

# The Proposed Google Books Settlement: Copyright, Rule 23, and DOJ Section 2 Enforcement

BY GREGORY K. LEONARD

**T**HE PROPOSED GOOGLE BOOKS settlement raises a number of interesting issues. The Department of Justice has objected to the settlement on antitrust and other grounds, and its antitrust objections provide a window into the current administration's stance toward antitrust enforcement, especially Section 2 enforcement.

In addition, if the Google Books settlement is ultimately approved by the court, that could have important implications for how class action settlements are negotiated in the future. The adoption of the class action mechanism in the U.S. legal system was motivated by efficiency. The proposed Google Books settlement, in resolving a purported class action, similarly generates substantial efficiencies. The central question is whether these efficiencies are sufficient to outweigh the objections raised by critics of the settlement.

## History

In 2004, Google initiated the "Google Library Project." Google's plan was to enter into partnerships with libraries and then scan the books held by those libraries to create a searchable digital library.<sup>1</sup> A user, having entered a search term, would be shown information about relevant books, including "snippets" of text that would give context to the books' use of the search term.<sup>2</sup> On September 20, 2005, several groups of copyright owners brought a class action lawsuit against Google, alleging that the scanning of books under copyright, and the provision of snippets from those books, violated copyright. Google responded that its actions constituted "fair use."

On October 28, 2008, Google and the plaintiffs announced a proposed settlement of the litigation. The proposed Settlement Agreement was remarkable because it went far beyond resolving the specific allegations contained in the complaint, which concerned whether Google's scanning of books and providing snippets violated copyright law.<sup>3</sup> Under

the proposed Settlement Agreement, Google would have the right to do much more than merely provide snippets. In particular, Google would have the right to sell users access to the full text of the books in its digital library, under a revenue-sharing arrangement specified in the Settlement Agreement.<sup>4</sup> Moreover, because the named plaintiffs claimed to represent a class consisting of all copyright holders, the Settlement Agreement would give these rights to Google, not just with respect to the named plaintiffs' copyrighted works but also with respect to any other book under copyright.

A firestorm of complaints about the Settlement Agreement arose immediately from a wide variety of objectors, including copyright owners, the DOJ, and potential competitors to Google, such as Amazon.<sup>5</sup> Google and the plaintiffs revised the Settlement Agreement in an attempt to address these objections. The result was the Amended Settlement Agreement (ASA).<sup>6</sup> On November 19, 2009, the court preliminarily approved the ASA and preliminarily certified classes "for settlement purposes only."<sup>7</sup>

The DOJ and other objectors have stated that, while the ASA moved in the right direction, it did not resolve fully a number of their concerns.<sup>8</sup> Supporters of the ASA have offered counter-arguments during the debate over the Initial Settlement Proposal and the ASA.<sup>9</sup> On February 18, 2010, the court held a fairness hearing at which argument was heard from proponents and opponents of the settlement, as well as the parties.<sup>10</sup> The court's opinion is currently pending.

Three common themes that emerge from the objectors' expressed concerns are that the ASA abridges the rights of copyright owners, goes beyond what Fed. R. Civ. P. 23 (Rule 23) allows, and violates antitrust law.<sup>11</sup>

## Does the ASA Abridge the Rights of Copyright Owners?

Critics of the ASA assert that the ASA abridges the rights of copyright owners in two respects. First, the ASA requires that copyright owners who do not wish to allow Google to include their books in its digital library must opt out of the ASA. Critics suggest, rather, that an opt-in mechanism would

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be more appropriate and consistent with the rights provided to copyright owners under the Copyright Act. Typically, before using copyrighted material, the user must obtain affirmative approval from the copyright owner, a procedure which is more akin to opt-in than opt-out. However, an opposing consideration is that the ASA's use of an opt-out mechanism is consistent with the standard approach taken in class actions, where class members who desire to bring their own case or otherwise do not want to be covered by the class settlement must actively opt out. Class actions are thought to be justified by their efficiency in resolving a large number of cases in a single action. This efficiency is conditional, in part, on the opt-out mechanism; the efficiency would decrease if an opt-in mechanism were used instead. In the case of the ASA, a potential abridgement of the rights of copyright owners needs to be weighed against the efficiencies that are made possible by the opt-out mechanism.

