

HARDLY SETTLED: THE GOOGLE BOOKS SETTLEMENT

Danny Heidtke

Student Fellow, Institute for Consumer Antitrust Studies

Loyola University Chicago, School of Law

Introduction

At the Frankfurt Book Fair on October 7, 2004, Google announced the beginning of “Google Print;” following that announcement, on December 14, 2004, Google publicized its partnership with several libraries that began the “Google Print” Library Project.¹ The Library Project’s goal was “to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers.”² Ultimately, the Google Books Library Project would show users information about the book, and in many cases, “a few snippets—a few sentences to display the search term in context.”³ Google undertook the process of scanning the respective libraries’ collections, adding new libraries along the way, and ultimately created Google Book Search. By December 2007, the Google Book Search interface was available in over 35 languages, and over 10,000 publishers and authors from over 100 countries were participating in the Book Partnership Program.⁴

Google’s ambitious project did not proceed without its share of critics. In 2005 the Authors Guild and five publishers filed two separate class action lawsuits against Google.⁵ The lawsuits alleged that Google had violated the copyrights of millions of the books it had scanned and placed online. The parties attempted to settle the respective lawsuits. On March 22, 2011, however, the Honorable Judge Denny Chin of the United States District Court for the Southern District of New York rejected the Amended Settlement Agreement (“ASA”) proposed by the Authors Guild, the Association of American Publishers and Google.⁶ The opinion states, “[t]he question presented is whether the ASA is fair, adequate and reasonable. I conclude that it is not.”⁷

The Google Books settlement raised a wide-range of objections from privacy rights to international law concerns.⁸ The primary focus of this paper, however, are the antitrust issues presented and addressed within the court’s decision to reject the proposed ASA. The court noted the following three objections to the ASA based upon antitrust grounds: (1) certain pricing mechanisms would constitute horizontal price agreements that would violate the Sherman Act; (2) the ASA would effectively grant Google a monopoly over digital books, and, in particular, so-called “orphan works”; and (3) such a

¹ Official Google Blog, “Google Checks Out Library Books,” http://www.google.com/press/pressrel/print_library.html (last visited: May 28, 2011).

² *Id.*

³ *Id.*

⁴ About Google Books, “Google Book History,” <http://www.google.com/googlebooks/history.html> (last visited: May 28, 2011)

⁵ *The Author’s Guild v. Google Inc.*, complaint filed on September 20, 2005; *The McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. v. Google Inc.*, complaint filed on October 19, 2005.

⁶ *The Authors Guild et al. v. Google Inc.*, 770 F. Supp.2d 666 (S.D.N.Y., 2011)

⁷ *Id.* at 669.

⁸ *Id.*

monopoly would further entrench Google's dominant position in the online search business.⁹ Although coverage of the antitrust concerns raised by the ASA in the court's decision was not expansive, the debate concerning the merits of such concerns is, in fact, comprehensive.¹⁰

Set out below is a brief discussion of "orphan works," which is critical to understanding most of the antitrust issues that arise as a result of the ASA. The antitrust concerns addressed by the court are then outlined and analyzed, followed by a few other important antitrust concerns raised in several commentaries.

Orphan Works

One of the most contentious areas with respect to the ASA is the sections pertaining to what is referred to as "orphan works." As Professor Matthew Sag suggests, "the issue of orphan works is complicated by the ambiguity and elasticity of the term itself. Orphan works are works for which the copyright owner cannot be readily identified and located by someone who might need permission to use the work."¹¹ The issue of orphan works is further complicated because there is a debate as to "how much effort a user should be expected to exert to track down wayward rightholders and negotiate with them."¹²

The tension concerning orphan works arose in this case because the nature of the class action mechanism under Rule 23 of the Federal Rules of Civil Procedure.¹³ When a class action settlement is proposed a class member is generally required to opt-out, or be subject to the terms of the settlement. For example, one issue in the Google Book Settlement is that orphan works owners cannot opt-out from a settlement. By definition orphan works will not have anyone speak up for them; thus, every orphan work will come in the purview of the settlement agreement.¹⁴

⁹ The court discusses the objections to the ASA concerning the belief that Google would be granted a monopoly over digital books and such a monopoly would entrench Google's market power. Interestingly, the decision does not discuss the merits of the objection pertaining to the pricing mechanisms set out in the ASA. *Id.*

¹⁰ The Laboratorium, http://laboratorium.net/archive/2011/03/22/inside_judge_chins_opinion (March 22, 2011, 23:56). (Professor James Grimmelmann: "[The antitrust] section is thin and a bit odd. It contains only a single citation to caselaw, and that one's only a "Cf." The rest is factual analysis and discussion of objections to the settlement. My take, therefore, is that this is an outline of reasons to be concerned about the settlement's competitive effects, but not a holding that it actually violates any of the antitrust laws.").

