

NYC judge expresses some doubts about Google deal

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(AP) -- A judge Thursday questioned whether Google and lawyers for authors and publishers went too far when they struck a deal that would let the gigantic search engine make money presiding over the world's largest digital library.

U.S. [District Judge](#) Denny Chin put lawyers who reached the \$125 million settlement on the defensive as he presided over a fairness hearing in a packed Manhattan courtroom where opponents of the agreement spent several hours urging him to reject it or demand changes. He did not immediately rule.

When the lawyers who completed revisions on the deal in the fall took their turn to speak, Chin questioned why the settlement gave [Google](#) publishing rights well into the future rather than merely rectifying any harm that led authors and publishers to sue it five years ago.

"Usually it's a release of claims based on what's happened in the past. Usually you don't have a release of claims based on future conduct. Why is this case different?" Chin asked Michael J. Boni, a lawyer for authors.

Boni agreed that the case was unusual but insisted the deal was fair despite objections by Google rivals, consumer watchdogs, academic experts, literary agents and even foreign governments.

The judge said it seemed akin to a settlement in a discrimination action

containing wording that says: "I'm releasing you now from discriminating against me in the future."

He also seemed to take the side of some of Google's stiffest critics, including the U.S. Department of Justice, when he noted that many of those protesting the deal would disappear if the company was required to get agreements from authors before letting their works be used.

As the deal stands, Google would be able to use so-called "orphan works" - out-of-print books whose writers' could not be located - and the works of other authors who declined to opt-out of the agreement after learning about it.

"I would surmise that Google wants the orphan books and that's what this is about," Chin said.

Boni said attempts by the litigants to notify authors had already caused 620,000 out-of-print books that some would call orphan books to be claimed by 40,000 authors. So far, Google has scanned about 10 million books.

"When there is money waiting for them, they come forward at a very high rate," he said.

Boni's remarks came after a stream of people opposing the deal each spoke for about 5 minutes, leading Boni to begin by saying: "I feel a little bit like Rocky getting beaten around the head and face for 15 rounds."

Minutes earlier, U.S. Deputy Assistant Attorney General William F. Cavanaugh took his swings, saying the Justice Department was continuing an investigation and believed the agreement might violate antitrust laws.

He said Google had used the settlement to give it rights it never negotiated for, "essentially rewriting people's contracts."

"It produces benefits to Google that Google could not achieve in the marketplace because of the existence of orphan works," Cavanaugh said.

Still, Cavanaugh said the Justice Department "recognizes and applauds the objectives of mass digitization. Our concern is that this is not the appropriate vehicle to achieve those objectives."

Attorney Daralyn J. Durie, speaking for Google Inc., which is based in Mountain View, Calif., said provisions of the deal requiring authors to opt-out if they don't want their books scanned rather than requiring Google to first get each rightholder's approval was not an issue the company could be flexible on.

"There would be no settlement. There is no other way to create a market for these out-of-print works so they can become available and so the rightholders can be located," she said.

"Microsoft abandoned their scanning project. They couldn't figure out a way to make it commercially viable," she said.

Chin at one point cited critics who say the deal gives Google too many rights and he added that it did seem to go beyond where prior law had in the past allowed cases to go.

Before the lawyers took their turn, Chin heard from about two dozen speakers, the majority asking that the settlement be changed or rejected.

"It's not going to be a great library, it's going to be a great store," said Sarah Canzoneri, a member of the Children's Book Guild and plaintiff in a lawsuit by authors and publishers.

Marc Mauer, president of the National Federation of the Blind, said the audio capabilities of Google's system "will give us access to 10 million books."

Andrew DeVore, a lawyer for folk singer Arlo Guthrie and "Pay it Forward" writer Catherine Ryan Hyde, said the library would exploit his clients with "woefully inadequate compensation" for "unknown and undisclosed uses."

The hearing put technology giants at odds: A lawyer for Sony Corp., which makes electronic book readers, said the company supports Google's effort because it would promote competition. But an attorney for Microsoft Corp. complained that it would give Google an unfair advantage.

The proposed settlement "was structured to solidify Google's dominance," said Tom Rubin, the Microsoft lawyer.

Other opponents said they were worried about Google's unchecked ability to track users' reading habits and collect data on them.

The deal "raises very serious privacy concerns," said John Morris, an attorney for the Center for Democracy & Technology.

France and Germany, which oppose the settlement, noted they support a European book-scanning project, Europeana, because it is in compliance with their laws and requires permission from copyright holders before books are scanned.

Irene Pakuscher, speaking for the government of Germany, said Germany "strenuously supports the creation of digital libraries" but said the settlement should be limited to U.S. authors and publishers.

Cynthia Arato, a lawyer for the New Zealand Society of Authors, said opposition to the settlement was so strong in European countries that its approval would place severe diplomatic stress on the United States and lead to calls for trade sanctions.

She said its approval would be "virtually certain to become the most controversial class action settlement ever to emanate from the United States."

David Nimmer, a lawyer for Amazon.com Inc., told Chin the agreement allowed "full scale commercial exploitation with essentially no restraint whatsoever."

He added: "It turns copyright law on its head."

Durie said Google disputed the notion.

"This does not turn copyright law on its head," she said. "We firmly believe that it constitutes fair use and is permissible under copyright law."

She said there was no "present danger that Google will monopolize the market for e-books" because the company currently had no market. She said competitors were trying to keep the company out of the market.

Durie said fewer than 10 million books of 174 million books in the world would be affected by the settlement, about 5 million of which were out-of-print works.

She said the [settlement](#) provides a mechanism to access out-of-print books.

"One way to get something is certainly better than no way to get them at

all. One distribution channel is a lot better than none," she said.

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