The second way in which the ASA abridges the rights of copyright owners, according to critics, relates to so-called "orphan works," i.e., works that are under copyright, but for which the owner is unknown or cannot be located. Critics point out that, while active copyright owners at least have the opportunity to opt out, the copyright owners of orphan works will, almost by definition, not even have that opportunity (unless they materialize and the orphan works are no longer orphans). However, it would again seem that the potential abridgement of the rights of copyright owners needs to be weighed against the efficiencies provided by the ASA. As discussed further below, there is reason to think that the value of the copyright on an orphaned work is small in most cases.

It should also be noted that it is not unprecedented for courts to abridge the rights of intellectual property owners. For example, in *eBay*, the Supreme Court made clear that a patent owner was not necessarily entitled to an injunction after a finding of patent validity and infringement.<sup>12</sup> Yet, an injunction is the mechanism by which a patent owner exerts the "right to exclude." Thus, in *eBay*, the Supreme Court found that certain circumstances warranted effectively taking away the patent owner's right to exclude.

Overall, it is reasonable to conclude that the significant gains to efficiency and consumer welfare that would result from approval of the Google Books settlement (as discussed further below) justify the possible abridgement of the rights of copyright owners that have been identified by critics of the ASA.

### Assessing the ASA Under Rule 23

The second common theme sounded by critics of the ASA is that its terms go well beyond what should be allowable under Rule 23.<sup>13</sup> Specifically, while plaintiffs' allegations were limited to Google's scanning of books and providing of snippets, the ASA sets up what amounts to an entirely new business framework under which Google can pursue a business strategy substantially wider in scope than its original conception

for the Google Library Project. The ASA permits Google to sell whole works in their digital form and even outlines the compensation Google will pay to the copyright owners.<sup>14</sup> A "registry" will be formed to administer the rights of copyright owners and a "fiduciary" will be designated to represent the non-present owners of copyrights to orphaned works.<sup>15</sup> Google can (with agreement from the registry and fiduciary) employ "additional revenue models" in the future.<sup>16</sup>

Of course, it is not at all unusual for litigation to be settled with an arrangement that goes well beyond the scope of the allegations in the underlying litigation. For example, two companies engaged in litigation over infringement of a single patent may settle the case by entering into a broad cross-license that covers their entire respective patent portfolios. What distinguishes the ASA, however, is that the underlying litigation is a class action. Thus, if the ASA is approved, the substantial new business framework that the named plaintiffs have negotiated with Google will apply not just to them, but also to other members of the class who were not directly represented at the bargaining table.<sup>17</sup> Critics of the ASA have argued that this is not an appropriate use of Rule 23.<sup>18</sup>

A preliminary question is whether the proposed classes in the litigation satisfy the Rule 23 requirements for class certification.<sup>19</sup> For a class to be certified under Rule 23, among other things, it must be shown that the class representatives have claims "typical" of those of the class, that the class representatives will "fairly and adequately protect the interests of the class," and that "questions of law or fact common to class members predominate over any questions affecting only individual members."<sup>20</sup> Courts have increasingly demanded rigorous analysis of whether the Rule 23 requirements have been met, especially in antitrust class actions.<sup>21</sup>

The purpose of the Rule 23 requirements is to ensure that what is good for the class representative is good for every other member of the class (or "substantially all" other members of the class). Then, the efficiency gains of a class action can be achieved without any danger that some members of the class will be made worse off by the litigation choices made by the class representative—for example, in negotiating a settlement of the litigation. If the Google Books proposed classes satisfy the Rule 23 requirements, a settlement that was good for the named plaintiffs would be good for all members of the class.<sup>22</sup>

In this case, the court has preliminarily certified the proposed classes "for settlement purposes only,"<sup>23</sup> as is typically the case when settlement occurs before the class certification hearing. As a result, there has been no "rigorous analysis" of the class certification question and, therefore, it is not clear that the Rule 23 requirements are actually met. For example, the DOJ suggests that the named plaintiffs are not adequate representatives of the proposed class because their incentives are not aligned with those of the owners of copyrights to orphan works.<sup>24</sup>

In any event, the ability of each proposed class member to opt out if they find the ASA not to be in its interest amelio-

rates the problem of the named plaintiffs having negotiated a deal that is bad for some members of the proposed class. But this returns to the question of whether the opt-out provision abridges the rights of copyright owners, and whether any such abridgement is outweighed by efficiency considerations. The business framework that the ASA would create—which would bring substantial benefits to users and Google—may not be possible unless it covers all copyright owners subject to an opt-out provision.