¹¹ Professor Sag goes on to discuss the difference between a "pure orphan" (an owner of some copyrighted work who will never be identified, despite the efforts of the person attempting to track them down) and a "contextual orphan" (situations in which a copyright owner could be found, but the expenses of doing so are prohibitive or unjustifiable); For more analysis see Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 *New York Law School Review* 19 (2010).

¹² Sag, *The Google Book Settlement and the Fair Use Counterfactual*, at 70

¹³ See Sag, at 46 (The "irony is that considerations of class-action fairness have prevented Google from divesting itself of this orphan works monopoly...")

¹⁴ Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* 5 *J. Competition L. & Econ.* 383, 393 (Sept. 2009) ("Of course, opt out is an active step and the class-action mechanism allows Google to sidestep neatly the problem of orphan works, as the holders of those will not opt out of the settlement. An orphan holder who shows up and opts out of the settlement is no longer an orphan, as we can now match the right in question with a particular individual or firm.")

The Book Rights Registry and the Unclaimed Works Fiduciary

To better understand the objections to the ASA, it is important to first understand the role of two entities created by the settlement. The parties to the settlement identified a potential conflict of interest in granting all rights to Google to control and manage the works it had scanned and digitized. To remedy the issue the OSA created an independent entity known as the Book Rights Registry (“Registry”). The Registry is primarily designed to act as an intermediary between Google and rightsholders by delivering profits and managing information related to the rightsholders.¹⁵

The Department of Justice objected to the OSA on a number of grounds; with respect to the Registry, however, the DOJ noted that the Registry could not adequately represent the interests of “inactive” rightsholders (those persons who currently hold rights in orphan works but cannot be located) because such interests may be conflicting. In response, the ASA created the Unclaimed Works Fiduciary (“UWF”), which was designed to protect the interests of the orphan works where such representation by the Registry was inadequate.

The ASA and Antitrust

The antitrust issues addressed herein are primarily concerned with the ASA’s propositions concerning orphan works. The debate within the criticism and commentary of the ASA concerning orphan works remains unsettled. The court, however, rejected the settlement and found that the ASA: (1) would give Google a de facto monopoly over unclaimed works; (2) would give Google control over the online book search market; and (3) Google’s ability to deny competitors the ability to search orphan books would further entrench its market power in the online search market.¹⁶

“Typically the analysis begins by defining the relevant market in which power is to be measured.”¹⁷ The market with respect to Google Book Search is difficult to define for a number of reasons. Specifically, the market is almost entirely speculative and Google Books offers a product—digital books, which also have physical counterparts—that consumers can access through several different mediums.¹⁸ Furthermore, the definition of a relevant market in this case is compounded by the wide-range of books currently in existence. For example, whether a physical book is an alternative to a digital book, or an orphan work has a viable substitute in the form of a “claimed” work, may vary depending on the age of the book, the topic of the book, the detail of the book, etc. Yet, the potential exists for Google to take advantage of its unique position provided by the ASA, for example: “Rare orphan books and rare public domain books have few good substitutes, because Google Books could set quite a high price for a book before a researcher would prefer to fly to Rome to access the text.”¹⁹

¹⁵ *Id.* at 394.

¹⁶ *The Authors Guild et al.*, at 682.

¹⁷ Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust*, at 33, West Publishing Co. (St. Paul, MN, 1977).

¹⁸ Eric M. Fraser, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, 2010 Stan. Tech. L. Rev. 4, at ¶ 30, available at <http://ssrn.com/abstract=1417722>.

