

**Before Google ‘Fairness’ Hearing,
Lois Wasoff Reviews Latest
on Google Book Settlement**

Recorded February 12, 2009

KENNEALLY: A class action lawsuit of historic scope. An Internet Goliath. Thousands of authors, publishers and other rights holders. National governments and multinational corporations. These are the ingredients of a dish called the Google Book Settlement. First announced in October 2008, the Google Book Settlement returns to the table on Thursday, February 18 when the main course is served in judge Denny Chin’s federal district courtroom in New York City.

Hello and welcome. For everyone at Copyright Clearance Center, thank you for joining me. I’m Christopher Kenneally, Copyright Clearance Center’s director of author relations. And with me on the line is our house expert for the Google Book Settlement, Attorney Lois Wasoff. Lois, welcome back.

WASOFF: Hi, Chris. It’s nice to be here.

KENNEALLY: It’s wonderful to have you back, and as we have done from time to time over the last year, we’ve invited you today to join us to take another close look at the very latest developments in this case. It’s a big meal ahead, so let’s go straight to it then. Can you briefly bring us up to date, tell us what’s been happening recently and what we can expect in days ahead?

WASOFF: Well, Chris, as you of course will recall, back in November, the proponents of the Google Book Settlement – Google, the Authors Guild and the Association of American Publishers – submitted an amended settlement agreement, the ASA, that incorporated changes from the original proposal that they had had preliminarily approved by the court more than a year before.

The ASA included changes that were very clearly intended to address some of the concerns that had been raised during the objection period preceding the November changes. With the submission of the ASA, the judge set a new schedule for re-notifying the potential class members, for the filing of objections, for opting out of the class, and also for the Department of Justice – the DOJ – to submit comments on the ASA.

The cutoff for the comments, objections and opt-outs was January 28. The Department of Justice was given some additional time, until February 4, to file its own reactions to the ASA. All of those objections and comments are now before the court.



In addition, we've had a little bit of late-breaking news. We found out last night and this morning that the proponents of the settlement have filed lengthy papers, a couple hundred pages of briefs, with the court in further support of the ASA. The filing is an attempt to respond to some of the objections that were raised in this round about the ASA.

What we can conclude from this is that you are absolutely correct. That February 18 fairness hearing date that you referred to before is the next key date. There will be a hearing that day and we can conclude that the proponents of the settlement still very much intend to appear before the judge on that date and to urge its approval.

KENNEALLY: And certainly among all the documents filed, one of the most critical was the one that got filed February 4 by the Department of Justice, just a week ago. And everyone's attention in that document went straight to a line on Page 11, which I'll quote. "The United States believes that the court lacks authority to approve the ASA."

So for obvious reasons, that's proved to be the big sound bite for most observers. It is a fairly categorical statement and it strongly suggests the question, is the settlement dead? But I know you always want to look beyond the headline, Lois, so I look forward to your view. How do you see things, given what DOJ said? Dead or alive?

WASOFF: There's been a lot of commentary out there, as you've said, and a lot of speculation that the agreement is dead, and that makes great attention-grabbing headlines, but I think the situation is a lot more complex and nuanced than that. I wouldn't necessarily jump to that immediate conclusion.

The DOJ brief – the Department of Justice brief – is certainly critical of many aspects of the ASA, but it's also conciliatory in some of its language. It recognizes the efforts made by the involved parties and it refers to some of the potential benefits to the public if a settlement can be made on some terms. It also suggests further discussions. It provides what one might describe as a roadmap for potential additional revisions.

But at the same time, the Department of Justice is quite adamant in the brief in dealing with what it characterizes as remaining core problems. We'll have an opportunity when we get together again to talk in more detail about Google's response to the Department of Justice objections, but what we do know sitting here right now is that there is a very complicated decision that will have to be made by Judge Chin.

If he does rule definitively on the ASA, either approving it as is or rejecting it completely, that will almost certainly result in an appeal, no matter what his ruling is.

KENNEALLY: About as safe a prediction as any in all of this.

Now, I know there were many objections filed, many of them submitted by original objectors. And even though those who had objected before were told that they couldn't just restate their objections, they did raise some new issues in all of this. Is there anything of note that we can consider as net new objections in these documents?

WASOFF: As you said, Chris, the judge did make it very clear that he expected objections filed with respect to the ASA to focus on what had been changed. In other words, he wanted to avoid going over the same ground and wanted concerned parties to think about the new elements being proposed.

The proponents in their own filings in support of the ASA conceded that although changes had been made, the core structure of the ASA was the same as that proposed in the original version. But those changes, as we've discussed before, Chris, were substantial in some specific areas.

For example, the definition of the membership of the class changed, particularly with reference to foreign works. The goal there was to minimize the impact of the settlement on foreign rights holders, some of whom had very strongly objected to the original version.

