

A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.

[Just Rewards?](#)

Posted on March 25, 2011 by [Joy S. Newborg](#)

What if a car thief stood before a judge and said, “Yes, I know I’ve stolen thousands of cars and broke the law, and I’m ready to make some reparations to the owners. But I think you should grant me permission to take all the cars I want in the future so that it wouldn’t be considered “stealing” anymore...that is, unless the rightful owner of a car tells me I can’t.” Sounds ludicrous, right? However, Google in its [Amended Settlement Agreement](#) with authors and publishers (“ASA”) was basically trying to do the same thing. But on March 22, 2011, U.S. Circuit Court Judge Denny Chin rejected their attempt and [denied the motion](#) for final approval of the ASA.

This case began when Google was hired by several major research libraries to digitally copy books and other writings in their collections. But as it is well known, even though you may own a copy of a book, you do not own the underlying copyrights to that book. In response, certain authors and publishers brought a class action lawsuit against Google for copyright infringement and sought not only damages but also injunctive relief. Instead of agreeing to discontinue violating copyright laws, Google is seeking court approval to continue violating copyright laws and on a much grander scale, now involving authors and copyright owners not harmed by the original lawsuit.



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Google wants to create and commercialize its own universal digital library of literary works (including books still protected under copyright laws) and have the ability to sell what has been referred to as “orphan books,” all without consent of the rightful copyright owners in violation of copyright laws. The ASA does provide some payment for the use, and that if authors or copyright owners do not want their works to be included, they are required to take action and “opt out” of the program.

Granted, this is a unique situation as it involves a settlement of a class action lawsuit, which generally permits parties to “opt out” of the class and not be covered by the settlement. However, the rights involved are copyrights, and the law specifically requires someone who wants to use another’s copyrighted literary work to first obtain consent from the owner – or “opt in” type of rights. The burden of action is on the prospective user, not the owner. . . .and the owner can simply ignore requests to use their literary works, effectively barring the prospective user from using such works until the copyright protection expires. In the decision, Chin wrote that a “copyright owner’s right to exclude others from using his property is fundamental and beyond dispute. . . .Under the ASA, however, if copyright owners sit back and do nothing, they lose their rights.” This would be in direct conflict with current copyright laws.

Even though people argue that it would be a great service to society to create a universal digital library, the problem is should someone be able to subvert the law simply because it comes in the form of a settlement agreement? Would this not result in rewarding those who violate the law, to be able to undermine the law in the future if they can create a situation where the violation is on a grand enough scale to result in a class action lawsuit? In the decision, Chin wrote:

“The ASA would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works. And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. While its competitors went through the ‘painstaking’ and ‘costly’ process of obtaining permissions before scanning copyrighted books, ‘Google by comparison took a shortcut by copying anything and everything regardless of copyright status’.”

Chin noted that Google’s plan to create and commercialize an online library in this manner is beyond the scope of the lawsuit, and would be best to leave in the hands of the legislators.

Also, does Google have altruistic motives for creating their universal digital library? It is important to note that access would not be freely available to all. Instead, if you wanted to gain access to Google’s library, you would be required to contact Google, enter into a contract and pay an access fee. The hypocrisy of that should not be lost.

