grant legal rights that are difficult to square with the core principle of the Copyright Act that copyright owners generally control whether and how to exploit their works during the term of copyright."
- In relation to the pricing mechanism: "It is unlawful for competitors to agree with one another to delegate to a common agent pricing authority for all of their wares";
- "There is no serious contention that Google's competitors are likely to obtain comparable rights independently"; and
- "Google already holds a relatively dominant market share in [the search] market. That dominance may be further entrenched by its exclusive access to content through the [proposed settlement]. Content that can be discovered by only one search engine offers that search engine at least some protection from competition. This outcome has not been achieved by a technological advance in search or by operation of normal market forces;

² THE AUTHORS GUILD, INC. et al. v. GOOGLE INC. Document 922, Statement of interest of the United States of America: http://thepublicindex.org/docs/amended_settlement/usa.pdf



rather, it is the direct product of scanning millions of books without the copyright holders' consent and then using [a class action procedure] to achieve results not otherwise obtainable in the market.”

Implications of settlement to authors and publishers

The proposed settlement would authorise Google to copy virtually any book protected by a U.S. copyright, including books authored or published in the UK, Canada and Australia. Thus, both U.S. and non-U.S.-resident rights holders of covered books who have not opted-out of the settlement would lose their right to sue Google for infringement of their copyright.

The settlement would authorise Google to make copies of covered books available to users in covered markets and to monetise these books in various ways.

In addition, Google would be permitted to keep 37 percent of any subscription or other revenues it generates from providing access to these books, with the balance going to a non-profit Registry to cover operating expenses and to make payments to those who identify themselves as having a copyright interest in a covered book.

Rights holders in covered books could request Google not to provide access to their books, but they could not prevent Google from digitising their books, storing such digital copies in Google's database, or using the contents of those books to improve Google's algorithms for its main search engine—all without providing any compensation to rights holders.

Furthermore, Google has not agreed to obtain consent from rights holders going forward before copying and commercialising books that are not covered by the settlement, and nothing in the settlement prevents Google from doing so. Thus, rights holders who opt out of the settlement may have no recourse against Google's continued unauthorised copying except to institute costly and lengthy infringement proceedings against the company in U.S. court.

Concerns for Australian Stakeholders

Whilst the agreement was negotiated by U.S. parties in an effort to settle U.S. litigation, it has direct effects on Australian authors and publishers.

Unless Australian rights holders affirmatively opted-out of the settlement by the deadline of 4 September 2009, the proposed settlement would give Google the right to copy, make publicly available, utilise for internal purposes, and profit from their works in the United States. And even if Australian rights holders did opt out, nothing in the settlement prevents Google from continuing to copy and profit from their books without authorisation.

Key concerns for Australia include:

- **The proposed settlement gives Google overwhelming control over orphan works.**

One of the key aspects of the settlement is that it gives Google—and Google alone—broad rights to copy and profit from orphan works.

The status and proper use of orphan works has been the subject of intense public policy discussions in a range of jurisdictions and the Australian Attorney-General's Department has foreshadowed a review of the treatment of orphan works under Australian copyright law for some time.

It is understood that this review is currently scheduled for 2011 and the implications of the Google Books settlement on the use and treatment of orphan works needs to be considered under the terms of this review.

As noted earlier, the US Department of Justice raised a series of objections to the proposed settlement, and has flagged serious concerns with the control over orphan works afforded to Google under the terms of the settlement:

As a consequence, the ASA (Amended Settlement Agreement) purports to grant legal rights that are difficult to square with the core principle of the Copyright Act that copyright owners generally control whether and how to exploit their works during the term of copyright. Those rights, in turn, confer significant and possibly anticompetitive advantages on a single entity – Google. Under the ASA as proposed, Google would remain the only competitor in the digital marketplace with the rights to distribute and otherwise exploit a vast array of works in multiple formats. Google also would have the exclusive ability to exploit unclaimed works (including so-called “orphan works”) without risk of liability.³

- **Google will leverage its dominate position in online search into the supply and distribution of digital books**

According to Experian Hitwise, in March 2010, Google had nearly 87.26 percent of all Internet searches in Australia⁴.

The risk for many providers of competing ebook services is that they will find it difficult to publicise and market their services due to Google's entrance into the marketplace.

The European Commission recently launched a formal investigation into whether Google has abused this dominant market position in Europe following a series of complaints from vertical search providers “*about unfavourable treatment of their services in Google's unpaid and sponsored search results coupled with an alleged preferential placement of Google's own services.*”⁵

Google's global launch of its eBookstore on 6 December 2010, with proposed plans to roll out the service to other jurisdictions in 2011 will put Google into direct competition with other ebook services -- and unlike any other service, Google alone would be able to provide access to millions of orphan works.

