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before the Committee on the Judiciary**

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**Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement**

Chairman Conyers, Ranking Member Smith, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to testify about the impact of the proposed Google Book Settlement Agreement on U.S. copyright law and policy as part of this hearing on Competition and Commerce in Digital Books.

**Summary**

The Copyright Office has been following the Google Library Project since 2003 with great interest. We first learned about it when Google approached the Library of Congress, seeking to scan all of the Library's books. At that time, we advised the Library on the copyright issues relevant to mass scanning, and the Library offered Google the more limited ability to scan books that are in the public domain. An agreement did not come to fruition because Google could not accept the terms.

In 2005, we followed very closely the class action filed by The Authors Guild and its members and the infringement suit filed by book publishers shortly thereafter. The facts of the underlying lawsuits are simple. Google was reproducing millions of protected books in their entirety, without permission of the copyright owners, through systematic scanning operations set up with large research libraries. Once scanned, the books were indexed electronically, allowing end-users to search by title and other bibliographic information. Google returned hits to its customers that included the option of browsing "snippets" (e.g. several lines of the book), except for public domain books, which could be viewed and downloaded in their entirety. Google's search engine is free to users, but the company collects substantial revenue from the advertising that appears on web pages, including those pages on which images of, and information from, copyrighted books appear. The lawsuits raised complex and sometimes competing legal questions, including questions about intermediate copying, future markets, book digitization goals and fair use. Members of the legal community and the public debated the issues vigorously and anticipated what a Court decision on the merits might look like.

When the parties announced last fall that they had reached a settlement in what was becoming a long and protracted litigation, our initial reaction was that this was a positive development. But as we met with the parties, conversed with lawyers, scholars and other experts, and began to absorb the many terms and conditions of the settlement—

a process that took several months due to the length and complexity of the documents—we grew increasingly concerned. We realized that the settlement was not really a settlement at all, in as much as settlements resolve acts that have happened in the past and were at issue in the underlying infringement suits. Instead, the so-called settlement would create mechanisms by which Google could continue to scan with impunity, well into the future, and to our great surprise, create yet additional commercial products without the prior consent of rights holders. For example, the settlement allows Google to reproduce, display and distribute the books of copyright owners without prior consent, provided Google and the plaintiffs deem the works to be “out-of-print” through a definition negotiated by them for purposes of the settlement documents. Although Google is a commercial entity, acting for a primary purpose of commercial gain, the settlement absolves Google of the need to search for the rights holders or obtain their prior consent and provides a complete release from liability. In contrast to the scanning and snippets originally at issue, none of these new acts could be reasonably alleged to be fair use.

In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress. The settlement is not merely a compromise of existing claims, or an agreement to compensate past copying and snippet display. Rather, it could affect the exclusive rights of millions of copyright owners, in the United States and abroad, with respect to their abilities to control new products and new markets, for years and years to come. We are greatly concerned by the parties’ end run around legislative process and prerogatives, and we submit that this Committee should be equally concerned.

As outlined below, the Copyright Office also believes that some of the settlement terms have merit and should be encouraged under separate circumstances. For example, the creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner. Likewise, the promise to offer millions of titles through libraries in formats accessible by persons who are blind and print disabled is not only responsible and laudable, but should be the baseline practice for those who venture into digital publishing. The ability of copyright owners and technology companies to share advertising revenue and other potential income streams is a worthy and symbiotic business goal that makes a lot of sense when the terms are mutually determined. And the increased abilities of libraries to offer on-line access to books and other copyrighted works is a development that is both necessary and possible in the digital age. However, none of these possibilities should require Google to have immediate, unfettered, and risk-free access to the copyrighted works of other people. They are not a reason to throw out fundamental copyright principles; they are a pretext to do so.

In the testimony below, we will address three specific points. First, we will explain why allowing Google to continue to scan millions of books into the future, on a rolling schedule with no deadline, is tantamount to creating a private compulsory license

through the judiciary. This is not to say that a compulsory license or collective license for book digitization projects may or may not be an interesting idea. Rather, our point is that such decisions are the domain of Congress and must be weighed openly and deliberately, and with a clear sense of both the beneficiaries and the public objective.