### Assessing the ASA Under the Antitrust Laws

Critics of the ASA have raised three types of antitrust concerns: horizontal price fixing, exclusionary conduct targeted at competitors of the named plaintiffs, and exclusionary conduct targeted at competitors of Google. The DOJ's expressed concerns are of significant interest to antitrust practitioners because they provide insight into how the current administration is approaching antitrust enforcement generally and Section 2 enforcement specifically. While the DOJ states in its introductory remarks that "[t]he United States is committed to working constructively with all stakeholders on the scope and content of an appropriate settlement of this matter,"<sup>25</sup> a reading of its brief suggests that the DOJ would be satisfied only with a substantially scaled-back settlement or one that gives to Google's competitors the same rights as it gives to Google.

The DOJ's brief starts by describing the Department's concerns relating to Section 1. The ASA specifies a revenue-sharing formula under which Google would compensate a copyright owner for use of the owner's work.<sup>26</sup> The DOJ suggests that, because this "price" was negotiated by plaintiffs jointly on behalf of all copyright owners, it may amount to horizontal price fixing and may therefore be illegal *per se*.<sup>27</sup> While this concern is potentially valid in the abstract, in this case there are several efficiency considerations that would necessitate rule of reason treatment. First, the revenue-sharing formula and the registry serve to avoid the substantial transactions costs and time that would be incurred if Google had to negotiate separately with each copyright owner. Such transactions-related efficiencies were an important motivation in the Supreme Court's decision in the BMI case to evaluate blanket music licenses under the rule of reason.<sup>28</sup> The role of the revenue-sharing formula and the registry under the ASA is similar to the role that BMI and ASCAP play in music licensing.<sup>29</sup> Second, many copyright works are complements for each other, rather than substitutes. This is particularly true given that there are network effects related to the size of the library that Google can create. Joint negotiation by providers of complementary products is generally procompetitive. A rule of reason analysis is required to weigh these possible justifications.<sup>30</sup>

While the DOJ's Section 1-related concerns might have been expected from almost any administration, its Section 2 concerns may well be a result of the current administration's pledge of more vigorous antitrust enforcement, particularly

in Section 2 cases. The DOJ's brief identifies two types of Section 2 concerns. The first (which also has a Section 1 component) is that the owners of copyrights on non-orphan works (i.e., the named plaintiffs) are in effect negotiating the price for the absentee owners of copyrights on orphaned works.<sup>31</sup> If the two sets of works were substitutes, the owners of copyrights on non-orphan works would have the incentive to raise the price of the orphan works above the level that the copyright owners of those works would negotiate on their own. While again valid in the abstract, given that the named plaintiffs negotiated a single revenue-sharing formula that would apply to all works—their own works as well as the orphan works—this concern does not appear to be very serious in this particular case (unless the class representatives turn around and opt out of the ASA). Moreover, the ASA provides for a "fiduciary" that, in principle, would be independent of the registry and would be charged with representing the interests of the owners of the orphaned works.<sup>32</sup>

The DOJ's second Section 2 concern, shared with a number of other objectors, is that Google will gain a certain degree of *de facto* exclusivity since the ASA provides Google an advantage that its competitors will not be able to duplicate.<sup>33</sup> Specifically, objectors maintain that Google will be able to sell access to orphaned works while its competitors will not be able to do so without violating copyright law.<sup>34</sup> This fact—even if true—is not by itself sufficient to show that the ASA harms competition. A proper analysis requires that the level of competition be compared in the world with the ASA in its current form and in the world "but for" the ASA. Although the critics of the ASA are not clear as to their assumptions regarding the but-for world, there are seemingly two possibilities.<sup>35</sup> First, the ASA could be abandoned (or cut back substantially) to deal only with the specific allegations cited in plaintiffs' complaint.<sup>36</sup> Second, the ASA could be extended to companies other than Google that wanted to start providing digital library services.<sup>37</sup>

In the first but-for world, where there would be no ASA at all or a severely diminished ASA, it is unlikely that Google could generate a Google Books service that was as attractive to consumers and available as quickly as it will be under the ASA.<sup>38</sup> This is because of the substantial costs and time that would be involved in engaging in separate transactions with each copyright owner. As the critics of the ASA have noted, the ASA creates an entirely new business framework. This business framework, the products it would create, and the benefits these products would generate for consumers likely would not be available without the ASA.<sup>39</sup> Orphan works, in particular, would not be available digitally to consumers because, by definition, Google (or its competitors) could not locate and negotiate with the copyright owners of these works. The contrast is quite sharp: with the ASA, products will be available to consumers that would not be available at any price without the ASA. Accordingly, consumers would be unambiguously better off in the world with the ASA than they would be in the first of the possible but-for worlds.<sup>40</sup>

