

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

IPFRONTIERS

Google books saga a 'choose your own adventure'

By the beginning of 2011, there was hope that the Google Books litigation, ongoing since 2005, was drawing to an end. The parties had hashed out an Amended Settlement Agreement, optimistic that they reached at a mutually beneficial compromise, providing fair opportunity for compensation of class constituents while allowing Google to digitize literary works and monetize that collection via targeted advertisements in search results.

The settlement agreement, however, was rejected in March 2011 by U.S. District Court Judge Denny Chin, citing concerns over the expense of the agreement and over the high number of candidate class participants who were either unknown or unavailable, or who had already opted out of the class.

A result of the March 2011 decision is a situation not unlike the popular children's books in which the reader chooses her way through the plot of the story: The two groups who brought the original suits against Google — a group of publishers and the Authors Guild — had to assess and decide, individually, between several options. They ultimately chose divergent paths. Whether those paths lead to the same ending is yet to be seen.

The Google Books "Library Project" began in 2004 when Google partnered with several (mostly university) libraries to digitize university volumes. The digitized volumes are made publicly searchable through the Google-provided "Google Books" website. Works that are part of the public-domain, i.e. not under copyright protection, are freely available in their full text form. For works subject to copyright protection, "snippets" are made available for search and viewing, and links to purchase the full version in electronic and/or physical form are provided.

A group of publishers, including McGraw-Hill, Pearson, John Wiley and Simon & Schuster, as well as the Authors Guild sued Google alleging mass copyright infringement based on Google's digitizing of the full works and the public display of snippets in the Google Books website without the consent of the copyright holders.

In November 2009, an Amended Settlement Agreement mentioned above was reached between the parties and submitted to the District Court for approval. The ASA applied to all persons who, as of Jan. 5, 2009, owned a copyright interest in one or more "books" or "inserts" as defined in the ASA, with certain limited exclusions.

Under the ASA, the parties released Google from liability for any past copyright violations based on Google's scanning and display of "snippets" of copyrighted material. Additionally, Google would be released from any liability for the future scanning and sale of the material, as well as the display of "snippets" and the sale of advertising on the Google Books website. In exchange, Google was to pay \$125M for the establishment of a Rightsholder registry, and would have shared approximately 2/3 of generated revenue with Rightsholders.

The ASA was rejected by Judge Chin for two primary reasons. First, the agreement was much broader in scope than the litigation itself. The ASA authorized Google to sell full copies of scanned volumes, which offered a solution to a problem that didn't exist; there was no disagreement over whether Google could sell full copies of the material because the unauthorized sale of a copyrighted work would clearly have been an infringement.

The second reason for the rejection was that the agreement provided for a release by an entire class of content owners — many of whom either expressly opted out of the litigation, objected to the settlement agreement or were missing or unidentified in the first place — for future conduct by Google. Such a release was deemed too broad by the court.

The settlement was ultimately rejected as "not fair, adequate and reasonable" and for exceeding the bounds of what the District Court could permit under Rule 23 of the Federal Rules of Civil Procedure.

With the rejection of the ASA, and instead of amending the

Continued ...



By **MATTHEW HULIHAN**

Daily Record
Columnist

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

settlement agreement or appealing the decision, litigation continued. However, the Authors Guild and the publishers at that point took different approaches to the continued litigation.

The publishers compromised with Google to reach a private settlement in late 2012. The settlement allows Google to serve up to 20 percent of a copyrighted work to a user, while providing the user an option to buy the full version through Google's Play service.

This model apparently has some appeal to other publishers as well. Since the late 2012 settlement, additional publishers have signed-on with Google under similar agreements. One implication is that the additional publishers believe they cannot overcome the precedent set by the initial settlement. A perhaps equally plausible implication is that the publishers believe the value they derive from Google's service, which facilitates discovery and drives sales of online e-books, is reasonable under the circumstances.

More interestingly, from a legal perspective, the Authors Guild chose to continue its original suit against Google. The fundamental issue faced in the original lawsuits — whether digitization of copyrighted works and the display of snippets was a fair

use — was never resolved between the publishers and Google, as far as we know, since the full details of the settlement are not disclosed. The Authors Guild, in choosing to continue litigation, is seeking a resolution to that fundamental issue.

A separate lawsuit instituted by the Authors Guild in September of 2011 may be a foreshadow to what will happen in the Guild's case against Google. The September 2011 suit was filed against an outfit called the HathiTrust Digital Library. HathiTrust is a partnership of universities for the preservation of digital volumes, including those created by Google as part of its Google Books initiative (it also houses some content of the Internet Archive).

In the HathiTrust case, an October 2012 Southern District of New York decision granted a Summary Judgment motion affirming that HathiTrust's activities constituted fair use. Meanwhile, in the litigation between the Authors Guild and Google, Judge Chin in May 2012 certified a class of authors at the request of the Authors Guild. Both of those decisions are being appealed to the Second Circuit, setting the stage for an interesting, and potentially final, chapter in the almost 8-year old case.

Matthew M. Hulihan is an associate with the law firm of Heslin Rothenberg Farley & Mesiti PC. He can be reached via email at mmh@hrfmlaw.com, or at (518) 452-5600.