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Bill Hannay
Schiff Hardin, LLP, whannay@schiffhardin.com

Ann Okerson
Yale University, aokerson@gmail.com

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The Long Arm of the Law

Bill Hannay, Partner, Schiff Hardin LLP*
Ann Okerson, Associate University Librarian, Yale University

As Virgil famously began the Aeneid, "ARMA VIRUMQUE CANO."[i] But some of the trends in the worlds of publishing and library management tempt me to change that to "ARMAGGEDON VIRUMQUE CANO" (with apologies to Virgil).

What will libraries of the future look like? Will they have the traditional look of handsome oak shelves loaded with equally handsome bound volumes, or will they disappear to be replaced by a single supercomputer containing digital images of all books ever written? (The computer would, of course, be called HAL, which stands for "Here Are Library.")

A recent Chicago Tribune headline warned: "Chicago Mayor announces plan to cut 550 librarians from city budget . . ." Tell me, O Spirit of Things to Come, is this the fate of our libraries in the future? In the words of a badly frightened Mr. Scrooge, "Are these the shadows of the things that will be, or are they shadows of things that may be, only? . . . If the courses be departed from, the ends will change. Say it is thus with what you show me!"

What if there was competition in electronic libraries in the future? Instead of HAL, we might have "Hello, Deli" with lots of electronic options to choose among beyond Google Books, such as:

- The Internet Archive[ii]
- HathiTrust[iii]
- Europeana[iv]
- Gallica[v]

As every antitrust lawyer and economist knows, competition is good for the soul and for our country. Judge Learned Hand (yes, that was his real name) ringingly said in the 1945 *Alcoa Aluminum* case: "Throughout the history of our antitrust laws it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Congress feared concentration of economic power not only on economic grounds, but also because of its threat to democratic values.

<u>The Google Books Case</u>

The *Google Books* case goes on. It was not resolved by the proposed settlement entered into between Google and the publisher and author plaintiffs. Depending on how the case is resolved, it could lead to unpredictable and possibly negative effects on the structure, staffing, and budgets of all libraries, whether public, private, or academic.

Why might that be true? How could that happen? Because a resolution like that proposed in the now-rejected settlement could reduce the ability of current or future electronic publishing competitors to enter the market to supply the wants and needs of libraries. Through the proposed settlement, private parties would have jointly restructured the publishing industry, with settlement terms replacing copyright laws and without any legislative authorization. After such a settlement, publishers and other search engines may not be able to compete in the future due to Google's enormous lead, its market share, and the very copyright barriers to entry that led to the litigation.

A Brief History of the Law Suit

2004 – The Google Print Project was initiated
2005 – Copyright lawsuits were filed by the Author's Guild and various publishers.
10/28/08 – A settlement of the dispute was announced.
09/18/09 – Numerous objections were filed, including by the Dept of Justice
11/13/09 – An Amended Settlement Agreement ("ASA") was announced and filed
11/19/09 – The District Court (Judge Chin) preliminarily approved it and ordered notice sent
02/04/10 –Objections to the ASA filed by many entities, including the ALA[vi] and the DOJ[vii]
02/18/10 – Judge Chin holds a Fairness Hearing and takes the case under advisement.

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03/22/11 – Judge Chin issues an opinion rejecting the ASA, holding that it is not "fair, adequate, and reasonable." (770 F.Supp. 2d 666.) He orders the parties to go back to the negotiating table.
09/15/11 – The parties report no progress Judge Chin gives the parties more time to try again.

The Court's Reasoning

Why did Judge Chin reject the proposed settlement, embodied in the ASA? There were several reasons: He objected to the "forward-looking commercial arrangements" established by the ASA that would have transferred to Google certain rights in exchange for future and ongoing arrangements, including the sharing of future proceeds and would have released Google from liability for certain future acts. For example, he noted that:

> [T]he ASA would grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit. The ASA would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works. And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. [770 F.Supp 2d at 678-79.]

The Court went on to say that:

> While its competitors went through the "painstaking" and "costly" process of obtaining permissions before scanning copyrighted books, Google by comparison took a shortcut by copying anything and everything regardless of copyright status. As one objector put it: "Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: 'So, sue me'." [770 F.Supp 2d at 679.]

As to antitrust concerns raised by the Department of Justice and others, Judge Chin held:

> The ASA would give Google a de facto monopoly over unclaimed works. . . As the United States observed . . . : "This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database—i.e., one that does not include the millions of orphan works—cannot compete effectively with the seller of a comprehensive product." [770 F.Supp 2d at 682.]