Second, we will explain why certain provisions of the proposed settlement dramatically compromise the legal rights of authors, publishers and other persons who own out-of-print books. Under copyright law, out-of-print works enjoy the same legal protection as in-print works.<sup>1</sup> To allow a commercial entity to sell such works without consent is an end-run around copyright law as we know it. Moreover, the settlement would inappropriately interfere with the on-going efforts of Congress to enact orphan works legislation in a manner that takes into account the concerns of all stakeholders as well as the United States' international obligations.

Finally, we will explain that foreign rights holders and foreign governments have raised concerns about the potential impact of the proposed settlement on their exclusive rights and national, digitization projects. The settlement, in its present form, presents a possibility that the United States will be subjected to diplomatic stress.

### **Factual and Procedural Background**

The proposed settlement, announced by the parties on October 28, 2008, would resolve claims that stem from Google's highly publicized Google Library Project. It is currently pending before the Honorable Denny Chin, United States District Court, Southern District of New York. Settlement Agreement, *The Authors Guild, Inc. et al. v. Google Inc.*, No. 06-CV-8136 (S.D.N.Y. Oct. 28, 2008). The proceeding combines the unresolved claims of authors and book publishers as initially filed in two underlying actions: *The Authors Guild, Inc. v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Sep. 20, 2005) (a class action filed by representative authors and the Guild) and *The McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05 Civ. 8881 (S.D.N.Y. Oct. 19, 2005) (an action filed on behalf of five publishing companies).

By way of background, as of 2008 Google had digitized about 7 million books and other materials obtained through agreements with library collections at the University of Michigan, Stanford University, Oxford University, Harvard University and the New York Public Library, among others.<sup>2</sup> At a hearing convened by the European Commission in Brussels on September 7, 2009, Google announced that it has now scanned approximately 10 million books. Of these, Google estimates that about 1.5

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<sup>1</sup> Under certain narrow circumstances, libraries and archives may make use of works that are in their last 20 years of copyright protection, provided that the use is for purposes of preservation, scholarship, or research and that the library or archives has first determined, on the basis of a reasonable investigation that certain conditions apply. See 17 U.S.C. §108(h)(i).

<sup>2</sup> Google Books Settlement Agreement, <http://books.google.com/googlebooks/agreement> (last visited Sept. 4, 2009).

million of these works are in the public domain. Many more may be works that are protected by copyright but have no identifiable or locatable copyright owner.<sup>3</sup>

## 1. Judicial Compulsory License

Class action lawsuits typically seek compensation for a class of similarly-situated persons who have suffered harm, or will suffer harm imminently, due to the defendant's past acts. The proposed settlement in fact resolves Google's past conduct by requiring Google to pay at least \$60 for each book and \$15 for each insert that was digitized prior to the opt-out deadline.<sup>4</sup> Proposed Settlement Agreement at 61, ¶ 5.1(a). But the class is overbroad and the settlement terms do not stop here.

Under the proposed settlement, the parties have crafted a class that is not anchored to past or imminent scanning, but instead turns on the much broader question of whether a work was *published* by January 5, 2009. As defined, the class would allow Google to continue to scan entire libraries, for commercial gain, into the indefinite future. The settlement would bind authors, publishers, their heirs and successors to these rules, even though Google has not yet scanned, and may never scan, their works.

We do not know the parties' reasons for defining the class according to whether a book was or was not published by January 5, 2009, but the result is to give Google control of a body of works that is many times larger than the 7 million works that were originally at issue. As defined, the class would bring into the settlement tent not only works that were published in the United States, and are therefore directly subject to U.S. law, but works published in most other countries in the world that have treaty relations with the United States.<sup>5</sup> While no one really knows how many works would be affected, Dan Clancy, the Engineering Director for the Google Book Search project, has been quoted as estimating that there are between 80 and 100 million books in the world.<sup>6</sup> As a practical matter, this means that the settlement would create for Google a private

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<sup>3</sup> Google Books Settlement, orphan works, and foreign works, <http://blog.librarylaw.com/librarylaw/2009/04/google-book-settlement-orphan-works-and-foreign-works.html> (last visited Sept. 4, 2009).

