Legally Speaking: Legal eBooks and Illegal eBooks

William M. Hannay  
*Schiff Hardin, LLP, whannay@schiffhardin.com*

Bruce Strauch  
*The Citadel, strauchb@citadel.edu*

Bryan M. Carson  
bryan.carson@wku.edu

Jack Montgomery  
*Western Kentucky University, jack.montgomery@wku.edu*

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he general topic for my contribution to the “Long Arm of the Law” program at the 2013 Charleston Conference was the continuation of two ongoing epic sagas in the world of digital books: the Apple eBooks price-fixing conspiracy and the Google Books copyright litigation. Charleston Conference attendees will perhaps remember my earlier accounts of episodes in these sagas: “Of Books and Competition” in 2010; “Apples and Books Or A Gaggle of Googles” in 2011; and “iPad That” in 2012. Since the 2012 Charleston Conference much has happened in the Apple and Google cases. Let’s start with the trial and judgment in United States v. Apple.

U.S. v. Apple, Inc.

As you may recall, in April 2012, the United States Department of Justice filed a civil suit against Apple and five of the six largest U.S. publishers alleging violations of the Sherman Antitrust Act arising from an alleged conspiracy to fix the price of eBooks. On the same day, the DOJ announced an already-negotiated settlement of the case against Hachette, HarperCollins, and Simon & Schuster. Not long thereafter, the attorneys general of 33 states filed their own cases against the defendants, which were joined with the DOJ’s suit for pretrial proceedings.

How did this happen?
It all started with the explosive success of Amazon’s Kindle eReader. As more and more publishers started offering eBooks in 2009, Amazon sought to dominate the business with a low-price marketing strategy: Amazon would retail all eBook bestsellers at $9.99 for use on its Kindle eReader (even if the print version sold for a lot more). Publishers were not happy about this pricing point, and neither was Apple which had plans to include an eReader 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.

The publishers and Apple began meeting in December 2009, and by January 2010 Apple had 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). In order to make this pricing point work economically, Amazon had to be pushed to raise its own prices.

The Motivator for this change was a price parity provision in the agency agreements called a Most-Favored-Nation clause ("MFN"). The provision not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor’s eBookstore, but also imposed a severe financial penalty upon the publishers if they did not force Amazon and other retailers to change their business models and cede control over eBook pricing to the publishers.

When the government sued, the publishers settled out, but Apple chose to go to trial. After a three-week trial in June of this year, U.S. District Judge Denise Cote — hearing the case as the fact-finder when the parties waived a jury — ruled that Apple had in fact 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.), Opinion, filed July 10, 2013. (Note that, since this was a civil case, rather than a criminal case, the correct terminology is that Apple was “found liable,” not “convicted.”)

The court found that the publishers and Apple had “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 court, 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.

Judge Cote found that the MFN clause “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. (The court’s written opinion includes a chart of telephone calls between the CEOs of the publishing houses.)

The court concluded that the conspiracy significantly harmed consumers. 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 “conspired[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 joining[t] the conspiracy, but also forcefully facilitat[ing] it.” Id.

In short, “[t]he totality of the evidence leads inescapably 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.” Opinion, 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.

The court subsequently had proceedings to determine what remedy to impose on Apple. On September 5, 2013, Judge Cote entered a Final Judgment and injunction against Apple. The court’s order requires Apple to modify its existing agreements with the five major publishers with which it conspired — Hachette Book Group (USA), HarperCollins Publishers L.L.C., Holtzbrinck Publishers LLC, which does business as Macmillan, Penguin Group (USA) Inc., and Simon & Schuster — continued on page 57.
In October, Judge Cote appointed Michael Bromwich as the external monitor of Apple. The 60-year-old Bromwich is an experienced criminal prosecutor and investigator, sort of a “go to” guy for difficult, high-profile assignments. He helped investigate the bombing of Pan Am Flight 103, probed the FBI’s conduct in the Aldrich Ames spy case, and took over the regulation of offshore drilling after the BP - Deepwater Horizon oil spill. Earlier in his career, he worked on the prosecution of Col. Oliver North. To counterbalance Bromwich’s lack of experience in antitrust matters, he will be assisted by Bernard Nigro, the chair of the antitrust department at the NY law firm, Fried Frank.

Apple, Inc. continues to maintain its innocence and has recently filed an appeal of Judge Cote’s orders to the U.S. Court of Appeals for the Second Circuit in New York City. The appeal will probably take a year or more to work its way through the system, but it is not likely that the district court’s order will be overturned. The liability finding is based on well-recognized principles of horizontal conspiracy theory and reasonably grounded in the evidence, and the remedy order seems carefully and narrowly drawn to address Apple’s specific type of misconduct, without over-reaching into other areas of Apple’s business (as the government had wanted).

A more interesting question is whether the enforcement action against Apple and the publishers will meaningfully benefit either consumers or libraries. For consumers, the prices of bestsellers in eBook format appear to have stabilized at levels lower than those prevailing during the time of the conspiracy, but are about 15-20% higher than Amazon’s $9.99 price point in 2009. For example, John Grisham’s Sycamore Row sells for $11.99, regardless of whether you order it as a NOOK Book, Kindle edition, or from the Apple iBookstore. And there are potential damage claims to be paid by Apple and the publishers: the five publishers have already settled the states’ claims against them for $166 Million in damages. (Their settlement with the DOJ involved only injunctive relief.) Judge Cote has scheduled a trial of Apple for May 2014 to determine the damages that it will have to pay the states and private plaintiffs as a result of its eBook price-fixing. The amount of overcharges — which would be trebled under the antitrust laws — could total hundreds of millions of dollars in damages.

