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Legally Speaking-So Many eBooks, So Little Time

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LEGAL ISSUES

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Legally Speaking — “So Many eBooks, So Little Time.”

Google Books Goes Back to the Drawing Board; Apple Suffers the Water Board Torture

by **Bill Hannay** (Schiff Hardin LLP, Chicago) <whannay@schiffhardincom>

The *Google Books* case is tantalizingly significant to the ongoing debate over what constitutes “fair use” in the digitization of library books. The jury (or at least the judge) is still out on this issue, however. It’s a fascinating portrait of the modern tension between libraries, publishers, authors, and the voracious appetite of the Internet community for “data.”

As readers may recall, in 2004, *Google* announced that it had entered into agreements with several major research libraries to digitally copy books and other writings in their collections. Since then, *Google* has scanned more than 12 million books. It has delivered digital copies to the participating libraries, created an electronic database of books, and made text available for online searching. The *Google Books Project* and its “digital library” were hailed as a boon to schools, scholars, and students, making all books — especially out-of-print works — available to the world.

In 2005, a number of authors and publishers brought a class action and related litigation, charging *Google* with copyright infringement. The authors sought both damages and injunctive relief, and the publishers sought injunctive relief. *Google*’s principal defense was fair use under §107 of the *Copyright Act*. The district court, however, has yet to reach the fair use issue, despite a heavily-litigated effort to settle the case and a trip to the U.S. Court of Appeals for the Second Circuit.

Google and the parties suing it (particularly the *Authors Guild*) tried to settle the case in 2008 and again in 2010. However, after numerous objections, extensive briefing, and lengthy oral arguments, the District Court held that the amended settlement agreement was not “fair, adequate, and reasonable” and rejected it. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y., filed March 14, 2011).

On December 12, 2011, attorneys for the *Authors Guild* filed a motion for class certification under Rule 23(b) (3), which was granted by *Judge Chin* on May 31, 2012.

See *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 2012 U.S. Dist. LEXIS 76080 (S.D.N.Y. 2012). *Google* appealed. On May 8, 2013 the Second Circuit heard oral argument and on July 1, 2013, issued an unusually brief opinion reversing *Judge Chin*’s class certification on the ground that certification was “premature” and should await further proceedings on *Google*’s fair use defense. *Google Inc. v. Authors Guild Inc. et al.*, No. 12-3200, 2013 WL 3286232 (2d Cir., filed July 1, 2013). The Court of Appeals stated:

Putting aside the merits of *Google*’s claim that plaintiffs are not representative of the certified class — an argument which, in our view, may carry some force — we believe that the resolution of *Google*’s fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues, including those regarding the commonality of plaintiffs’ injuries, the typicality of their claims, and the predominance of common questions of law or fact. Moreover, we are persuaded that holding the issue of class certification in abeyance until *Google*’s fair use defense has been resolved will not prejudice the interests of either party during the projected proceedings before the District Court following remand.

Thus, the question of whether it is “fair use” to electronically copy millions of copyrighted works has now resumed centerstage in the *Google Books* case. The possible resolution of this question may be presaged by the *HathiTrust* case which involves essentially the same question.

In *HathiTrust*, *Judge Baer* of the U.S. District Court in New York City was faced with the obverse side of the *Google Books* case. It involves the same copying of millions of books by *Google*, but the case looks at that conduct from the viewpoint of the libraries that receive from *Google* and, in turn, make available the digitized books to their patrons. The district

court granted summary judgment in favor of the libraries in October 2012. See *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). The court read Second Circuit law to hold that, where the use of the copied work is for scholarship and research, the analysis “tilt[s] in the defendants’ favor.” Moreover, the court viewed the copying as fair use because it was “transformative.” Accordingly, *Judge Baer* held that:

The use to which the works in the [HathiTrust Digital Library] are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining. [*Id.* at 460.]

Judge Baer therefore dismissed the *Authors Guild*’s complaint against the libraries.