<sup>4</sup> The settlement also addresses and resolves other issues such as the conduct of libraries, but the Office will not address those provisions for purposes of this preliminary assessment of issues with the Proposed Settlement Agreement.

<sup>5</sup> The United States enjoys international copyright relations with all but a small number of countries. *See* U.S. Copyright Office, Circular 38a: International Copyright Relations of the United States (rev. July 2009) (available at <http://www.copyright.gov/circs/circ38a.pdf> (last visited Aug. 25, 2009)).

<sup>6</sup> *See* "The Audacity of the Google Book Search Settlement," Pamela Samuelson, [http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl\\_b\\_255490.html](http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl_b_255490.html) (last visited Aug. 12, 2009).

structure that is very similar to a compulsory license, allowing it to continuously scan copyrighted books and “inserts.”<sup>7</sup>

Compulsory licenses in the context of copyright law have traditionally been the domain of Congress.<sup>8</sup> They are scrutinized very strictly because by their nature they impinge upon the exclusive rights of copyright holders. A compulsory license (also known as a “statutory license”) is “a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions.” *Satellite Home Viewer Extension Act: Hearing Before the S. Committee on the Judiciary, 108th Cong. (2004)* (statement of David O. Carson, General Counsel, U.S. Copyright Office) (May 12, 2004). “[C]ompulsory licensing . . . break[s] from the traditional copyright regime of individual contracts enforced in individual lawsuits.” *See Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988) (describing limited license for cable operators under 17 U.S.C. § 111). By its nature, a compulsory license “is a limited exception to the copyright holder’s exclusive right . . . As such, it must be construed narrowly. . . .” *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909). Congress is the proper forum to legislate compulsory licenses when they are found necessary. *See* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.07 (2009) (Congress has authority to grant exclusivity and “may properly invoke . . . [n]onexclusivity under a compulsory license”); *cf. Cablevision* at 602 (citing *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394, 414 (1974) (stating that it was Congress’s role to address the issue of secondary transmissions if the Copyright Act of 1909 was inadequate). Compulsory licenses are generally adopted by Congress only reluctantly, in the face of a marketplace failure. For example, Congress adopted the Section 111 cable compulsory license “to address a market imperfection” due to “transaction costs accompanying the usual scheme of private negotiation. . . .” *Cablevision* at 602. “Congress’ broad purpose was thus to approximate ideal market conditions more closely . . . the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of high transaction costs.” *Id.* at 603.

As a matter of copyright policy, courts should be reluctant to create or endorse settlements that come so close to encroaching on the legislative function. Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored. Here, no factors have been demonstrated that would justify creating a system akin to a compulsory license for Google – and only Google – to digitize books for an indefinite period of time.

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<sup>7</sup> The term “insert” is broad. It includes (i) text, such as forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other Books, Periodicals or other works; (ii) children’s Book illustrations; (iii) music notation (*i.e.*, notes on a staff or tablature); and (iv) tables, charts and graphs. Proposed Settlement Agreement at 9, ¶ 1.72.

<sup>8</sup> *See, e.g.*, 17 U.S.C §§ 111, 112, 114, 115, 118 and 119.

At very least, a compulsory license for the systematic scanning of books on a mass scale is an interesting proposition that might merit Congressional consideration. As stated above, various compulsory licenses have been carefully crafted over the years after extensive deliberation and consideration of the viewpoints of all affected stakeholders, though none apply to books or text. Among the issues Congress would want to consider are the pros and cons of allowing copyright users, rather than copyright owners, to initiate the digitization of copyrighted works; the rate of compensation that should be paid to copyright owners; and whether the same license terms should apply to mass digitization activities undertaken for the public interest by non profit organizations such as libraries, and for profit purposes by commercial actors. Congress also would want to consider whether all books merit the same attention, or whether differences can be drawn from the date of publication, the type of publication, or such facts as whether the rights holder is likely to be alive or deceased. Congress would need to consider the treaty obligations that may apply.

## **2. The Sale of Copyrighted Books without Consent of Rights Holders**

The Copyright Office strongly objects to the treatment of out-of-print works under the proposed settlement. The question of whether a work is in-print (generally, in circulation commercially) or out-of-print (generally, no longer commercially available) is completely inconsequential as to whether the work is entitled to copyright protection under the law.