Another substantial change was that the mechanism for dealing with unclaimed works had been changed. An unclaimed works fiduciary was created in the revised version, in the ASA, as a way of dealing with objections that there were conflicts presented within the supposed represented class between the owners of rights to known works and the owners of rights to unclaimed works.

The unclaimed works fiduciary was also intended to address some of the objections that had been raised by state attorneys general about the treatment of unclaimed funds in the original version.

Some changes were also made in how pricing was handled and how future uses were authorized, in competitor access to the Google database. And all of these changes were really intended to placate some of the antitrust concerns that the Department of Justice and others noted in their objections to the original settlement.

And then finally, another change that was made was that the original settlement agreement as proposed included a most-favored nations clause that angered many of the commentators, and that was simply removed entirely.

So now we've got some of the same objectors filing, but they're filing objections with respect to these changed terms. For example, France and Germany filed objections before and they filed again now, expressing substantial concerns about the treatment of foreign rights holders in the current ASA, essentially saying that foreign rights holders are not as out of the settlement as a top-line reading of the agreement would indicate.



Amazon and Microsoft filed strong objections last time. They filed again, making similar legal arguments dealing with antitrust law and issues involving class action, but basing them on the new facts presented by the new version of the agreement.

Several of the states' attorneys general filed again, obviously not convinced that the changes made with respect to revenues attributable to unclaimed works would be adequate under the laws of their state.

So, we're seeing new objections, even if some of the objectors are not new.

Now, one thing that is helpful to us in analyzing all this is that the Department of Justice got an extra week. Everyone else had to file their objections by January 28. The Department of Justice had until February 4. So in its filing, the Department of Justice includes comments on and references to many of the other objections.

So without minimizing the importance of all of the various objections filed, each of them has some importance and has something to add to the discussion. The DOJ filing – the Department of Justice filing – really can serve as a useful summary for us of many of the other objections.

KENNEALLY: Right, and I think that's an important point. Because we don't have a lot of time right now, we're going to sort of use DOJ as the lens through which to see all of this. To that point then, Lois, for our audience, you've read the DOJ statement through and through. What's the tone and what are the major highlights?

WASOFF: The brief clearly recognized a certain promise in the proposal, and there was commentary about an acknowledgement of what the DOJ characterized as substantial progress having been made from the original settlement proposal. That progress is essentially the changes we just talked about, Chris, the changes in dealing with pricing and foreign works and unclaimed works.

But despite acknowledging substantial progress, the Department of Justice also stated unequivocally that it saw very substantial issues as remaining. Even in their original documents in support of the amended settlement agreement, the proponents themselves characterized the agreement as being substantially the same in its core, although they then went on to describe the changes they'd made.

It's the analogy we've used before, that the tree is still the same. The amended settlement agreement changed the shape of it by pruning some of the branches. And according to the Department of Justice, because the core of the original settlement is the same, some of the core problems in fact remain.

KENNEALLY: A rose is a rose is a rose, so to speak.

WASOFF: So to speak. The Department of Justice, for example, went on at some length about its belief that the amended settlement agreement is an attempt to use the class action mechanism to implement a forward-looking business arrangement. The Department of Justice also emphasized that the amended settlement agreement grants rights that don't square with some of the core principles of the Copyright Act, that in fact are inconsistent with some of the core principles of the Copyright Act, essentially because it uses an opt-out rather than an opt-in system, compromising the ability of copyright owners to control whether and how their works will be exploited.

The other points made by the Department of Justice – the core issues that they called out – included remaining concerns about possible anti-competitive advantages being conveyed to the single entity – Google – by the terms of the settlement.

There was discussion about Google continuing under the amended settlement agreement to have the exclusive ability to exploit unclaimed works without the liability risk that would be faced by others if they tried to do it. Although the pricing mechanisms, as we discussed, have been changed, the Department of Justice felt that the pricing mechanisms, even as revised, continue to raise antitrust concerns.

They're concerned that there's no major broader licensing system put into place and that the way the class action mechanism is being used is pushing it too far, that although some of the goals may be laudable, the particular means chosen in the amended settlement agreement, according to the Department of Justice, is not the appropriate way to achieve those goals.

KENNEALLY: That's a lot to digest, and a lot of it does sound pretty negative, especially if we remind ourselves of that statement, the United States believes that the court lacks authority to approve the ASA. With that in mind then, is there cause for hope at all? Is there really a path forward from here, possibly?

WASOFF: It depends on a lot of things, but the Department of Justice certainly outlined a possible path. Toward the end of the brief, it was pretty explicit in saying – in acknowledging that the court could disagree with the Department of Justice's conclusion that if the court lacks the authority to approve the agreement, that the court could perhaps, as part of that disagreement, recommend changes to the amended settlement agreement that would mitigate some of the risks and that would provide a basis for approval. And there were some specific suggestions made that I think are important.