The *Authors Guild* has appealed the *HathiTrust* decision to the Second Circuit, and briefing is in process. It is hard to predict whether the appellate court will agree with the district court’s admittedly unprecedented application of the concept of “transformation” in a way that permits copying of the complete text of millions of books. Nor is it clear whether it was appropriate for the court to ignore *Google*’s role in the copying process or *Google*’s for-profit goals in commercializing the digitized books. (“Plaintiffs argue that Defendants’ uses cannot be considered non-commercial because of their relationship with *Google*. Although the relationship between *Google* and Defendants is potentially relevant to the uses of the works made by *Google*, that issue is not before this Court.” 902 F. Supp. 2d at 462 n. 27.)

Turning back to the *Google Books* case now that it — and in turn the fair use issue — is before *Judge Chin* again, the end result is hard to predict. Recognizing that, unlike the libraries, *Google* itself clearly has a commercial purpose in mind for its digitization program, it is questionable whether the *HathiTrust* decision will be a harbinger of *Judge Chin*’s decision on fair use. A different omen of things to come may

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be **Judge Chin's** comment when he rejected the **Google Books** settlement in 2011. At that time, he flatly declared: "**Google** engaged in wholesale, blatant copying, without first obtaining copyright permissions." 770 F. Supp. at 679. Perhaps his view of **Google's** conduct will soften when he immerses himself in the nuances of the fair use doctrine in Section 107 of the **Copyright Act**.

If **Google** hopes that its use of copyrighted works via digitization will be deemed a "fair" use under the **Copyright Act**, **Apple Inc.** must surely be hoping that it will be able to undo a finding by the district court in New York that **Apple** engaged in seriously *unfair* conduct by conspiring with various publishers to fix the price of eBooks. After a three-week trial in June of this year, **Judge Denise Cote** — hearing the case as the fact-finder when the parties waived a jury — ruled that **Apple** conspired to restrain trade in violation of Section 1 of the **Sherman Act** and relevant state statutes. *United States v. Apple, Inc.*, Case 1:12-cv-02826-DLC, Dkt No. 326 (S.D.N.Y., filed July 10, 2013).

As **Charleston Conference** attendees may recall, the story of how **Apple** came to be dubbed a "price fixer" is classic. When publishers started offering eBooks, **Amazon** jumped into the business with a killer of a marketing plan: **Amazon** would retail all eBook bestsellers at \$9.99 for use on its Kindle e-reader (even if the print version sold for a lot more). Publishers weren't happy, and neither was **Apple**, which had plans to include an e-reader program on its iPad (scheduled to be introduced in 2010) but needed prices to be higher than \$9.99 in order to make a profit.

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suggestions, findings, and tips (1) generalize across the spectrum, and (2) speak to issues and needs experienced across the spectrum.

Get this book for your library ASAP! For institutions and organizations supporting a library school or program, a copy for the circulating collection is a must. All libraries, though, should consider acquiring several copies to distribute among library personnel. If administrators, librarians, and other staff could take just ten minutes a day to read a chapter or two, they could easily finish the book within a month. Individual chapters or even the book as a whole could serve as a strong basis for dialogue to improve services and productivity, and overall to "do more with less" — a road that all organizations are navigating. To provide even more bang for the buck, staff could employ some of the communication and project management strategies to organize such dialogues. Happy reading and happy library-lifehacking, everyone! 🐼

The publishers and **Apple** began meeting in December 2009 and, by January 2010, "agreed to work together to eliminate retail price competition in the eBook market and raise the price of eBooks above \$9.99." Opinion at 11. According to the opinion **Apple** was the lynchpin in the conspiracy between and among **Apple** and the publishers: "It provided the Publisher Defendants with the vision, the format, the timetable, and the coordination that they needed to raise eBook prices." *Id.*

Apple executed individual "agency agreements" with each of the publishers under which **Apple** would act as an "agent" in selling eBooks at a retail price set by the publishers (which were \$3 to \$5 higher than **Amazon's** \$9.99 retail price).

