McGraw Hill Gets E-Textbook Royalties Suit Trimmed

By **Hannah Albarazi**

Law360 (January 12, 2022, 3:25 PM EST) -- A New York federal judge trimmed a breach of contract claim Tuesday from a putative class action alleging McGraw Hill shortchanged textbook authors on royalties from e-book sales but left intact the authors' claim for breach of the implied covenant of good faith and fair dealing.

U.S. District Judge Lorna G. Schofield held that under New York law, the authors — university professors who accuse the textbook publisher of manipulating contractual language to redefine royalty requirements to reduce the money authors receive from the electronic versions of their textbooks — "are entitled to royalties from net receipts on the textbook and no more."

The judge said the authors are not entitled to royalties for additional content — such as PowerPoint presentations and lesson plans that defendants sell with the e-textbooks — and found their arguments that McGraw Hill's new royalty payment policy breached their contract, to be unpersuasive.

However, Judge Schofield ruled that the authors' claim for breach of the implied covenant of good faith and fair dealing survives dismissal, as the authors had sufficiently alleged that McGraw Hill engaged in a bad faith effort to enrich itself at the expense of the authors.

The proposed class of textbook authors sued McGraw Hill LLC and McGraw Hill Education Inc. in New York federal court in January 2021, alleging that the publisher deprived them of royalties by "artificially redefining" the contractual amount it must pay for selling e-textbooks.

The named plaintiffs — economics professors at New York University, Scripps College and Northwestern University who have written textbooks published by McGraw Hill — said the publisher used to pay royalties to them on the "entirety of revenues" of their textbooks sold on the publisher's "Connect" online platform, which launched in 2009 and was a "replacement" for paper textbooks.

But recently, McGraw Hill "unilaterally" decided it would only pay royalties on what it deemed the "textbook" portion of the sales and refused to pay royalties on sales from the Connect platform while reducing those on related online study materials, the authors said.

"This maneuver amounts to a bald attempt by McGraw Hill to pass its Connect-related costs to authors, in direct contravention of its contracts, which state that McGraw Hill will publish the authors' works 'at its own expense,'" the complaint states.

They claim affected authors will face a 25% to 35% drop in royalties with the latest change.

The authors said McGraw Hill's decision violates their respective contracts by "introducing new terms not present" in the agreement and also goes against its longstanding "course of performance" to pay the entire sales price of their online textbooks sold on Connect.

McGraw Hill has said it believes the authors' complaint lacks merit.

Judge Schofield wrote in her order Tuesday that she agreed with the publisher that the breach of contract claim should be dismissed.

The judge said the authors' assertion that their contracts require McGraw Hill to pay royalties based on the net receipts of the total sale price of the work as opposed to just the revenue attributed to specific components of the Connect product is inconsistent with the plain text of the contracts.

The authors' assertion that the new royalty payment policy charges what amounts to a platform fee to authors in violation of the contracts also fails, the judge said, because Connect is more than a publishing platform and includes content such as lesson plans and tests along with the textbook.

"Connect is therefore not akin to the ink and paper required to publish a hardcopy textbook as plaintiffs assert," Judge Schofield wrote.

The judge also held that, despite the authors' arguments to the contrary, their royalty contracts unambiguously define the work as the textbook titles themselves.

"When a contract is unambiguous on its face, it is improper to consider extrinsic evidence," wrote Judge Schofield.

Although the judge rejected the authors' breach of contract claim, she determined that the authors had met their burden of plausibly alleging a lack of good faith by the publisher.

While the authors allege McGraw Hill unilaterally and arbitrarily set the price of their e-books in a way that puts more money in its own pockets and less in the pockets of authors, the publisher contends that the price of the e-book component of a Connect textbook sale is determined fairly based on the market value of the e-book.

"But that argument does not address the sufficiency of the complaint, and instead raises a factual question, which cannot be resolved on a motion to dismiss," the judge ruled.

Counsel for McGraw Hill declined to comment, while counsel for the proposed class did not return a request for comment Wednesday.

The proposed class is represented by Daniel L. Berger, Richard S. Schiffrin, Caitlin M. Moyna of Grant & Eisenhofer PA and Chanler A. Langham of Susman Godfrey LLP.

McGraw Hill is represented by Catherine A. Williams and Saul B. Shapiro of Patterson Belknap Webb & Tyler LLP.

The case is Flynn et al. v McGraw Hill LLC, case number 1:21-cv-00614, in the U.S. District Court for the Southern District of New York.

– Additional reporting by Tiffany Hu. Editing by Vaqas Asghar.