³THE AUTHORS GUILD, INC. et al. v. GOOGLE INC. Document 922, Statement of interest of the United States of America: http://thepublicindex.org/docs/amended_settlement/usa.pdf

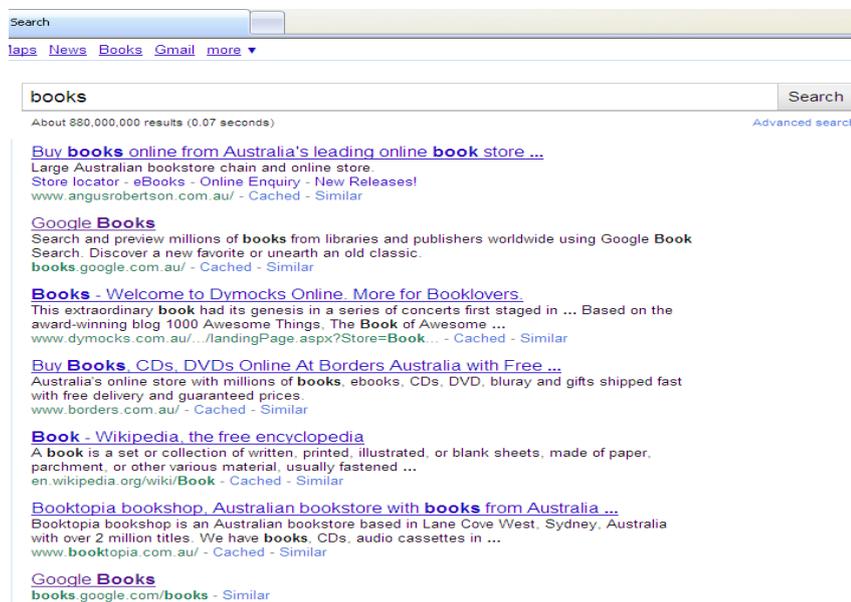
⁴<http://www.hitwise.com/au/press-centre/press-releases/google-reigns-supreme-for-australians/>

⁵<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en>

While the European Commission process is ongoing, the book industry in Australia should monitor closely any potential competition issues that arise from the Google Books settlement and the launch of Google's eBookstore.

Scott Dougall, Google's director of product management for Google eBooks has already stated that if the settlement is approved, *the full library of scanned books and those scanned in the future will go into the Google eBookstore inventor.*⁶

It should be noted that in a search on Google.com.au for the term 'books' on 7 December 2010 – Google Books already holds 2 of the top 7 organic search results – prior to the official launch of Google's commercial ebooks service in Australia (see screenshot below).



- **The proposed settlement would substantially impact competition in the supply of digital books and book search services.**

Various provisions in the proposed settlement—including one that would bar the Registry from doing more favourable deals with Google's competitors—would effectively make authors and publishers beholden to Google in the supply of online books and book search services.

In response to these and many other competition concerns raised by the settlement, the United States Department of Justice has begun an antitrust investigation of the settlement and filed an objection with the court on these issues.

In the words of Robert Darnton, the director of Harvard University Library, the settlement will give Google "what can only be called a monopoly—a monopoly of a new kind, not of railroads or steel but of access to information." This is because the settlement grants Google a license to a sweeping collection of copyrighted works that simply cannot be duplicated for other services, mainly because

⁶As reported in USA Today, Could Google eBooks rob Kindle of a happy ending?, 7 December 2010: http://www.usatoday.com/tech/products/2010-12-07-googlebooks07_CV_N.htm



most of those works are so-called “orphan” works, *i.e.*, works that are within their term of copyright, but with respect to which the rights holder cannot be located. This will make it essentially impossible for any company or entity, in Australia or elsewhere, to offer services that compete in any meaningful way with Google.

For example, the settlement will effectively “privatise” the world’s libraries, according to Brewster Kahle, the founder and director of the Internet Archive and the Open Content Alliance. For this reason, librarians also have been vocal in expressing concerns about its impact.⁷ The Association of Research Libraries has “asked the court supervising the settlement to exercise vigorous oversight to ensure that the powerful groups that control content do not leave individual researchers, libraries, other cultural organizations and the public without an effective voice.”⁸

In sum, the settlement will solidify Google’s already dominant position in the supply of book search and related services—a position Google acquired solely because for years it ignored authors’ and publishers’ pleas to cease copying their works without authorisation.

Because the Internet is likely to become the primary means through which people access books in the future, the settlement would give Google substantial control over the future fortunes of Australian authors and publishers.

