

## **Lois Wasoff Returns for an Update on Google Books**

### **An Online Seminar presented September 28, 2011**

KENNEALLY: On September 15, Judge Denny Chin returned to his New York City courtroom for his scheduled update on negotiations toward a settlement in the ongoing Google Books case. Attorneys for Google, the Authors Guild, and various publisher plaintiffs all reported that talks were continuing. However, while the publishers and Google saw progress being made, the authors sounded less hopeful.

By session's end, Judge Chin was putting the case on track for trial as early as next summer. Welcome, everyone, to Copyright Clearance Center's ongoing series reporting on developments around the Google Books settlement. My name is Christopher Kenneally, and joining me, as always, is Lois Wasoff. Lois, welcome again.

WASOFF: Hi, Chris, how are you?

KENNEALLY: Fine, and it's good to see you back here at CCC, Lois. Your extensive experience in copyright law and the publishing business really does help us sort out these complex legal matters. Let me, again, remind our audience that Lois Wasoff was past chair of the Copyright Committee at AAP, and for many years, she was vice-president and corporate counsel at Houghton Mifflin.

Lois has also served on study groups that have looked at a variety of issues related to copyright law and libraries, and she is a frequent speaker in this country, and abroad, on issues related to copyright. When we last spoke in late March, Lois, Judge Chin had only recently issued his long-awaited opinion in the Google Book Search settlement proceedings, rejecting the amended settlement agreement proposed by the Authors Guild, AAP, and Google.

Judge Chin did, however, leave the door open for the parties to renegotiate and resubmit the settlement. You and I went into great detail when we discussed Judge Chin's rejection, and that webinar is still available on [copyright.com](http://copyright.com)'s education page. Our listening audience should check out the webinar if they're interested in getting all the details. Before we discuss what occurred at the most recent status conference, is there an easy way to summarize the important unresolved points of Judge Chin's rejection? What did the parties need to work at to resolve?

WASOFF: Well, it's (inaudible), Chris. Judge Chin, in his lengthy and well-reasoned opinion really went over in some detail the various objections that had submitted to the court in connection with the settlement agreement. He also discussed the statements that had been made in support of approval of the settlement agreement. He reviewed concerns regarding copyright, international law, antitrust, privacy, and he also discussed the class action and procedural aspects of the case.

After going through that analysis, he ultimately concluded that the settlement agreement was not fair, adequate, and reasonable. That was the legal standard that he was charged to define. If he could not find that the settlement agreement met that standard, he – it was his obligation to disapprove it, and that is what he did. But to respond specifically to your question, he did give the parties some guidance in that decision, as to what they might do to this amended settlement agreement to make it a document that he felt he could approve.

He definitely, in his opinion, left the door open for the parties to renegotiate and resubmit the settlement. He gave them some specific guidance. For example, he urged them to consider adopting an opt-in, rather than an opt-out model, as a way of ameliorating some of the concerns that were raised in the objection. And in that decision, he set a date for a status conference, encouraging the parties to begin renegotiating the agreement and to come back to him, hopefully with a revised agreement.

The initial date set was in late April, it was postponed a couple of times, the September 15<sup>th</sup> status conference that you and I are talking about today was the conference that was ultimately held, and it was the time when the judge got the report back from the parties about their progress – or lack of progress towards settlement.

KENNEALLY: Well, as we've come to expect, Lois, that's a fairly clear and concise review of the story so far. So let's get to September 15<sup>th</sup> and that status conference. Exactly what transpired just two weeks ago? I understand there were some interesting developments, can you review those?

WASOFF: Yes. First, the judge had warned the parties that if they couldn't settle, the case was going to start moving toward trial. The case, he said, has been pending for some years. If they couldn't settle it, the judge wanted to move it along. So one of the things that came out of the status conference was that the judge made it clear that he is expecting the parties to have the case ready for trial, hopefully in July of 2012.

Backing up from that date, he gave the parties a schedule for some of the key events that have to occur leading up to the trial. So there will be submissions on class verification due to him by December 12<sup>th</sup>. Google will have the opportunity to make submissions in response to those by January 20<sup>th</sup>. He is asking the parties – he is instructing the parties – to complete their discovery in the case by the end of March of 2012.

