Legal Update: Where the Lawsuits Are
By George H. Pike*

The legal drama has always been a popular television staple. From *Perry Mason* to *L.A. Law* to *Boston Legal* these shows feature fast-moving, hard driving lawyers who resolve their clients' legal challenges in the space of an hour.

Most of us know that the legal process takes more than an hour. But even real programming like Court TV or the O.J. Simpson trials don't show the legal process at its most complex. While the Simpson trial went on for several weeks, there was a fairly clear-cut beginning (the Bronco chase), middle (Johnny Cochran and Judge Ito) and end (acquittal), over a fairly limited time frame of a few months.

But lawsuits involving business or commercial interests are often conducted not over a period of months, but over a period of years. All three stages: beginning, middle and end, are often very protracted. The parties to the lawsuit generally expect that kind of time-frame. In some cases, they may even welcome it, or at least strategically plan for it. But for those outside of the lawsuit whose interests may be affected by the outcome, the wait can become confusing and frustrating.

Google and the VA

There have been several recent lawsuits which have attracted the attention of the information industry. Google has been involved in a number of these lawsuits, particularly the copyright challenge to its Google Book Search program (originally Google Print), as well as separate challenges to its use of thumbnail images and results ranking. Data breaches have led to litigation against the Department of Veterans Affairs, Choice Point and others. These lawsuits are often splashed over the front pages of industry and mass-media publications, blogged and commented on, then disappear as time passes. But while the media interest disappears, the lawsuits continue to work their way through the process, leaving many to wonder what is happening.

All lawsuits, both the straightforward and the complex, begin the same way. A complaint is filed in court by the party—known as the plaintiff—claiming to have been legally injured by the actions of another party—the defendant. In May, 2006 the Department of Veterans Affairs (VA) announced that a laptop computer containing personal information on over 26 million individuals had been stolen. By mid-June three separate complaints had been filed in three separate federal courts against the VA seeking money damages and asking the court to require the VA to better secure its information.

Complaint and answer

Normally, the complaint is followed within a few weeks by the defendant's answer. The answer will admit or deny the elements of the complaint, and raise any defenses that the defendant might have, such as saying, "Yes, that is what happened, but it was not negligence."

Because of the complex circumstances of the VA cases, no answers have yet been filed (as of this writing in late November.) There was an initial question of whether the three cases should be consolidated in a single lawsuit. The VA initiated the consolidation request, wanting to defend one case in one location. The plaintiffs resisted, arguing that the three cases were relatively small in number, and would not burden the VA. The plaintiffs also might have strategically thought it was better to battle the VA on multiple fronts, rather than a single front. In November 2006, a court panel ordered the cases consolidated and assigned to the Washington, DC district court.

Class action lawsuits

These suits were also filed as class-action lawsuits. The plaintiffs want to represent the "class" of everyone affected by the defendant's actions. A class action is favored when there are large numbers of potential victims who each have minimal damages, but all caused by the same circumstances. In the VA case, each potential victim can claim no more than $1,000 in damages. For an individual this is rarely enough to justify a lawsuit. But with 26 million potential victims in the class, the damage potential becomes $26 ***b***illion dollars.

Usually the defendant would prefer that each victim sue individually and not be considered a class. They know that very few of the 26 million potential victims will sue over a $1,000, which will save them from the complexity, expense and potential liability of a class action lawsuit.

While the plaintiffs in the VA case have asked for class action status, it is up to the court to decide whether to grant it. Now that the case has been consolidated, the court will require the VA to formally answer the complaint and will take up the question of class action status. Granting class action status would add to the complexity of the case, but with the stakes being raised to a potential billion dollar verdict, the motivation to find a settlement increases as well.

Google Book Search

The Google Book Search lawsuits have gone beyond the beginning phase and are now in the middle phase. Lawsuits were filed in the fall of 2005 by a group of publishers, and by the Author's Guild representing individual authors and as a class action to represent all authors affected by Google. Answers were filed in late 2005 and the cases were consolidated in the spring of 2006.

Early in the summer of 2006, the case moved into the "middle" phase when the court established a calendar for discovery and motions. Discovery is where the parties to a lawsuit obtain information from each other and from third parties about the facts surrounding the suit. Through discovery, parties can obtain documents, interview witnesses, pose written questions, and take depositions, all with the goal of obtaining as much information as possible. While discovery benefits justice by exposing all relevant

information and encouraging settlement, it has been criticized as a time consuming and expensive process that favors the deeper pocketed party.

