Court Rejects Google Books Settlement – Quick Guide to the Decision

BY MITCHELL ZIMMERMAN

Fenwick
FENWICK & WEST LLP

Overview

Twelve million scanned books and six years after Google was sued for digitizing entire libraries of books without authorization, in late March 2011 Federal District Judge Denny Chin rejected a controversial settlement of the class action suit. *Authors Guild v. Google Inc.*, 05 Civ. 8136 (Opinion, March 22, 2011).

Underlying Litigation

The lawsuit by authors and publishers challenges Google's claim that the copying for the purpose of allowing the display of "snippets" in response to online searches represented fair use. The Court concluded that the forward-looking part of the settlement – which established an elaborate struc-ture and institutions for the use and exploitation of online books, especially orphaned works – "exceeds what the Court may permit under Rule 23" governing class actions. The 48-page decision discussed myriad issues, and it may be useful to distinguish what Judge Chin actually decided from the many points as to which he expressed concern.

Problems Seen by the Court

Overriding all issues was the Court's belief that "questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agree ment among private, self-interested parties." The Court specically held:

> The Amended Settlement Agreement ("ASA") improperly sought to release claims well beyond those contemplated by the pleadings. As the Justice Department stated (and the Court agreed), it represented "'an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.'"
>
> Class plaintiffs do not adequately represent the interests of certain class members, including particularly the interests of academic authors, foreign rights holders, and rights holders who do not come forward to register for benefits under the Registry.
>
> The settlement would give Google a de facto monopoly over unclaimed works, creating "'a dangerous probability that only Google would have the ability to market to libraries . . . a comprehensive digital-book subscription."

The Court agreed with the objectors – whose "great number" the Court deemed significant – on the foregoing points. The Court was also influenced by its "concerns" over several additional issues which it did not necessarily resolve.

First, the Court stated it was reluctant to "encroach" on Congress's prerogative to address copyright issues posed by technological developments. Second, the Court felt that an objection "might have merit" that the ASA would grant Google the right to expropriate rights in violation of 17 U.S.C. § 201(e). Third, it was incongruous "to put the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission." Fourth, there were real privacy concerns although the Court appeared to conclude that they would not preclude a settlement if additional protections were to be adopted. Fifth, there were serious issues as to whether the ASA would violate international law, particularly the Berne Convention and TRIPS, by exploiting works of foreign rights holders without their express permission.

"In the end, I conclude that the ASA is not fair, adequate, and reasonable." However, "many of the concerns raised in the objections would be ameliorated if the ASA were converted from an 'opt-out' settlement to an 'opt-in' settlement," and the Court urged the parties to consider revising the ASA accordingly.

Mitchell Zimmermann (MZimmerman@fenwick.com) is a partner and Chair of the Copyright Group at Fenwick & West LLP, of Mountain View, CA.