The Google Book Settlement gives Google *carte blanche* permission to use out-of-print works by operation of the default rules. If a work is out-of-print, Google need not obtain permission before incorporating it into new “book store” products. These include on-line displays (up to 20% of a work), full-text purchases, and subscription products for institutional subscribers and library patrons. There are mechanisms by which the rights holder may stop Google after the fact and prospectively collect royalties that are predetermined by the Book Rights Registry (“BRR”). In summary, the out-of-print default rules would allow Google to operate under reverse principles of copyright law, and enjoy immunity from lawsuits, statutory damages, and actual damages.

The activities that prompted the plaintiffs to file suit against Google – the wholesale scanning of books, electronic indexing and snippet display – are activities as to which reasonable minds might differ when considering whether such activities are acts of infringement or are, for example, fair use. However, the same cannot be said of the new uses that the settlement agreement permits Google to make of out-of-print works. We do not believe that even Google has asserted that, in the absence of this class action settlement, it would be fair use to undertake the new activities that Google would enjoy risk-free as a result of the settlement. In essence, the proposed settlement would give Google a license to infringe first and ask questions later, under the imprimatur of the court.

We are not experts on the proper scope of class action settlements, but we do wonder whether, as a constitutional matter, a class action settlement could decide issues that were not properly before the Court as part of the case and controversy presented during the litigation.<sup>9</sup> At the very least, within the context of copyright litigation, the class action mechanism has been used sparingly in recent years and has never resulted in the broad adoption of a settlement permitting extensive future uses of copyrighted products that were not the subject of the original infringement action.<sup>10</sup> A class action settlement that permits new activities for years to come, and removes the judicial remedies of millions of authors and publishers that are otherwise afforded by the Copyright Act, seems to us to be an excessive exercise of judicial power. The default rules for out-of-print books are not a small issue in the settlement because the *substantial majority* of books covered are out-of-print works—millions and millions of books. To be clear, the Office does not dispute the goal of creating new markets for out-of-print books – copyright duration has always been longer than the first print-run of a book and it has always been obvious that works will come in and out of favor, and in and out of print, during the term of protection. But copyright law has always left it to the copyright owner to determine whether and how an out-of-print work should be exploited.

Apart from its interest in ensuring the proper application of law and policy, Congress should be particularly concerned about the settlement since it would interfere with the longstanding efforts of Congress and many other parties to address the issue of orphan works. The broad scope of the out-of-print provisions and the large class of copyright owners they would affect will dramatically impinge on the exclusive rights of authors, publishers, their heirs and successors. Such alteration should be undertaken by Congress if it is undertaken at all. Indeed, this Committee has already invested significant time in evaluating the orphan works problem and weighing possible solutions. That process is not over. The Google Book Settlement would frustrate the Committee's efforts and make it exceedingly difficult for Congress to move forward. A much more

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<sup>9</sup> As Judge Friendly stated in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981), “If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.” In *National Super Spuds*, a settlement purported to release the claims of class members who held both liquidated and unliquidated contracts when the original complaint only concerned persons who held liquidated contracts during a specific period of time. The Court held that the harm done by the unclear release of parties outweighed the benefits of settlement and reversed the settlement approval. *Id.*

<sup>10</sup> One of these class actions, *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1379 (S.D.N.Y.), is the remedies phase of an infringement suit brought by members of the National Writers Union, in which the writer-plaintiffs successfully challenged the sale of their newspaper and magazine articles in commercial databases. See *New York Times v. Tasini*, 533 U.S. 483 (2001). A settlement agreement has been proposed by the parties to the consolidated cases.<sup>10</sup> However, the proposed settlement, if finally adopted, would speak only to the activities originally at issue in the suit: the reproduction, display and distribution of copyrighted articles in electronic databases. Settlement Agreement, *In re Literary Works* (2005), ¶ 1(f). In contrast with the proposed settlement agreement, the *In Re Literary Works* settlement does not authorize the publisher and database defendants to further copy, package, and sell the copyrighted articles as part of new products such as subscriptions, books, or compilations, for example. Nor does it lock in licensing terms, including payment, for future kinds of activity.

productive path would be for Google to engage with this Committee and with other stakeholders to discuss whether and to what degree a diligent search for the rights holder should be a precondition of a user receiving the benefits of orphan works legislation, or whether a solution that is more like a compulsory license may make sense for those engaged in mass scanning. Whatever, the outcome, Congress is much better situated than the judiciary to consider such important and far-reaching changes to the copyright system.

