Ruling May Undercut Google in Fight Over Its Book Scans

By EDWARD WYATT

A recent federal court decision in California might undermine a pillar of defense for Google in its dispute with publishers and authors who are challenging the company's right to scan books that are still under copyright.

Representatives of publishers and authors who have filed lawsuits against Google over its Book Search program said they believed that the decision raised questions about a case that Google had cited in its defense of the Book Search program.

Some intellectual property lawyers agree. "I think the judge's decision completely sets up the case the authors have against Google," said Karen S. Frank, a partner at Howard Rice Nemerovski Canady Falk & Rabkin, a San Francisco law firm, who is not involved in the lawsuit.

In the recent case, Judge A. Howard Matz of United States District Court for the Central District of California, said Google's use of thumbnail-sized reproductions in its image search program violated the copyright of Perfect 10, a publisher of X-rated magazines and Web sites, because it undermined that company's ability to license those images for sale to mobile phone users.

The Perfect 10 decision went against an earlier ruling by the United States Court of Appeals for the Ninth Circuit, which includes California. That ruling, in Kelly v. Arriba Soft, said the use of thumbnail images in an Internet search engine did not violate the copyright of the producer of the original work. Rather, the appeals court said, the thumbnail reproductions should be considered a "fair use" of copyrighted material because they were transformative in nature and provided a public service by allowing users to easily search the Internet. The court noted that because there was no market for the low-resolution, postage-stamp-size images, they did not affect the potential value of the actual-size images.

"I think it takes the wind out of their sails," Jan Constantine, the general counsel for the Authors Guild, said of the Perfect 10 decision. The guild and the Association of American Publishers brought copyright infringement lawsuits against Google over its Book Search program.

Michael Kwun, litigation counsel for Google, disagreed, saying that the case "will affect only searches related to Perfect 10, and will not have any effect on other Google products."

Book Search is Google's effort to scan and digitize the contents of several university libraries, making the libraries' entire collections available for online search. Because Google's search results display only a few lines of text of copyrighted material, it has argued that it is making a fair use of the works.

Publishers and authors argue that because Google must copy an entire book to make its contents searchable, it is violating the copyright of the author or publisher if it does so without permission. Google has offered to let publishers opt out of the Book Search program but has refused to ask permission to make the copies.

Allan R. Adler, a vice president for governmental and legal affairs at the Association of American Publishers, said the California court's willingness to rule against the Arriba Soft precedent under a
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different set of facts was encouraging to the publishers' group, as was the judge's statement that the public benefit of Google's search engine does not necessarily outweigh the rights of copyright holders.

"Google is going to have a difficult time arguing that there isn't a marketplace for publishers to license their works" given the Perfect 10 decision, Mr. Adler said.

Neither the Perfect 10 case nor the Arriba Soft case are direct precedents for the Book Search lawsuits, which were filed in Federal District Court in New York. But Mr. Adler said that even if the publishers do not assert that there is currently a market for the few lines of text displayed by Google Book Search, the fact that a market exists for the digital copies created by Google could work in the publishers' favor.

Ms. Frank agreed. She noted that the judge in the Perfect 10 case further differentiated that case from Arriba Soft by noting that Google's AdSense program allows it to generate revenue from its search technology.