NOTES

To All IFRRO Members
From General Counsel
Re IFRRO-Google Telephone Conference, 24 February 2010;
Meeting with Google on 10 March 2010 in Brussels
Date 11 March 2010 (incl. comments from Google received on 20 April 2010)

Following an initiative from the ad-hoc Google Coordination Working Group established in Oslo in October 2009, Olav Stokkmo and Anita Huss-Ekerhult from the IFRRO Secretariat (i) joined a telephone conference with Google representatives (Dan Clancy, Santiago de la Mora, Daphne Keller and Antoine Aubert) on 24 February 2010, 17.00-18.00 CET; and (ii) met, together with Samantha Holman (ICLA) and Olga Martín Sancho (FEP), with Google representatives (Dan Clancy, Santiago de la Mora, Tom Turvey, Jon Orwant and Antoine Aubert) on 10 March 2010, 14.30-16.00 CET, in Brussels.

1. PROVISION OF LIST OF DIGITISED BOOKS TO IFRRO MEMBER ORGANISATIONS, AS PROMISED BY GOOGLE

A. BASED ON WHICH SEARCHABLE CRITERIA

Regarding a list of the works that Google has digitised, Google stated that it is willing to work directly with any of IFRRO’s member organisations to provide them with a list of those works digitised that may be owned by individuals or organisations that they represent (this would be based on narrowing Google’s list of scanned works, using searchable criteria, e.g. country of publication or other criteria rightholders/organisations would consider useful). The purpose of providing this data is to help organisations identify their rightholders and make it easy for rightholders to express their wishes regarding how Google may use these works.

Google explained that it is willing to enable RROs to function similarly like the Books Rights Registry under the Amended Settlement Agreement (ASA), if approved. List generation criteria would be based on the country of publication code along with the language of the publication when appropriate. Google will provide information such as title, author, publisher and date of publication (if available and appropriate.) Even though Google will try to avoid errors as much as possible, errors might still occur. At this point in time, Google does not know which of these works were in fact registered with the US Copyright Office or published in countries covered by the settlement. So, this list will also include works that are not covered by the ASA, but Google is willing to work directly with IFRRO members regarding these works.

More specifically, Google sees the following two main possibilities as regards the country of publication code; in both cases, the margin error should be quite low:

a) A list could be generated on the basis of the correlation of the country of publication and language.
b) For countries where the language is not distinct (e.g. UK, Spain, Germany), the assessment will be based on the metadata records that identify the country of publication which Google has obtained from various sources, including libraries.

A simple agreement may be required to ensure that the data provided is only used for the related purpose. Much of this data has been provided to Google as part of metadata licensing contracts, and Google's rights to distribute this information are limited.

**B. TIME-TABLE ENVISAGED BY GOOGLE TO PROVIDE THIS LIST**

Google has this list of digitised books already at hand. Google would just need to start the engineering talks with each organisation, for instance regarding the details of the shipment of a related DVD, etc. Google is willing to talk to each member organisation separately. Based on the organisations’ interest, Google will identify those organisations that would wish to receive this database; further work might also be related to the language of the organisation in question, which rightholders they represent, etc.

Member organisations are advised to contact Google representatives (Jon Orwant) directly in this regard.

**2. POSSIBILITY FOR IFRRO MEMBER ORGANISATIONS TO ALSO RECEIVE AN ELECTRONICALLY SEARCHABLE LIST OF WORKS REGISTERED WITH THE US COPYRIGHT OFFICE**

To assist class members in determining if their work was registered with the US Copyright Office, Google has digitised and is making available online a copy of volumes that relate to works registration of the US Copyright Office Catalogue of Copyright Entries from 1923 to 1978. This will allow users to access these volumes online as well as to search an individual volume from this collection and to search over the entire collection. These volumes, along with directions on how to access these works, can be seen at: http://books.google.com/googlebooks/copyrightsearch.html.

Google is considering how to develop a process by which it can determine whether a work has been registered with the US Copyright Office for works published prior to 1978 and published within the US. One option is to develop a searchable database of the US Copyright Office records while another would be to develop a mechanism for searching the digitised scans to find a registration record for a particular book. Google is currently waiting to see the results of the proposed ASA before developing a process to make this determination.

Prior to making any of the default uses authorised under the settlement agreement to provide access to a work through models such as Consumer Purchase or an Institutional subscription, Google must determine if it believes a work is covered by the settlement agreement. Once Google makes a determination that it believes that a work is covered by the settlement agreement, it will notify the Books Rights Registry
(BRR) at least 60 days before making any such uses and the BRR will notify the rightholder.

Google representatives highlighted that the registration requirement with the US Copyright Office only applies to the authorisation under the ASA. There is still the possibility for rightholders/organisations to directly authorise uses vis-à-vis Google outside the scope of the ASA, if they so wish. Google will make an assessment of each individual situation, depending on the knowledge of the respective rightholder/organisation.

3. TREATMENT OF WORKS WHICH WERE INCLUDED IN THE PREVIOUS VERSION OF THE SETTLEMENT, BUT LEFT OUT OF THE SCOPE OF THE AMENDED (CURRENT) SETTLEMENT (ASA)

For works not covered by the ASA, Google will be treating them as Google does today, unless Google enters into an agreement with the appropriate rightholder. If the works are in copyright, access will be limited to snippets. However, Google will respect rightholder requests to not scan their works as part of the library project, or to exclude snippets from appearing in search results. Google also plans to extend to these rightholders the opportunity to enter into an agreement that is similar to the ASA with respect to the economic models provided.