The settlement combined with Google’s commercial eBookstore offering has the potential to create an entrant in the digital publishing market that will be difficult to compete against due to:

- Google’s ability deliver a significant stream of traffic to its books offerings from its dominance of the Internet search market;
- the terms of the settlement enabling Google commence with a service with a scale unmatched by almost all competing digital books services; and
- Google’s service not being reliant on any particular device for distribution, which has created a barrier to adoption of other platforms.

In short, by making Google the monopoly gatekeeper to online access of U.S., Australian, UK and Canadian books throughout the large U.S. marketplace, the proposed settlement would give Google inordinate influence over the future development of digital books around the world. With unique rights to such a vast library, Google Books may become the de facto model for how consumers and libraries access digitised content,—including in Australia. Google’s exclusive control over digital copies of orphan works will also further solidify its overwhelming monopoly control over search, further cementing Google’s role as the de facto gatekeeper to online content of all types. We believe that Australia would be better served if it were allowed to develop, innovate and experiment in the digital books arena, rather than accept a model imposed through a private lawsuit litigated abroad.

⁷ Brewster Kahle, A Book Grab by Google, *Washington Post* (19 May 2009), at

<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051802637.html>.

⁸ Mike Sachoff, Library Groups Ask Judge to Monitor Google Book Search Settlement, *Web Pro News* (5 May 2009) (quoting Tom Leonard, the Association president), at

<http://www.webpronews.com/topnews/2009/05/05/library-groups-ask-judge-to-monitor-google-book-search-settlement>.



Conclusion

ICOMP is keen to ensure that Australia continue to enjoy a strong presence in the digital book market, while ensuring the Australian book industry be more efficient and globally competitive.

We recommend the Book Industry Strategy Group consider undertaking additional steps that will help strengthen the Australian online publishing industry and protect the rights of authors in a digital world, these include:

- Review the Google book settlement and take necessary steps to ensure there remains healthy competition in the digital book market;
- Protect authors by working with the Attorney General's Department to ensure a proper review of the treatment of orphan works under Australian copyright law in a digital world; and
- Work with public libraries ensuring that the access to books digitally remain available and not be controlled by any particular commercial organisation.

ICOMP looks forward to working with the Book Industry Strategy Group in implementing these recommendations and ensuring the Group's aim of developing a comprehensive strategy for securing Australia's place in emerging digital book market is met.

About ICOMP

ICOMP is an industry initiative for organisations and businesses involved in Internet commerce, particularly online publishers, advertisers, Internet service and network providers, and agencies active in online advertising. ICOMP sponsors conferences and press roundtables, issues policy briefs, conducts consumer research, and advocates generally for a more competitive, transparent, privacy friendly, and secure online marketplace.

More than 40 companies, trade associations, consumer organisations and individuals have endorsed ICOMP's principles, including several Australian companies. ICOMP is funded by member contributions as well as sponsorship from Microsoft. Burson-Marsteller acts as its secretariat globally and Parker & Partners provides secretariat and advisory services for ICOMP in Australia.

ICOMP's mission is to promote widespread support for principles that are essential to a healthy online environment. Key goals are to encourage competition, transparency, data privacy and respect for intellectual property protection as well as the adoption of best practices to promote creativity, innovation, safety and trust. ICOMP's overall objective is the sustainable growth of the Internet consistent with the rule of law.

Vigorous competition is the best way to ensure that consumers enjoy the full benefits of the online marketplace. For competition to flourish, no single company should be allowed to abuse its market power to the detriment of competition or consumers. Where any company has a disproportionate



influence over the online marketplace, it is under a special responsibility to act in a responsible and transparent way.

Free and fair competition also strengthens the ability of consumers to exercise informed choice in relation to their privacy and the use of their personal data for behavioural advertising. Transparency promotes informed choice and helps build trust.

Respect for intellectual property rights is also the key to consumer welfare. Intellectual property rights provide the incentive for investment in research and development, and for the creation of content that is the life blood of the online world. These three core principles -- robust competition, strong data protection and respect for intellectual property rights -- form the basic foundation of online commerce. They also provide the basis of ICOMP's activities.

To this end, ICOMP:

- Helps educate and inform stakeholders and decision-makers how the online marketplace functions and how competition rules should be applied.
- Campaigns for compliance with data protection rules and for encouraging companies to compete in the provision of privacy safeguards for consumers online.
- Brings together participants from across the Internet to identify and promote best practices.

Contact

Please address any questions regarding this submission to:

Louise O'Donnell
ICOMP Advisor
Ground Floor, Boeing House, 55 Blackall Street , Barton ACT 2600
Phone: 61 2 6215 4200
Email: icomp_au@hotmail.com