As a side note, the Copyright Office would like to underscore for the Committee that out-of-print works and orphan works are not coextensive. Orphan works are works that are protected by copyright but for which a potential user cannot identify or locate the copyright owner for the purpose of securing permission. They do not include works that are in the public domain; works for which a copyright owner is findable but refuses permission; or works for which no permission is necessary, i.e. the use is within the parameters of an exception or limitation such as fair use. Many out-of-print works have rights holders who are both identifiable and locatable through a search. In fact, the U.S. works covered by the proposed settlement would all be searchable, at a minimum, through Copyright Office records because the settlement includes U.S. works only *if* they are registered. Proposed Settlement at 3, 9, ¶¶ 1.16, 1.72. Certainly, rights information may not be current and there may be disputes about rights between publishers and authors. However, these are the realities of the copyright system and the reason that Congress, the EU and other foreign governments have been working on a solution, with all of the deliberation and fine tuning that is appropriate. Until there is a legislative solution, it is our strong view that Google should conduct itself according to the same options available to other users of copyrighted works: secure permission; forego the use; use the work subject to risk of liability; or use the work in accordance with fair use or another limitation or exception.

The Office also notes that while the BRR might well provide a place for rights owners to come forward with contact information, it is also likely to have the unfortunate effect of creating a *false* database of orphan works, because in practice any work that is not claimed will be deemed an orphan. Many rights holders of out-of-print books may fail or refuse to register with the BRR for very good reasons, whether due to lack of notice, disagreement with the Registry's mission or operations, fear (*e.g.* privacy concerns) or confusion. The fact that the rights holder is missing from the BRR may also mean that he has no interest in licensing his work.

### **3. International Concerns**

We are troubled by the fact that the proposed settlement implicates so many foreign works even when they have not taken steps to enter the United States market. While it would be appropriate to allow foreign nationals to participate voluntarily in licensing programs that may be developed by the BRR or other collectives, they should not be automatically included in the terms of the settlement. Moreover, we are aware that some foreign governments have noted the possible impact of the proposed settlement on the exclusive rights of their citizens. Indeed, many foreign works have been digitized by

Google and swept into the settlement because one copy was in an academic research library in the United States. As a matter of policy, foreign rights holders should not be swept into a class action settlement unknowingly, and they should retain exclusive control of their U.S. markets.

The settlement imposes a requirement that all “U.S. works” be registered with the Copyright Office. U.S. works are, in relevant part, works that are first published on U.S. soil or published simultaneously in the United States and a treaty partner. *See* 17 U.S.C. § 101. That the parties would apply a registration requirement in this manner comes as no surprise in and of itself, especially since the issue is pending before the Supreme Court in another case. *See Muchnick v. Thomson (In re Literary Works in Elec. Databases Copyright Litig.)*, 509 F.3d 116, 122 (2<sup>nd</sup> Cir. 2007), *cert. granted sub nom. Reed Elsevier Inc. v. Muchnick*, 129 S.Ct. 1523 (2009). But in our view, this rule should be applied to all works in the class, i.e. to the extent foreign works are implicated at all, they should have been published in the United States and registered with the U.S. Copyright Office.<sup>11</sup>

For the past few months, we have closely followed views of the proposed settlement as expressed by foreign governments, foreign authors and foreign publishers. We have read numerous press accounts<sup>12</sup> and spoken with foreign experts. We know that some foreign governments have suggested that the settlement could implicate certain international obligations of the United States.<sup>13</sup> As the Committee is aware, the

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<sup>11</sup> Article 5.1 of the Berne Convention provides for national treatment of authors by requiring that authors enjoy, in other Union countries, the rights provided to nationals of such Union countries. Berne Convention, 102 Stat. 2853 (1988). TRIPS also provides for national treatment in article 3.1; it requires Members to “accord to nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property.” TRIPS Agreement, art. 3.1, 33 I.L.M. 81 (1994).