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In the second possible but-for world, Google's competitors would be allowed to free-ride on Google's efforts in obtaining the ASA. Google took on significant costs and risks in pursuing the Google Books Project and demonstrated "superior skill, foresight, and industry" in negotiating the ASA.<sup>41</sup> Free riding undermines a company's incentives to undertake these types of efforts. Indeed, it is possible that Google would rather scuttle the ASA than create competition for itself by allowing other companies a free ride. As the DOJ notes, Google is far ahead of the competition, such as Amazon, in terms of scanning works.<sup>42</sup> Google might prefer to take the slow approach, where it would have a substantial head start, rather than the quick approach where it would have no head start due to free riding by competitors. Thus, in the second but-for world, it is not necessarily the case that consumers would be better off even if only the effects in the digital library services market are taken into consideration. The argument against allowing free riding becomes even stronger if the broader effects on the economy are considered, because a general policy of allowing free riding by competitors will decrease companies' incentives in the future to take risks and incur costs as Google did in this case.

The foregoing discussion assumes that Google would in fact be the only provider of digital library services if the ASA is approved. However, this is not at all clear. Seemingly, nothing stands in the way of a competitor pursuing exactly the same course as Google did and thereby obtaining its own settlement similar to the ASA. The DOJ and other critics have stated that they think this is unlikely.<sup>43</sup> But the ASA increases the likelihood of such settlements being reached simply by providing a model that could be duplicated easily.<sup>44</sup> In addition, copyright owners would have the incentive to foster downstream competition by entering settlements with Google's competitors that give those competitors the same rights and ability to compete that Google has.<sup>45</sup>

The DOJ and other critics maintain that, in the absence of their own comparable settlements, competitors will be unable to include orphan works or works with ambiguous ownership in their libraries, which would put them at such a substantial disadvantage to Google that they would be unable to survive in the market.<sup>46</sup> By itself, this argument has little antitrust merit. Antitrust does not punish a company for gaining a competitive advantage by doing something other companies cannot do. Nor does antitrust punish a company for being the first to accomplish something, even if, once accomplished, competitors cannot duplicate it. This simply means that it was a "winner take all" market, where Google won.

A potentially more sophisticated argument is that, assuming competitors cannot duplicate the ASA, Google will have market power over orphan works and will be able to leverage this market power into the provision of digital library services for non-orphan works. However, orphan works have little value relative to non-orphan works. Since an economically rational copyright owner would not lose track of a work that

had substantial value, it reasonably can be inferred that most orphan works have relatively little value.<sup>47</sup> The low value stems from a low level of market demand for an orphan work. Because of the low levels of demand for and value of orphan works, they would seem to be a dubious source of market power.<sup>48</sup>

Similarly, the claim that competitors would need access to orphan works to compete with Google is ill-founded. Small bookstores with specialized or other limited titles on hand compete with large bookstores that carry a large number of titles. Wal-Mart competes with large bookstores by selling only the limited set of best-sellers. Thus, there is no reason to think that Amazon and other potential competitors to Google would be greatly hindered in competing with Google even if they did not have access to orphan works.

Finally, the DOJ argues that "Google's exclusive access to millions and millions of books may well benefit Google's existing online search business. Google already holds a relatively dominant market share in that market. That dominance may be further entrenched by its exclusive access to content through the ASA."<sup>49</sup> This is an ambitious Section 2 argument, based on the idea that Google's alleged market power in search could be maintained by preventing competitors from entering or building strength in search using a digital library service.<sup>50</sup> While proving up such an argument would face many practical obstacles in court (e.g., whether Google has market power in search, whether Google's integration of the two services has procompetitive benefits, etc.), it may be indicative of the type of aggressive Section 2 enforcement that the DOJ under the current administration is willing to pursue. Certainly, it is consistent with AAG Christine Varney's now famous remarks to the effect that Google is the new Microsoft and that vigorous Section 2 enforcement is needed.<sup>51</sup>

## Conclusion

The DOJ's objections to the ASA support the view that the current administration is attempting to fulfill its promise to engage in more energetic Section 2 enforcement than its predecessor. This is reflected by the DOJ's focus on "exclusivity" for Google and "foreclosure" of competitors. Such a focus, however, runs the risk of overly discounting the procompetitive benefits of the ASA, including the introduction of a new service that might otherwise not exist for some time.