More specifically, as regards the possibility to exclude snippets, Google has established a website, which will make it easier for all rightholders to express their wishes vis-à-vis Google by completing a spreadsheet and advising Google e.g. not to scan a book or to exclude snippets: http://books.google.com/support/partner/bin/answer.py?answer=20771&query=library+exclusion&type=. Thus, in case Google receives a request, the following two possibilities would arise today:

a) If a work has been scanned, rightholders can ask Google to exclude snippets completely; however, Google will not delete the file as such.

b) If a work has not been scanned yet, Google will not scan that work. Note, however, if a rightholder wishes later on to have this book scanned and included in the programme, it may be more difficult for Google to obtain a copy of the work to scan for inclusion in the programme.

Today, Google would proceed as follows: if Google has scanned a book, it would tell the organisation in question that a relevant book had been scanned, and that it may be a book that matches with some of the organisation’s rightholders. Google is in a position to identify works that might be similar, and will work with each respective RRO to develop a process to assist them in identifying rightholders.

Generally, Google is proceeding by taking the following steps: (1) scan a work; (2) show snippets; (3) contact the respective organisation. Google believes that it is able to scan a work within the US prior to authorisation for the purposes of indexing and scanning due to the fair use provision allowed under US Copyright law. Due to the lack of comprehensive rights databases, it would be impractical if not impossible to
search for each rightholder prior to scanning due to the time and effort that would be required.

Olav Stokkmo pointed out the copyright implications from a rightholder perspective of Google’s approach of first scanning and subsequently informing.

Olav Stokkmo also referred to the French court case decided on 18 December 2009, where a Paris court ruled against Google in a copyright infringement case filed by a French publisher, La Martinière, and later joined by the French Publishers Association SNE and French authors group SGDL, and stated that Google was infringing the copyright of the publishers’ books by scanning excerpts (‘snippets’) and including these in its Google Book Search results (http://www.juriscom.net/documents/tgiparis20091218.pdf).

Google representatives stated that Google has put procedures in place to avoid the reappearance of works (even though these were not totally ‘waterproof’). Related issues were often based on conflicts in relation to the author-publisher contractual relationship (for instance, publishers often simply do not know if they own the rights). In the Google Partner Program, authors and publishers have, in most cases, come to an agreement among themselves. Under the terms of the ASA, on the other hand, when neither the author nor the publisher would authorise the uses, the situation is unambiguous: Google would not be allowed to make any uses.

4. POSSIBLE PHONE CONFERENCES OR MEETINGS WITH RROs/IFRRO MEMBERS

Google is willing to have separate/joint phone conferences or meetings if approached by IFRRO member organisations/RROs, and to talk to each organisation individually. Ultimately, any agreement will be individual.

5. AOB

A. GOOGLE EDITIONS

Finally, Google referred to the upcoming Google Books paid access product “Google Editions”. Starting in summer 2010, a book publisher will be able to sell access to books that have been digitised as part of the Google Books program, http://sites.google.com/site/geforpartners/home. Google Editions is based on an “opt-in” mechanism for worldwide distribution, and on a consumer purchase model. It will include scans from libraries and rightholders who would wish to be involved in Google Editions, as well as works covered by the ASA (if approved) if the rightholders of those works want to be part of the Partner Program. The showing of images/photographs will depend on the ownership of rights and will, eventually, be a commercial decision.

Against this background, Google indicated a possible cooperation with RROs/IFRRO member organisations on two levels:
a) Google could approach RROs/IFRRO member organisations for rights clearance;
b) publishers and authors could mandate RROs/IFRRO member organisations to clear rights and allow these RROs/IFRRO member organisations to approach Google for the inclusion of their out-of-print books in Google Editions.

Google wanted to continue to inform IFRRO in order to assist RROs/IFRRO member organisations to understand how Google Editions works and the opportunities it offers to authors, publishers and IFRRO members in general. Google representatives also highlighted that some confusion with the ASA (if approved) is to be expected; it would be appreciated if IFRRO member organisations could assist publisher associations locally, and that local organisations could be informed through the IFRRO network.

B. GOOGLE SCHOLAR

As regards journal publishers, Google has launched the “Google Scholar” project, http://scholar.google.com/intl/en/scholar/about.html, providing a simple way for users to broadly search for scholarly literature. In this regard, Google works with scholarly publishers to index works from all research disciplines and make them searchable on Google Scholar.

NB: Google has reviewed and approved these notes (relating to both the Google-IFRRO phone conference on 24 February 2010 and the meeting in Brussels on 10 March 2010) on 20 April 2010.
ANNEX

RELEVANT CONTACT DETAILS

• Questions relating to the Amended Settlement Agreement (ASA):
  ➢ Dan Clancy (dclancy@google.com)
  ➢ Jeff Cunard (jpcunard@debevoise.com)
  ➢ Mike Boni (mboni@bonizack.com)

• Questions regarding the list of digitised books:
  ➢ Jon Orwant (orwant@google.com)
  ➢ Google scanlist team (scanlists@google.com)

• Questions regarding the Google Partner Program:
  ➢ Santiago de la Mora (sdelamora@google.com)

• Questions regarding Google Editions:
  ➢ Santiago de la Mora (sdelamora@google.com)

• Questions regarding Google Scholar:
  ➢ Santiago de la Mora (sdelamora@google.com)
  ➢ Abhi Jain (abhij@google.com)

• Any other questions:
  ➢ Santiago de la Mora (sdelamora@google.com)
  ➢ Antoine Aubert (aaubert@google.com)