If, after discovery is concluded, the parties would like to ask the court, or one of the parties would like to ask the court to make a decision based on the discovery and the law without having to go to trial, then the mechanism for doing that would be to make a motion for summary judgment. The judge has made it clear that he would

be expecting motions for summary judgment, if they're going to be made, by mid-July of 2012.

So that was expected if the parties didn't reach a settlement. The other interesting thing that came out of the status conference, though, is that we got a sense of what's been going on behind the curtain. We got a sense of whether the parties are moving towards settlement, and what was quite interesting is that we learned officially that the parties appear to have split in their progress toward a settlement.

The publishers, on the one hand, seem to be making – or say they are making – more progress with Google. The AAP attorney, Bruce Keller, indicated that a trial may not ultimately be needed, because the publishers and the Google had made significant progress towards a settlement in the case.

The Authors Guild does not seem to be as far along on the road toward settlement. In fact, Michael Boni, who's the attorney representing the Authors Guild, seemed to be much less emphatic, much less encouraging, about the likelihood of an eventual settlement. It seems that there may be unresolved issues between Google and the authors that will not be worked out prior to a trial, and might eventually have to go through a trial process.

**KENNEALLY:** Well, almost from the very beginning, these two cases were connected, and it raises questions if they should become separated. What are the implications, Lois, of the publishers and authors having separate negotiations toward a settlement.

**WASOFF:** Well, you're right, Chris, that these cases have been linked together for a very long time. The authors and the publishers have been working together toward a resolution with Google for quite a long time, for some years. But if we go back to the very beginning, to when the cases were first filed, the picture's different. The cases were filed as separate actions initially.

The publishers filed a lawsuit as a test case, with named publishers and certain works specified. The Authors Guild used the class action mechanism for the case, and that's the mechanism that was ultimately adopted by both parties for purposes of settlement.

But since they started separately, and they started with different procedural mechanisms, although they were based on the same underlying facts – both cases involved Google's scanning activities, as part of its library project, both cases involved testing the boundaries of fair use – but since they did start separately, and used those separate mechanisms, it wouldn't really be that surprising to see the cases separate again and proceed on different tracks as they move toward potential settlement.

And it's really too early to speculate about what those settlements – or settlement if they're able to stay together – would look like. Based on the court's decision, it really does seem likely that the – that any settlement might use an opt-in rather than an opt-out mechanism. And there's been some events that are relevant to that – the settlement process outside this courtroom, particularly in respect of the Authors Guild and the class action mechanism.

The most significant one, in my view, is – there was a recent decision in the Second Circuit that deals with questions related to class actions, and particularly to the certification of the class. You remember, Chris, I'm sure, the Tasini case. It was a major copyright case, it involved the use by – a challenge by freelance writers to the use of their work by publishers in online databases in digital format.

That case went on for some time. People think that it's over, but in fact, it's kind of like John (inaudible) be John (inaudible). One wonders when it will ever be resolved. The case that the Second Circuit just decided is sort of a – the progeny of Tasini. It is a case involving a dispute over the class action settlement that was ultimately arrived at in the Tasini – in the Tasini case, in the freelancers' case.

The Second Circuit was asked to consider whether the lower court's approval of a class action settlement in that case should be upheld. The Second Circuit – and keep in mind, the Second Circuit is the appellate court that would ultimately have to rule on any decision made below about a class action settlement in the Google case – Second Circuit ultimately decided that a class could not be certified in that circumstance because of conflicting interests amongst the class members.

Now the facts are different, the circumstances are different, but if you're thinking about how the Authors Guild settles its class action suit against Google, it's hard to avoid at least the implication that the Second Circuit's decision in this recent case – in the Muchnick case – will, at a minimum, complicate any attempts to settle the Google case on a class action basis.

And then another interesting development outside the courtroom, which could have some implication for potential settlements and discussions in – particularly on the Authors Guild side, but perhaps for the publishers as well – has to do with a lawsuit that the Authors Guild filed.