The ASA raises other issues that could be relevant for antitrust practitioners. If the court approves the ASA, it could have a substantial impact on the way in which some class actions are settled. For example, a Section 2 class action brought by a small competitor against a dominant firm could be settled by the dominant firm agreeing to enter into a business arrangement with all the members of the class in some unrelated line of business. The terms of the arrangement negotiated by the class representative would be binding on all members of the class that did not opt out. The class action

mechanism has been recognized for its efficiency in litigating a large number of related claims. The ASA suggests another way in which the class action mechanism can promote efficiency—by allowing the defendant to settle litigation and simultaneously set up a business arrangement that would be costly and time-consuming to achieve through individual negotiations between the defendant and each putative class member. ■

<sup>1</sup> Google Library Project, available at <http://books.google.com/googlebooks/library.html>.

<sup>2</sup> *Id.*

<sup>3</sup> The initial proposed settlement agreement (Initial Settlement Agreement) is available at [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement).

<sup>4</sup> *Id.* § 2.1(a).

<sup>5</sup> See, e.g., Statement of Interest of the United States of America Regarding Proposed Settlement Agreement (Sept. 18, 2009); Objection of Amazon, Inc. to Proposed Amended Settlement, *The Author Guild, Inc. v. Google, Inc.*, No. 05 cv 8136-PC (S.D.N.Y. filed Jan. 27, 2010), available at [http://thepublicindex.org/docs/amended\\_settlement/amazon.pdf](http://thepublicindex.org/docs/amended_settlement/amazon.pdf); Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc. et al., and Google Inc., *The Authors Guild Inc. v. Google, Inc.*, No. 05 cv 8136-CV (S.D.N.Y. filed Jan. 28, 2010), available at <http://www.openbookalliance.org/wp-content/uploads/2010/01/01282010OBA-Supplemental-Brief.pdf>; Letter from Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law and Information, University of California, Berkeley to Judge Denny Chin re: Supplemental Academic Author Objections to the Google Book Search Settlement (Jan. 27, 2010) [hereinafter Samuelson Letter], available at [http://thepublicindex.org/docs/amended\\_settlement/Samuelson\\_supplemental\\_objection.pdf](http://thepublicindex.org/docs/amended_settlement/Samuelson_supplemental_objection.pdf).

<sup>6</sup> The ASA is available at [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement).

<sup>7</sup> See Order Granting Preliminary Approval of Amended Settlement Agreement at 2, *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. filed Nov. 19, 2009), available at [http://counsel.cua.edu/fedlaw/Court%20Order%20on%20Supplemental%20Notice%20\(2\).pdf](http://counsel.cua.edu/fedlaw/Court%20Order%20on%20Supplemental%20Notice%20(2).pdf).

<sup>8</sup> See, e.g., Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, *The Authors Guild, Inc. v. Google, Inc.*, No. 05 cv 8136-DC (filed Feb. 4, 2010) [hereinafter DOJ Brief], available at <http://www.justice.gov/atr/cases/authorsguild.htm>; James Grimmelman, *The Amended Google Books Settlement Is Still Exclusive*, CPI ANTITRUST J., Jan. 2010, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=james\\_grimmelman](http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=james_grimmelman).

<sup>9</sup> See, e.g., Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMP. L. & ECON. 411 (2009); Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, GCP: THE ANTITRUST CHRONICLE, Oct. 2009, available at <http://www.law.harvard.edu/faculty/elhauge/pdf/Elhauge%20Framing%20the%20Issues%20in%20the%20Google%20Books%20Settlement%20CPI%20article.pdf>; Einer Elhauge, *Why the Google Books Settlement Is Procompetitive* (Dec. 30, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1459028](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028) [hereinafter Elhauge II]; Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement* (July 8, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1431555](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555).

<sup>10</sup> For a blow-by-blow description of the fairness hearing, see James Grimmelman, *GBS: Fairness Hearing Report*, THE LABORATORIUM (Feb. 20, 2010, 6:52 PM), [http://laboratorium.net/archive/2010/02/20/gbs\\_fairness\\_hearing\\_report](http://laboratorium.net/archive/2010/02/20/gbs_fairness_hearing_report).