<sup>12</sup> *See, e.g., Google Books Leaves Japan in Legal Limbo*, The Japan Times Online; *Germany Wants EU to Fight Google Books Project*, The Local, June 2, 2009 (quoting Foreign Minister Frank-Walter Steinmeiser); *Politicians Back Heidelberg Appeal: German Authors Outraged at Google Book Search*, Spiegel Online, Apr. 27, 2009 (“German politicians have voiced their support for an appeal by 1,300 German authors...known as the Heidelberg Appeal”—sent last week to German President Horst Kohler, Chancellor Angela Merkel and the heads of Germany’s 16 federal states); Letter to the European Commission from the Federation of European Publishers and Presidents of National Publisher Associations, June 16, 2009 (available at <http://www.danskeforlag.dk/download/pdf/323absb035.pdf> (last visited Aug. 26, 2009)); Federal Ministry of Justice, *Zypries urges European action against Google Books*, *Press Release of the German Minister of Justice*; (“In Brussels today, Federal Minister Zypries stressed that...Brussels must take further steps that may be necessary to protect rights holders.”); “*EU to study how Google Books impact authors*, Reuters, May 28, 2009 (“The commission will carefully study the whole issue and, if need be, to take steps,” Vladimir Tosovsky industry minister for the Czech EU presidency, told a news conference.”); *Agreement concerning Google Book Search is a Trojan Horse*, Boersenverin des Deutschen Buchhandels, Nov. 11, 2008 (“[T]he American precedent model is out of the question for Europe...Germany and Europe have already implemented legal provisions and models which allow wide access to digital content while respecting the rules of copyright”).

<sup>13</sup> By way of background, the United States is a party to important copyright treaties and bilateral agreements which impose minimum obligations for copyright protection and enforcement, on the one hand, and confine the scope of permissible exceptions and limitations on exclusive rights, on the other hand. These include the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), the

governments of Germany and France have filed objections with the Court. Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, *The Authors Guild, Inc., et al. v. Google Inc.*, No. 05 Civ. 8136 (DC) (S.D.N.Y. Aug. 31, 2009); Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, *The Authors Guild, Inc., et al. v. Google Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y. Sep. 8, 2009). Numerous foreign authors and publishers have raised concerns as well, including concerns about navigating the settlement from a distance. Indeed, the inherent difficulties of doing business internationally is one reason that typical collective management organizations work through counterparts in foreign countries, making it easier and more efficient for rights holders to protect their works on foreign soil, in foreign languages, under foreign laws, and using foreign currencies.

Some foreign governments have raised questions about the compatibility of the proposed settlement with Article 5 of the Berne convention, which requires that copyright be made available to foreign authors on a no less favorable basis than to domestic authors,<sup>14</sup> and that the “enjoyment and exercise of these rights shall not be subject to any formality.”<sup>15</sup> For example, the Federal Republic of Germany has asserted that “[T]he proposed settlement is contrary to both the Berne Convention and WCT.” Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany at 4.

For purposes of this hearing, we are not suggesting that international obligations of the United States are at issue or necessarily would be compromised. However, it is a cause for concern when foreign governments and other foreign stakeholders make these types of assertions.

## **Conclusion**

Mr. Chairman, thank you again for inviting me here today to present my observations and concerns. The Copyright Office welcomes any questions that the Committee has about the copyright implications of this unprecedented settlement agreement. To summarize, it is our view that the proposed settlement inappropriately creates something similar to a compulsory license for works, unfairly alters the property interests of millions of rights holders of out-of-print works without any Congressional oversight, and has the capacity to create diplomatic stress for the United States. As always, we stand ready to assist you as the Committee considers the issues that are the subject of this hearing.

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World Trade Organization Agreement on the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and the World Intellectual Property Organization Copyright Treaty, as well as many bilateral agreements that address copyright issues. *See, e.g.*, US-Peru Trade Promotion Agreement, Dec. 14, 2007, 121 Stat. 1454. Under Berne,<sup>13</sup> copyright protection is afforded to works published in any country that is party to one of the copyright treaties and agreements to which the United States is a party or by any national of that country.

<sup>14</sup> Berne Convention art. 5(1).

<sup>15</sup> Berne Convention art. 5(2).