The case – this new case that the Authors Guild filed, was filed only about a week before the status conference. It's interesting – it did not use the class action mechanism that the Authors Guild used in its case against Google. It does involve – the new case does involve the digital scans that Google was providing to the participating libraries. And the progress of that case could have some implications for the Google case as well.

**KENNEALLY:** Well, how does this new case, this so-called HathiTrust case, differ from the Google Books case?

WASOFF: HathiTrust is a consortium. It's a group of university libraries. And they've joined together, they've formed this consortium with the purpose of facilitating making digital copies of works widely available. HathiTrust has a corpus – an enormous corpus of full-text, digitally scanned works. The estimates are around 10 million works. The estimates that I've seen are that about 70% of them are still in copyright.

What the HathiTrust did was make an announcement that it would begin making digital copies of works that it considered to be orphan works available to library users of its constituent libraries, on the basis that the use of those orphan works was a fair use. The Authors Guild suit was brought in response to that announcement by the HathiTrust.

It was brought, as I mentioned, not as a class action, but as a case that named as plaintiffs the Authors Guild, a number of individuals – a number of organizations representing foreign rights holders. The suit was filed in the same federal – New York federal court in which the Google Books case is still pending. It was assigned to Judge Chin initially, but has now been reassigned to another judge.

And it's an interesting case. The named defendants in that case – the universities and university libraries that are participating in the HathiTrust, and that were going to participate in this orphan works program that the HathiTrust was proposing – include schools like Duke University, Cornell University, the University of California, the University of Michigan.

The case was seeking a very broad injunction. It was really seeking a court order that would prevent the further use of these digital files that are being maintained by the HathiTrust. These digital files that are, to some extent, comprised of the digital scans that Google created through its original Google Library Project. The complaint also makes reference to the fact that Judge Chin's opinion in the Google Books case called orphan works an issue that should be addressed by Congress, and much of the press coverage about the case has referred to that as well.

So, again, we're back in a situation where private litigation is dealing with issues that many seem to feel should – could best be addressed, should be addressed, through legislation.

KENNEALLY: Well, this new case is only a couple of weeks old – the other case we've been talking about is more than five years old. But a lot has already happened in the HathiTrust case since the initial filing. Tell us about that.

WASOFF: Well, it's very interesting. What happened was the HathiTrust, as part of a plan to release the first several hundred of these so-called orphan works, released a list of the works. Very, very quickly, the Authors Guild, and others investigating

the works designated on that list, were able to identify authors and copyright owners for some of the works.

Now that raised some interesting questions about the kind of research the HathiTrust has done in determining what works were orphans and what works weren't. So the HathiTrust subsequently issued a statement saying that it has committed to improving the process of identifying authors, and stating that, for the moment, it's going to suspend its orphan works project, and it's going to see if it can develop what they describe as a robust, transparent, and fully documented process before restarting the project.

What happens, specifically, to that orphan works project that the HathiTrust was promulgating remains to be seen. But clearly, whatever happens in that particular instance, the question of orphan works – the questions that come out of uses, potential uses, desired uses of this corpus of digital scans created by Google – are going to continue to be questions we have to think about and pay attention to.

**KENNEALLY:** Right. And I should add, in other news, that Michael Healy, who served as executive director designate of the Book Rights Registry, an entity that the Google Books settlement proposed to create, was recently appointed executive director, author and publisher relations, here at Copyright Clearance Center. Listeners will find a full report from Publishers Weekly on our own website, [www.copyright.com](http://www.copyright.com).

And with that, we will wrap up today's program, recorded September 28, 2011, on the Google Books settlement. Attorney Lois Wasoff, I want to thank you again for joining us, and helping me and our audience to understand this important, complex issue.

**WASOFF:** Thank you, Chris.

**KENNEALLY:** The not-for-profit Copyright Clearance Center is very pleased to bring you this special podcast, as well as other educational programs on copyright throughout the year. For the latest schedule of events that we have, please go to [copyright.com](http://copyright.com) and click on the tab for education.

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