Copyrights

Copyright Office Opposes Google Settlement, Orphan Works Issue Also Topic at Hearing

"While aspects of the agreement have merit, key parts are fundamentally in odds with the law," Register of Copyrights Marybeth Peters said at a Sept. 10 House Judiciary Committee hearing, referring to the proposed $125 million settlement of a class-action copyright infringement lawsuit brought by writers and publishers challenging Google Inc.'s book-scanning project. Authors Guild v. Google Inc., No. 5 Civ. 8136 (DC) (S.D.N.Y., hearing scheduled 7/2/09) (128 PTD, 7/8/09).

In her written testimony, Peters said that the proposed settlement inappropriately creates something similar to a compulsory license for works, unfairly alters the property interests of millions of rights holders of out-of-print works without any Congressional oversight, and has the capacity to create diplomatic stress for the United States.

At the committee's oversight hearing on competition and commerce in digital books, David Drummond, Google's chief legal officer, asserted that the number of truly orphan works is small and that the settlement will create financial incentives for authors of those difficult-to-track books to come forward.

Panelists at the hearing discussed the settlement's impact on orphan works and urged Congress to continue working towards passing orphan works legislation.

Drummond also used the forum to announce that book retailers would be allowed to sell access to out-of-print books that will be made available through the Google Books settlement. In a press statement accompanying Drummond's testimony, Google said that it "will host the digital books online, and retailers such as Amazon, Barnes & Noble or your local bookstore will be able to sell access to users on any Internet-connected device they choose."

This announcement comes just months after Google announced an open platform for publishers to market their books through Google Books which would allow users to purchase a book from any retailer and access that book from any Internet-connected device they choose.

Copyright Concerns and Orphan Works Issues

Peters said that when dealing with new technologies, "only Congress has the power to review the various interests." She argued that the Google Books settlement "undermines Congress' method of determining the issues."

"In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress," she said in her written testimony.

Paul Misener, vice president of global public policy at Amazon.com, shared that sentiment, stating that the proposed settlement would give Google "liability-free monopoly rights over the millions of orphan works."

Orphan works—whose copyright owners are difficult to trace—have been a hot topic in the Google Books settlement debate since it was first announced.

Paul Aiken, executive director of the Authors Guild insisted at the Judiciary hearing that Google will actively seek out orphan works owners and that the settlement will actually create a new commercial market for those works. Drummond had argued the same point at a Howard University School of Law panel discussion in July (144 PTD, 7/30/09). Aiken said that the success rate of finding the authors of orphan works was up to 90 percent.

Randal C. Picker, a law professor at the University of Chicago, agreed with Peters that only the government can create a license to use orphan works. The question, he said, was whether Congress would allow the creation of license for just one company, Googles, or whether it would enact legislation establishing a broad license for all. He, along with many other panelists, urged Congress to pass orphan works legislation to help resolve this issue.

Congress first addressed the orphan works issue in the Orphan Works Act of 2006 (H.R. 5439), which was later incorporated into an omnibus copyright bill, appearing as Title II of The Copyright Modernization Act of 2006.
(H.R. 6052) (179 PTD, 09/15/06). That legislation made little headway in the 109th Congress, but the 110th Congress reintroduced the topic in the Orphan Works Act of 2008 (H.R. 5889) and the Shawn Bentley Orphan Works Act of 2008 (S. 2913) (90 PTD, 5/9/08).

Both those earlier House and Senate bills would have added a new section to Chapter 5 of the Copyright Act, limiting the remedies available in cases of civil infringement to "reasonable compensation," when prior to use, the infringer performed a qualifying, good faith documented search attempting to uncover the owner of the work. In September 2008, an amended version of S. 2913 was passed by an unanimous Senate and sent to the House, but the House failed to act on it further, leaving to the next Congress the task of sorting out the rights to orphan works (189 PTD, 9/30/08).

Rep. John Conyers Jr. (D-Mich.), chairman of the House Judiciary Committee, said at the hearing, "We must find the rights holders to the orphan works and provide access to those who are sight impaired.” He said that Google had indicated to him—which Drummond verified during his testimony—that it would support legislation providing wide access to orphan works.

Conyers urged that "others who wish to compete with Google Books must adhere to the same copyright protections Google said it would."

Democratization of Knowledge

Rep. Lamar Smith (R-Texas) said in a statement released the day of the hearing that "Google has made accessible literally millions of books that were out of print or otherwise largely available to readers and researchers."

Marc Maurer, president of the National Federation of the Blind, testified at the hearing that the Google Books settlement is "for the blind and many others, the next step in the democratization of knowledge." He voiced his support to the settlement and said that it will change the usually limited access usually given to the blind.

"We want the right to buy books, to pay for intellectual property," he said. "Many look at the blind as charity, who should be given what they need; however, we should be given access to the commercial marketplace. We want to spend the same amount of money to get the same books at the same time as all others do.” The National Federation of the Blind also voiced this opinion at the Howard University conference in July.

Recent Settlement Action

Google's proposed settlement with publishers and authors over its searchable book database is awaiting approval by the U.S. District Court for the Southern District of New York, which is scheduled to take up the case on Oct. 7.

The settlement, tentatively agreed to last October, would resolve two class action lawsuits brought against Google in 2005 by several authors and publishers, challenging Google's arrangement with several large libraries to digitize the entire contents of their collections and make the resulting database searchable over the internet (209 PTD, 10/29/08).

Under the agreement, Google would pay $125 million in exchange for the right to scan millions of books into an electronic internet-accessible format. The settlement also calls for royalties from the online sale of books to be split 63-37 between the Books Rights Registry, representing rights holders, and Google.

The court in May pushed back the final hearing on the settlement from June 11 to Oct. 7 (81 PTD, 4/30/09). Earlier, the court issued an order indicating that the U.S. Department of Justice had opened an antitrust investigation into the proposed agreement.

In a letter to Judge Denny Chin, the DOJ said it had reviewed public comments expressing concern that aspects of the settlement agreement may violate the Sherman Act.

Most recently, Microsoft Inc., Amazon.com Inc., and Yahoo! Inc. joined with library associations, distributors, and the Internet Archive to create the Open Book Alliance in opposition to the settlement (164 PTD, 8/27/09).

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