<sup>11</sup> Various objectors have raised additional issues, e.g., privacy concerns. See Samuelson Letter, *supra* note 5, at 15.

<sup>12</sup> *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>13</sup> See, e.g., DOJ Brief, *supra* note 8, at 4–11.

<sup>14</sup> ASA, *supra* note 6, § 2.1(a).

<sup>15</sup> *Id.* at art. VI.

<sup>16</sup> *Id.* § 4.7.

<sup>17</sup> See Grimmelman, *supra* note 8, at 2–3 (“[T]he settlement rests on the fiction that the class members consent to Google’s future actions. . . . For orphan owners, the fiction is a transparent lie.”).

<sup>18</sup> The DOJ also argues that the scope of the ASA is not consistent with existing legal precedent that governs the settlement of class actions. See DOJ Brief, *supra* note 8, at 4–11.

<sup>19</sup> The court has preliminarily certified an “Amended Settlement Class” consisting of “[a]ll persons that . . . have a Copyright Interest in one or more Books or Inserts” and two sub-classes, an “Author” sub-class and a “Publisher” sub-class, that are contained within the overall Amended Settlement Class. See Order Granting Preliminary Approval of Amended Settlement Agreement at 3.

<sup>20</sup> FED. R. CIV. P. 23.

<sup>21</sup> See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

<sup>22</sup> In principle, while the proposed class may satisfy the Rule 23 requirements for the purposes of litigating the allegations of the complaint, it may not satisfy those requirements with respect to a proposed settlement that went far beyond the allegations. Here, however, it is hard to see how, if common issues predominate with respect to the allegations in the complaint, they would not predominate with respect to the ASA.

<sup>23</sup> Order Granting Preliminary Approval of Amended Settlement Agreement, *supra* note 7, at 2–3.

<sup>24</sup> DOJ Brief, *supra* note 8, at 12.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> See ASA, *supra* note 6, at art. IV.

<sup>27</sup> DOJ Brief, *supra* note 8, at 16–19. The DOJ notes that changes from the initial Settlement Agreement reduce the concerns about horizontal price fixing, particularly now that Google is allowed to reject the ASA’s revenue-sharing formula with respect to any commercially available work and instead negotiate a separate compensation arrangement with the copyright owner for that work. However, the DOJ’s concerns are not entirely eliminated because, among other things, Google would not have the right to reject the ASA’s formula with respect to non-commercially available work. See *id.* at 16–17.

<sup>28</sup> *Broadcast Music Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). Elhauge argues that the ASA is more procompetitive than the arrangement found to be procompetitive under *BMI*. See Elhauge, *supra* note 9, at 7.

<sup>29</sup> To be sure, there are some differences as well. For example, in the music industry, ASCAP and BMI compete to represent rights owners, while there would be only a single registry under the ASA. In addition, rights owners opt in to either ASCAP or BMI, whereas they would have to opt out of the ASA.

<sup>30</sup> The ASA also specifies the retail pricing “algorithm” that Google would use for all works. ASA, *supra* note 6, § 4.2. The DOJ objects to this as horizontal competitors (the copyright owners) “delegat[ing] to a common agent [Google] pricing authority for all of their wares.” DOJ Brief, *supra* note 8, at 19. Again, however, under *BMI*, this practice likely is justified given the efficiencies involved in avoiding numerous bilateral negotiations between Google and users.

<sup>31</sup> DOJ Brief, *supra* note 8, at 20.

<sup>32</sup> ASA, *supra* note 6, at art. VI. The DOJ is concerned that the fiduciary does not have sufficient authority, e.g., it cannot renegotiate the revenue split with Google for unclaimed works. See DOJ Brief, *supra* note 8, at 20.

<sup>33</sup> See, e.g., DOJ Brief, *supra* note 8, at 21; Grimmelman, *supra* note 8, at 2.

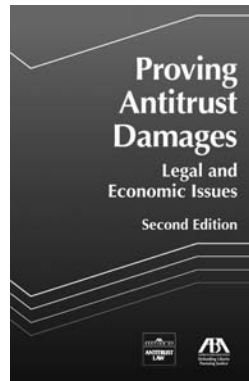
<sup>34</sup> Grimmelman, *supra* note 8, at 2. It is unclear whether the ASA allows the registry to give licenses to Google’s competitors for orphaned works. See Lemley, *supra* note 9, at 10 n.18; Elhauge, *supra* note 9, at 3. Grimmelman thinks that this would not be permissible under copyright law. See Grimmelman, *supra* note 8, at 3–4.