The Court went to say:

> [A]s counsel for the Internet Archive noted, the ASA would give Google "a right, which no one else in the world would have . . . to digitize works with impunity, without any risk of statutory liability, for something like 150 years." The ASA would [also] arguably give Google control over the [internet] search market. . .The ASA would broadly bar "direct, for profit, commercial use of information extracted from Books in the Research Corpus" except with the express permission of the Registry and Google. [*Id.*]

The Court concluded:

> As the United States and other objectors have noted, 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. I urge the parties to consider revising the ASA accordingly. The motion for final approval of the ASA is denied, without prejudice to renewal in the event the parties

> negotiate a revised settlement agreement. [770 F.Supp 2d at 686.]

Where Are Things?

In the months since the proposed settlement was rejected by Judge Chin in March 2011, lawyers representing the author-plaintiffs, the publisher-plaintiffs, and Google have continued to negotiate but have not reached any agreement. At the most recent status hearing on 9/15/11, the lawyers put an optimistic face on the situation and asked for more time. At the court's prompting, they agreed not to delay the litigation further and to initiate a pretrial discovery schedule extending into the summer of 2012. No trial date has been set. Why can't a new settlement be reached? What's the problem? Basically the fundamental structure of the settlement was rejected by the court. In effect, Judge Chin recognized that the emperor was not wearing any clothes. That is, what Google and the plaintiffs wanted to establish was entirely outside the laws—copyright, antitrust and procedural.

The parties had tried to impose a radical rebalancing of burdens and rights, and the court was having none of it. The "opt in" approach suggested by the court (in lieu of the settlements' opt-out arrangement) in turn seems to be a major sticking point in the re-negotiation (at least for Google). If the owner of a copyright does not affirmatively "opt in" to the settlement, Google would have no right to use that book, thus leaving Google with incompleteness and uncertainty about many books.

So, What Is To Be Done?

In the past few months, there have been at least two very interesting "roundtable" conferences asking the musical question "Can the Google settlement be fixed?" One was in May in San Francisco and one was in D.C. in June. (See 82 PTCJ 87; 82 PTCJ 292)

I won't give away the end of the movie, but I will tell you that almost no one agreed with anyone else. One speaker said that "My experience working in this area makes it seem unlikely that we can work this out in our lifetimes." But if we wait long enough, things may work out on their own.
Time wounds all heels; or perhaps it's that other competitors seem to be nipping at Google's heels. I hear that Internet Archive is digitizing over 1,000 books a day; the HathiTrust Digital Library includes about 6 million volumes; Europeana links to at least 10 million digital objects from 1,000 EU archives; and Gallica from France is expanding at 5,000 new documents per month. All of this competitive activity in the electronic library sphere says to me "Let a thousand points of digitizing shine!" It suggests to me a Rodgers & Hart song which goes something like: ♫"If they asked me, I could scan a book."♫

<u>SkyRiver v OCLC</u>

Wait, speaking of books, does anybody want a status report on the other hot antitrust case in the world of libraries? I am speaking of course about <u>SkyRiver v. OCLC</u>, which is the antitrust suit that began in the Northern District of California in July 2010 (Case No. 10-cv-03305-BZ) and was subsequently moved to federal court in the Southern District of Ohio (Case No. 2:10-cv-1017).

SkyRiver is a bibliographic utility that promotes itself as offering a low cost alternative for cooperative cataloging—an alternative to OCLC, that is.[viii] A second plaintiff, Innovative, in the business of providing integrated library systems has also joined the lawsuit.

What's the case about? SkyRiver and Innovative claim that OCLC has monopolized[ix] three markets:

- The market for bibliographic data about the holdings of college, university and research libraries;
- The cataloging of bibliographic records of the holdings of academic libraries; and
- The market for interlibrary lending (ILL) between and among academic libraries.
- OCLC is further alleged by Innovative to have attempted to monopolize the integrated library systems (ILS) market.[x]

What did OCLC do that is supposedly wrong? Plaintiffs allege that OCLC (1) requires its member libraries not to share the metadata of their own library holdings contributed to OCLC's WorldCat database with any for-profit firms for commercial use and (2) requires them exclusively to use OCLC's services.