Also, significantly, some of these suggestions were made by the Department of Justice – or similar suggestions were made by the Department of Justice – in its original filing on the

original settlement agreement, and the proponents didn't pick it up for the amended settlement agreement.

So whether this is a realistic roadmap, whether this includes some elements that would just be non-starters for the proponents, we can only speculate.

But the Department of Justice's recommendations included, first, a recommendation that the agreement use an opt-in regime rather than the opt-out mechanism that's in there now, at least for the forward-looking aspects of the settlement, for the ongoing licensing aspects of the settlement.

It proposed that a meaningful significant waiting period exist before Google could commercially exploit out-of-print works without the permission of the rights holder.

It suggested delaying or conditioning the acceptance of the ASA until certain standards were set by the unclaimed works fiduciary and by the book registry that's created by the agreement that is designed to further reduce the volume of unclaimed works. There was a suggestion that there be a requirement that a reasonably diligent search be made for the rights holder by Google or the registry, and that the results of that search be publicly disclosed.

They suggested some changes in the definition of a book under the ASA. Significantly, they suggest imposing a term of years, of perhaps five or 10 years, on the exploitation. They wanted to see language that specifically required the parties to agree to comply with the terms of any copyright legislation enacted in the future. There were concerns expressed in the Department of Justice brief that the approval of the ASA could actually have detrimental effects on the likelihood that legislation would be passed that would create a more level playing field in this area.

And they also suggest examining whether there exists a means for other entities other than Google to get access to orphan works, rights on certain works, the unclaimed works, that would be consistent with Rule 23, with the class action procedures. And that again is an attempt to encourage the parties to work harder at finding a way to level this playing field and mitigate the issue that the Department of Justice sees of Google having too unique, too powerful a position in relation to these works.

KENNEALLY: All right. We are recording this on Friday, February 12, ahead of that fairness hearing coming up next week, next Thursday, the 18th. And I just want to ask you to take out Lois' crystal ball there and see whether you have any hint of what the action's going to be like that day, and give us sort of a sense of what we can anticipate.

WASOFF: For those of us who are following this closely, it's going to be fascinating. Maybe not generally fascinating, but for those of us like you and I, Chris, who've been following this closely, it's going to be interesting.

There are about 30 different speakers, the neighborhood of 30 different speakers that have been recognized by the court as having the ability to speak at the hearing. The number is a little bit of a moving target. The overwhelming majority of those – more than five-sixths of them, by the present count, about 25 of them – are going to be speaking in opposition to the current amended settlement agreement. About five will be speaking in favor.

All of those speakers will be given only five minutes each, and the court has suggested that they coordinate their remarks to prevent too much redundancy. The judge has also said he's going to read all of the written submissions to the court, even if speakers have not been given an opportunity to speak or can't cover all of their points in their five minutes. So we know what Judge Chin will be doing for the next period of time. He has a lot of reading to do.

Following those individual presentations, there'll be a representative of the Department of Justice speaking, and then finally, the parties to the suit, the proponents of the settlement. Because at this point, Google, the authors and the publishers – or more properly, Google, the Authors Guild and the Association of American Publishers – are on the same side. Even though they were adversaries in the litigation, they're all the proponents. They'll be given an opportunity to speak as well.

The entire courtroom will be filled essentially only with people who are going to be speaking because there's that big a crowd who will be speaking. There's an overflow room that's been designated. There'll be a video broadcast. The Twitter feeds will be interesting. It'll be a very, very, very full day.

KENNEALLY: I'm thinking, Lois, that people might want to have it moved over to the Metropolitan Opera House. This sounds more like grand opera of Wagnerian proportions than it does a typical day in federal district court.

WASOFF: It certainly does, thought usually at the end of the opera, somebody dies. I'm not sure that'll be the case here.

KENNEALLY: Well, hopefully not. Hopefully, though, they'll get through it all in a single performance. It's a lot to take in for the judge.

Next Thursday, February 18 is when that fairness hearing takes place,

Thank you very much, indeed, Lois Wasoff, our in-house expert on the Google Book Settlement, for joining us again.



And that's hardly the end of it all, even though the 18th is just next week and that fairness hearing comes in. I want to let everybody know that Copyright Clearance Center's Google Book Settlement series will continue, coming up Thursday, March 4 at 12 noon eastern time, with an hour-long online seminar featuring analysis of the fairness hearing and more. Bringing Lois back with us in the WebEx format. We look forward to that. Look forward to seeing you again then in a couple of weeks time, Lois.

WASOFF: Thank you, Chris.

KENNEALLY: For more information on that program, to register and to learn all about past editions of this Google Book Settlement series, please go to copyright.com/events or write to the educational services group, education@copyright.com.

For me, Chris Kenneally and for everyone at Copyright Clearance Center, thank you for listening and 'bye for now.

END OF PODCAST