- <sup>35</sup> Elhaug argues that the only but-for world that should be considered is the one without the ASA because objectors should not be permitted to condemn the ASA on the basis that there exists an alternative settlement agreement that would have been even better for consumers than the ASA. Elhaug, *supra* note 9, at 2.
- <sup>36</sup> See, e.g., DOJ Brief, *supra* note 8, at 23.
- <sup>37</sup> See, e.g., the DOJ's brief objecting to the original settlement agreement, Statement of Interest of the United States of America Regarding Proposed Class Settlement at 25 (Sept. 18, 2009), available at <http://www.justice.gov/atr/cases/authorsguild.htm> ("This risk of market foreclosure would be substantially ameliorated if the Proposed Settlement could be amended to provide some mechanism by which Google's competitors could gain comparable access to orphan works.").
- <sup>38</sup> Critics of the ASA may have in mind that an alternative approach to the ASA is for Congress to pass legislation to deal with the orphan works problem. See DOJ Brief, *supra* note 8, at 9–10. However, it may be a long wait before Congress acts. See, e.g., Lemley, *supra* note 9, at 12. There seems little reason to delay the benefits to consumers of the ASA. Approval of the ASA would not prevent Congress from passing such legislation in the future. *Id.*
- <sup>39</sup> If Google is unable, without the ASA, to create a Google Books service as good and as quickly as the one it could create with the ASA, it is extremely unlikely that any other competitor would be able to do so.
- <sup>40</sup> The supporters of the ASA have focused on this point. See *generally* Hausman & Sidak, *supra* note 9; Lemley, *supra* note 9, at 9–10; Elhaug, *supra* note 9, at 4.
- <sup>41</sup> Grimmelmann argues that Google will have received "exclusivity" over orphan works due to "the stroke of a District Judge's pen" rather than any superior "business acumen." Grimmelmann, *supra* note 8, at 3. However, a creative litigation settlement strategy is reasonably considered business acumen.
- <sup>42</sup> DOJ Brief, *supra* note 8, at 21.
- <sup>43</sup> See, e.g., *id.* at 21; Grimmelmann, *supra* note 8, at 5.
- <sup>44</sup> This may be particularly true given that the ASA provides a means to resolve copyright ownership disputes and to keep track of the copyright owners for each work. See Lemley, *supra* note 9, at 4; Elhaug, *supra* note 9, at 3.
- <sup>45</sup> Grimmelmann is "not so sure" that copyright owners will want to settle with one of Google's competitors. Grimmelmann, *supra* note 8, at 5. However, copyright owners will have the incentive to facilitate entry by competitors to Google if Google is exercising market power in the downstream market. The copyright owners' economic incentives lead them to favor efficient distribution of their works to consumers. If increased competition downstream would increase the efficiency of distribution (e.g., by removing double marginalization), copyright owners would want to facilitate entry of competitors to Google. On the other hand, copyright owners' incentive to keep the downstream market competitive is somewhat blunted by the ASA's revenue-sharing formula (if downstream competition drives the price of a work to zero, the copyright owner ends up with a share of nothing). But, the registry presumably could negotiate a change in the compensation scheme, e.g., to a per download payment, in order to solve this problem, at least for future works.
- <sup>46</sup> See, e.g., DOJ Brief, *supra* note 8, at 21–22.
- <sup>47</sup> If an orphan work turns out to have substantial value, the copyright owner would have an incentive to step forward to claim the royalties. See, e.g., Lemley, *supra* note 9, at 4.
- <sup>48</sup> Lemley also argues that a digitally available orphan work likely has many substitutes, both alternative works in digital form and the orphan work itself in hardcopy form at libraries. *Id.* at 6.
- <sup>49</sup> DOJ Brief, *supra* note 8, at 22.
- <sup>50</sup> See, e.g., Dennis Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. Econ. 194 (2002).
- <sup>51</sup> Audio: AAI Annual Conference (June 2008), available at <http://www.antitrustinstitute.org/archives/Varney.ashx>.



## Proving Antitrust Damages: Legal and Economic Issues

### SECOND EDITION



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