



ARE Copyright Litigation Alert: Southern District Judge Rejects Google Books Amended Settlement Agreement

April 5, 2011

Author(s): Michael J. Kasdan

On March 22, 2011, Judge Chin of the U.S. District Court for the Southern District of New York rejected the proposed Amended Settlement Agreement (“ASA”) in the class action copyright infringement suit brought by The Authors Guild, et al. against Google, Inc. The settlement was rejected on the basis that it is not fair, adequate or reasonable.

In *The Authors Guild, et al. v. Google, Inc.*, multiple authors and publishers brought a class action copyright infringement suit against Google on behalf of all holders of U.S. copyrights in books. 2011 U.S. Dist LEXIS 29126, at *7 (S.D.N.Y. Mar. 22, 2011). The suit alleges that Google’s scanning of books in order to display “snippets” of the books for online searching constitutes copyright infringement. *Id.* at *27. After the parties engaged in settlement negotiations, they ultimately executed the ASA. The parties then submitted the ASA for final approval pursuant to *Federal Rule of Civil Procedure 23(e)*. *Id.* at *6. However, Judge Chin rejected the agreement on the grounds that it would allow Google the right to “exploit entire books, without permission of the copyright owners.” *Id.* at *2.

Under the terms of the proposed ASA, Google would be allowed to “(1) continue to digitize Books and Inserts, (2) sell subscriptions to an electronic Books database, (3) sell online access to individual Books, (4) sell advertising on pages from Books, and (5) make certain other prescribed uses.” *Id.* at *87. While he initially acknowledged that the settlement process had been a fair, arms length negotiation, a factor which favors the approval of the settlement, Judge Chin found that the class’ substantial objections to the ASA presented some significant concerns. *Id.* at *20-21.

In particular, the opt-out provisions of the ASA presented concern for Judge Chin. Under the ASA, copyright holders could exclude their books from Google’s registry by requesting removal. However, Judge Chin found that “it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.” *Id.* at *39. Judge Chin suggested that many of the concerns with the ASA could be addressed by changing the ASA from an “opt-out” settlement to an “opt-in” settlement, and he urged the parties to do so. *Id.* at *51.

Other of Judge Chin’s concerns included that “[t]he ASA would grant Google control over the digital commercialization of millions of books, including orphan books [copyrighted books



whose owners cannot be located] and other unclaimed works. And it would do so even though Google engaged in wholesale, blatant copying without first obtaining copyright permissions.” *Id.* at *28-29.

We will continue to monitor this case and provide further updates as the parties either attempt to narrow the settlement agreement or resume litigation.

In the meantime, please feel free to [contact](#) our attorneys regarding issues raised by this case.

* Michael J. Kasdan was a partner and [Jessica Rasmussen](#) is an associate at Amster, Rothstein & Ebenstein LLP. Their practice specializes in intellectual property issues including litigating patent, copyright, trademark and other intellectual property disputes. Jessica may be reached at jrasmussen@arelaw.com.