The calendar for the Google Book Search cases allows discovery to continue through November 2007. Even though the issues may seem clear—Google is not denying that it is scanning books which are copyrighted—the details of Google's use and technology, copyright ownership of the various works, and market impact all need to be explored in discovery.

2007 and 2008

Following discovery the court expects Google and the publishers/authors to file motions for summary judgment. These are requests to the court to accept the facts that are established by the discovery process, and make a decision based on the legal principals at issue. Google will argue that even if they did copy books without permission, the fair use doctrine allowed it. The publishers and authors will say that fair use does not apply to these facts. The court's calendar expects the summary judgment process to take place in the first half of 2008.

A summary judgment decision, or a trial, might be considered the end of the case. But given the legal complexities and amount at stake, the losing party is likely to appeal. A separate case involving Google and its use of thumbnail images is currently at this stage. Perfect 10, an adult oriented magazine and Website, sued Google in November 2004, claiming that the use of thumbnail images by Google's search engine was copyright infringement. Sixteen months later, a trial court agreed and found for Perfect 10.

Google appealed to the 9th Circuit Court of Appeals, which heard the case in November, 2006. A final decision may be expected early in 2007. Of course, that final decision could also be appealed to the U.S. Supreme Court. Or the appeals court could send it back to the trial court for new action based on the appellate court's interpretation of the law.

Microsoft finally in court

Three trips back and forth between the trial court and the appellate court have kept a class action suit against Microsoft alive for nearly seven years, with the trial only now beginning. In 2000, several Iowa residents filed a class-action lawsuit against Microsoft claiming that Microsoft held a monopoly in its Windows operating systems. As a result, they claim that Microsoft overpriced its operating system and application software in violation of Iowa state law. Microsoft responds that its products are fairly priced and accepted because of their price and quality.

Microsoft settled federal antitrust claims about its software bundling practices in the late 1990's. However, this case arises out of Iowa's Competition Law and has moved slowly forward. Microsoft sought an early dismissal of the case, followed by a request to deny class action status, and a claim that the issues were already resolved by the federal

lawsuit. The Iowa Supreme Court denied each of these procedural requests and as of December 2006, a trial has finally begun. The highlight of the expected six month trial will be the in-court testimony of Bill Gates and Steve Balmer

Litigation as chaos

A colleague of mine once described the litigation process as "chaos", suggesting that each step in the process was deliberately complicated so as to discourage pursuing litigation at all, or settling litigation that has begun.

Some of the documents in the VA litigation indicated that settlement negotiations were already underway. There have also been hearings before Congress on the VA and data-security, which may also encourage the VA to settle in order to avoid possibly worse legislation. Last spring, ChoicePoint entered into a settlement with the Federal Trade Commission over its 2005 data breach. Since then, ChoicePoint has been working with the FTC to locate victims and compensate them for their losses. This could provide a model for a VA settlement.

A settlement of the Google Book Search lawsuits seems less likely, at least at this time. Google, for good or ill, has the deep pockets to fund its defense and the financial incentive to push for an outcome in its favor. Google's web page and blog also make it clear that they feel they have the better case. The author's/publishers may also feel that their livelihood is at stake, but may have a bit more motivation to settle if a licensing or other shared royalty system can be worked out.

"Digital" lawsuits

Long-lived "digital" lawsuits such as these challenge the information industry mainly because the technology is changing so fast that the law has a difficult time keeping up. Most people thought that the issue of search engine "thumbnail" images was settled, but when Perfect 10 raised a new theory about thumbnails having a market value as downloadable cell-phone wallpaper in its suit against Google, the issue came back. The academic community would love to have "digital" lawsuit decide the question of fair use rights and electronic course reserves/electronic class handouts, but no one wants to be sued—which is necessary to raise and resolve the issue. The Google print case will very likely be a landmark decision on fair use—if it ultimately goes to trial rather than settle—because of the stakes and amount of money and knowledge involved. A recent Supreme Court decision involving eBay and dealing with patent infringement is having an impact and may be a reason that patent reform efforts slowed down in Congress.

Until the courts make their final decisions, or the cases settle, we are still left with uncertainty and a process that is measured in years. The best course of action may be to accept the status quo, take advantage of Google book search and thumbnail images as long as they last, but keep in mind a "plan B", should it be necessary.

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