For libraries, the question of whether the Apple case has been or will be of any benefit is more complex. As some of the programs offered at the 2013 Charleston Conference illustrated, publishers have made life difficult for libraries that wish to make eBooks available to patrons or researchers. Some publishers refuse to publish a lendable eBook version of their titles, and those that do offer a lendable one impose high license fees (you can’t “buy” the book) and also various restrictions on circulation. If you buy Sycamore Row for
your personal Nook or Kindle, it will cost you $11.99, but if you want a lendable version for the public library, you will probably pay eight times that amount (assuming that Doubleday will lease you one).

Why do publishers seem so determined to make it hard for libraries to lend e-books? I bet it has something to do with money, eh? Publishers probably think they will “sell” more e-books to individuals if folks can’t click on their local library’s website and download a copy of the book for free. Is it legal for publishers to impose high prices and burdensome lending rules on libraries? Probably, unless it turns out that publishers have been talking to each other about their e-book marketing strategies for libraries in the same way that they appear to have had consultations about working with Apple on their library customers (more likely).4

A matter of either Congressional action (not necessary inform and perhaps moot our assessment 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. 721 F.3d at 134.

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.

Judge Chin wasted little time in moving forward with consideration of the fair use defense. After the parties submitted legal briefs, the court heard oral argument on September 23, 2013. While it is notoriously unreliable to divine which way the case will come out from the give and take of oral argument, at least one court watcher concluded that the judge was definitely leaning towards Google. Judge Chin appeared to find the decision by his fellow judge Harold Baer in the HathiTrust case to be controlling.

In that case, 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 looked at that conduct from the viewpoint of the libraries that received from Google and, in turn, made 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 scholar-

Google Books

Turning to the long-running battle between authors and Google over the Google Books Project, the marathon has entered its eighth year of combat. As Charleston Conference attendees will recall from my prior reports, in 2005, a number of authors and publishers brought a class action and related litigation in Federal court in New York City, charging Google with copyright infringement arising from Google’s agreements with several major research libraries to digitally copy books and other writings in their collections. (Since 2004, Google has reportedly scanned some 20 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” has been hailed as a boon to schools, scholars, and students, making all books — especially out-of-print works — available to the world.

The authors and publishers had a rather different view of Google Books and sought both damages and injunctive relief from the court. Google’s principal defense was “fair use” under §107 of the Copyright Act. The district court, however, has not yet ruled on the fair use issue; instead, the case has been sidetracked in two separate (unsuccessful) settlement efforts and various procedural disputes.

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).

In an effort to put the case back on track, attorneys for the Authors Guild filed a motion for class certification under Rule 23(b)(3) on December 12, 2011. After briefing and hearings, Judge Chin granted the motion on May 31, 2012. See 282 F.R.D. 384 (S.D.N.Y. 2012). Google appealed. On May 8, 2013 the U.S Court of Appeals for the Second Circuit heard oral argument and on July 1, 2013, issued an unusually brief opinion reversing Judge Chin’s grant of class certification on the ground that certification was “premature” and should await further proceedings on Google’s fair use defense. See Google Inc. v. Authors Guild Inc., 721 F.3d 132 (2d Cir 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. 721 F.3d at 134.

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ship and research, the analysis “tilt[s] in the defendants’ favor.” Moreover, the court viewed the copying as fair use because it was “transformative.” 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.

During oral argument in the Google case, Judge Chin drew attention to Judge Baer’s conclusion that the library copies in the HathiTrust case were fair use and asked counsel for the Authors Guild whether the court was not in fact bound by that ruling. Judge Chin pointed to ways in which Google Books has improved research and enabled new kinds of research, such as data mining. (He noted that his law clerks use Google Books to do cite checks.) He asked whether those uses are “transformative.” Counsel for the Authors Guild countered by focusing the court’s attention on Google’s motivations, which were commercial, not exploratory. He also pointed out that the Authors Guild has appealed the HathiTrust decision to the Second Circuit.

It is hard to predict whether the appellate court will agree with Judge Baer’s admittedly unprecedented application of the concept of “transformation” in HathiTrust to permit copying of the complete text of millions of books. Judge Chin seemed to take a harder line when he rejected the proposed 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. Now he seems to have changed his tune.

It is hard to accept the proposition of Judge Baer (and perhaps of Judge Chin) that the ease of electronic searching of scanned documents is legally “transformative.” Research for centuries has been done by human beings reviewing the text of books and documents, looking for words or names or ideas. The fact that a computer can perform that search process faster does not, it seems to me, transform the process into something so different as to allow an unauthorized party to ignore the copyrights of the original authors and publishers. Copying millions of books and storing them in a searchable database may indeed be a useful thing for the world, but defending that copying on the ground that it is for the public good strikes me as little more than a “Robin Hood” defense, in which stealing from “rich” authors is justified on the ground that the proceed are being given to “poor” academics. Is that really a “fair” use? continued on page 59
Endnotes

1. Bill Hannay is a partner in the Chicago-based law firm, Schiff Hardin LLP, and an Adjunct Professor at IIT/Chicago-Kent College of Law. He is a frequent speaker at the Charleston Conference and the author of nine books on antitrust and trade regulation.


4. For example, in response to member concerns, the Digital Content & Libraries Working Group of the American Library Association has focused on influencing the so-called “Big 6” trade publishers to sell eBooks to libraries on reasonable terms. See Ebook Business Models for Public Libraries (August 2012), http://www.americanlibrariesmagazine.org/blog/digital/releases-%281%281%28E-book-business-models-public-libraries%281%2880%280%28D.