The agreements also included a price parity provision, or Most-Favored-Nation clause ("MFN"), which not only protected **Apple** by guaranteeing it could match the lowest retail price listed on any competitor's e-bookstore, but also imposed a severe financial penalty upon the publishers if they did not force **Amazon** and other retailers similarly to change their business models and cede control over eBook pricing to the publishers.

On April 11, 2012, the Department of Justice filed a civil suit against **Apple** and five of the six largest U.S. publishers. (Thirty-three states filed their own cases against the defendants, which were joined with the DOJ's suit.) On the same day, the DOJ filed a proposed consent decree settling the case against **Hachette**, **HarperCollins**, and **Simon & Schuster**. After considerable fireworks, the settlement was approved by the court, and settlements subsequently followed with the other publishers. Only **Apple** chose to go to trial.

In the court's view, the MFN "eliminated any risk that **Apple** would ever have to compete on price when selling eBooks, while as a practical matter forcing the Publishers to adopt the agency model across the board." Opinion at 48. The MFN clause "literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from **Amazon**." *Id.* at 56. And during their negotiations with **Amazon**, the publishers shared their progress with one another.

Since "the laws of supply and demand were not suspended for eBooks" when the publishers increased the prices of their eBooks, they sold fewer books. Opinion at 97. Thus, consumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise eBook prices: some consumers had to pay more for eBooks; others bought a cheaper eBook rather than the one they preferred to purchase; and still others deferred a purchase altogether rather than pay the higher price. *Id.* at 98.

Analyzing the trial record, **Judge Cote** found that there was "compelling evidence" that **Apple** "conspire[d] with the Publisher Defendants to eliminate retail price competition and to raise eBook prices" and "overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy." Opinion at 113. **Apple** was "a knowing and active member of that conspiracy ... not only willingly join[ing] the conspiracy, but also forcefully facilitat[ing] it." *Id.*

The circumstances of the publishers' simultaneous adoption of the agency agreement model advocated by **Apple** is itself powerful evidence of their agreement:

[I]n adopting a model that deprived each of them of a stream of expected revenue from the sale of eBooks on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by **Amazon**. [Opinion at 120.]

In finding that **Apple** has engaged in an illegal conspiracy to restrain trade, the district court rejected **Apple's** argument that the court would reverse well-recognized antitrust law if it held that the publishers' MFN clause was illegal. The court emphasized that:

The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. That does not, however, make it lawful for a company to use those business practices to effect an unreasonable restraint of trade. And here, the evidence taken as a whole paints quite a different picture — a clear portrait of a conscious commitment to cross a line and engage in illegal behavior with the Publisher Defendants to eliminate retail price competition in order to raise retail prices. [Opinion at 132.]

In short, "[t]he totality of the evidence leads inextricably to the finding that **Apple** chose to join forces with the Publisher Defendants to raise eBook prices and equipped them with the means to do so." *Id.* at 134-35. **Judge Cote** even quoted **Apple** founder **Steve Jobs'** own words against his company, pointing out that, on the day of the launch of the iPad, **Jobs** told a reporter that "**Amazon's** \$9.99 price for [a book newly offered on iPad for \$14.99] would be irrelevant because soon all prices will 'be the same.'" *Id.* at 149.

One might think that it is amazing that one of America's most innovative and revered high-tech companies would land itself in such a pickle. But from a review of the testimony and documents quoted in the district court's opinion, it was clear to **Judge Cote** that **Apple's** executives had a totally tin ear and a blind eye to the obvious price-fixing conspiracy that they were orchestrating. The publishers' executives were no better.

The five publishers in the case have already settled the states' claims against them for \$166 million in damages. (Their settlement with the DOJ involved only injunctive relief.) This case also will cost **Apple** a pretty penny in damage claims before all is said and done. And it should also remind American businesses that merely calling a sales term a "most favored nation" clause does not immunize the arrangement from federal or state antitrust laws. 🐼