OCLC has allegedly imposed these membership terms to prevent the development of competing bibliographic databases, cataloging services, or ILL services and is also attempting to squeeze Innovative out of the ILS market.

What's the status?

In December 2010, OCLC filed a motion to dismiss the complaint on the ground that it fails to plead facts making a plausible claim and in any event the plaintiffs' theories do not constitute antitrust violations. In February 2011, SkyRiver and Innovative responded to the motion, defending the sufficiency of their complaint under antitrust law. In April 2011, the parties agreed—and the court entered an order—staying discovery until the court rules on the motion to dismiss. A decision could occur anytime.

What will happen? Who knows? Both parties are represented by Ohio-based law firms that are highly experienced in antitrust law, and both sides submitted articulate and thoughtful briefs in connection with the motion to dismiss.

The Plaintiffs' 39-page complaint seems thoughtfully written with lots of detail, but the Sherman Act is a tricky law, made all the harder by a U.S. Supreme Court decision about the need for "plausible" claims of antitrust violation. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

What do I think? Clearly, more competition is better than less competition. Competition spurs lower prices and higher quality and service. So, I am all for competition and for innovative companies. This reminds me of that great song from "Fiddler on the Roof": ♫"Innovation. Innovation."♫

Conclusion

In parting, we all need to give a special farewell and RIP to Steve Jobs, who epitomized innovation in the electronic sphere and gave us . . . Apples. No doubt Saint Peter logged onto his iPad to log Mr. Jobs into heaven.

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[*] Bill Hannay is a partner in the Chicago-based law firm, Schiff Hardin LLP, and an Adjunct Professor of Law at IIT/Chicago-Kent College of Law. He is a frequent speaker at the Charleston Conference on legal topics of interest to librarians.

[i] "I sing of arms and the man."

[ii] It is reported that Internet Archive is a non-profit which digitizes over 1000 books a day, as well as mirrors books from Google Books and other sources, and as of May 2011, it hosted over 2.8 million public domain books, greater than the approximate 1 million public domain books at Google Books. See http://en.wikipedia.org/wiki/Google_Books. Open Library, a sister project of Internet Archive, lends 80,000 scanned and purchased commercial e-books to the visitors at 150 libraries. *Id.*

[iii] The HathiTrust Digital Library reportedly preserves and provides access to material scanned by Google, some of the Internet Archive books, and some scanned locally by partner institutions. As of May 2010, it includes about 6 million volumes, over 1 million of which are public domain. *Id.*

[iv] Europeana reportedly links to roughly 10 million digital objects as of 2010, including video, photos, paintings, audio, maps, manuscripts, printed books, and newspapers from the past 2,000 years of European history from over 1,000 archives in the European Union. *Id.*

[v] It is reported that Gallica from the French National Library links to about 800,000 digitized books, newspapers, manuscripts, maps and drawings, etc. Created in 1997, the digital library continues to expand at a rate of about 5,000 new documents per month. *Id.*

[vi] The ALA stated that "The cost of creating . . . a repository and Google's significant lead time advantage suggest that no other entity will create a competing digital repository for the foreseeable future. In the absence of competition . . ., the settlement could compromise fundamental library values. . . . [T]he absence of competition for the institutional subscription service . . . makes libraries particularly vulnerable to profit maximizing pricing."

[vii] The DOJ stated, on the one hand, that a project like Google Books had the potential of "[b]reathing life into millions of works that are now effectively dormant, allowing users to search the text of millions of books at no cost, creating a rights registry, and enhancing the accessibility of such works for the disabled and others are all worthy

objectives." On the other, the DOJ asserted that "The rights granted to Google under the ASA confer significant and possibly anti-competitive advantages on a single entity. . . .Google would remain the only competitor in the digital marketplace with the rights to . . . 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. The ASA's pricing mechanisms . . . also continue to raise antitrust concerns."

[viii] OCLC was founded in 1967 by a group of Ohio libraries and merged with RLG in 2006. OCLC is now "a worldwide organization in which almost 27,000 libraries, archives and museums in 171 countries are members." Membership is "open to libraries and other memory organizations of all types and sizes."

[ix] Section 2 of the Sherman Act prohibits "monopolizing" or "attempting to monopolize" a market. SkyRiver must prove that OCLC has a monopoly and maintains or got it through anticompetitive, predatory or exclusionary means.

[x] Innovative must prove that OCLC has a dangerous probability of achieving monopoly by using improper means with the specific intent to monopolize.