¹⁹ *Id.*, at ¶ 38

As previously mentioned, the discussion of antitrust issues concerning the ASA in the court opinion was not expansive. Nevertheless, arriving at a viable settlement is necessary to achieve Google's ultimate goal of providing greater access to books to the public. In order to find a solution to the objections to the ASA it is necessary to analyze first how the ASA increases the barriers to enter the online book search market; second, how the terms of the ASA consequentially grant Google a de facto monopoly in orphan works; and finally, how the terms of the ASA will entrench Google's market power in two markets.

Increasing Barriers to Entry

The court opinion rejecting the ASA does not discuss whether the ASA would create a barrier to enter into the digital book search market.²⁰ Nevertheless, the terms of the ASA would have the following impacts: (1) Google's competitors face an assembly of copyright holders who are now more aware of book digitization projects, and (2) competitors would not be able to offer a product as complete as Google's without access to the orphan works in the Google Book Search database. Thus, the terms of the ASA increase the existing barriers to enter the digital book search market because the likelihood of litigation is increased, and the presence of a more complete product is already in the marketplace.

The initial barrier to enter the digital book search market is copyright law itself. As an indirect result of Google's actions, the lawsuits filed against Google, and the subsequent settlement proposals, Google's competitors face copyright holders with a heightened awareness of book digitization projects. Google is not at fault for such a result, it certainly did not intend to be sued when it began its ambitious project.²¹ Nevertheless, because the likelihood for litigation has increased as a result of the copyright holders' increased awareness, Google's actions have amplified an already significant deterrent.²² The direct result is: a potential competitor will be required to obtain licenses for each work it intends to make part of its digital book search—something Google was not required to do.²³

A competitor of Google may well be able to expend the cost necessary to locate each copyright holder of each work it wishes to make part of its digital book search product—except, of course, for the copyright holders associated with orphan works. In support of the ASA it has been suggested that Google's competitors have the financial

²⁰ The opinion does state that the ASA would arguably give Google *control* over the search market; however, the court does not explicitly deal with whether that control will function as a barrier for Google's competitors to enter into the market. *See The Author's Guild et al.*, at 683-684 ("The ASA would arguably give Google control over the search market. The ASA would permit third parties to display snippets from books scanned by Google, but only if they have 'entered into agreements with Google;' internal citations omitted)

²¹ Although some objectors to the ASA do not agree with that assessment. *See The Author's Guild et al.*, at 679 ("As one objector put it: 'Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: 'So, sue me.'")

²² *See* Christopher A. Suarez, *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition*, 55 N.Y.L. Sch. L. Rev. 175, 205 ("The high litigation costs of any copyright challenge faced by a potential book digitizer would be a significant deterrent—this Settlement alone will cost Google \$125 million. And that number does not include litigation costs.")

²³ *Id.*

ability to enter the market, the financial incentive to enter the market, and “no technological reason exists that creates a barrier to entry in the future.”²⁴ Similarly, as Professor Sag suggests, the ASA may not constitute a barrier to entry because competitors can learn from Google’s experience and the Registry provides Google’s competitors with an easier route to reaching agreement to use copyrighted works.²⁵ Justifying the ASA by citing Google’s competitors’ financial and technological ability to obtain proper licenses, however, overlooks what is at the foundation of the antitrust issues raised by the settlement: the orphan works problem.

At this time no one seems to know exactly what sort of demand for, or utility, the orphan works will provide.²⁶ It remains to be seen what sort of impact Google’s possession of the orphan works will provide and whether Google’s access will amount to a barrier to enter the book search market because the demand for orphan works is uncertain.²⁷ Regardless of the demand for the orphan works, support for the ASA points to the non-exclusive terms of the ASA as proof that the ASA does not increase the barriers to entry.²⁸ The presence of the ASA’s non-exclusivity clause has no practical impact on the barriers to enter the digital book search market because the copyright laws still present the initial barrier to enter the market. This initial barrier is strengthened by Google’s more complete product that is present in the market place, regardless of the non-exclusivity clause.

Therefore, a competitor seeking to publish its own digital book search product is essentially presented with three options: (1) place an orphan work into its digital book search product and assume potential liability for copyright infringement; (2) place a relatively incomplete product into the market by refraining from using any orphan works in its digital book search product; or (3) refrain from entering the digital book search market at all to avoid potential litigation or placing a subordinate product into the market. On the contrary, through the terms of the ASA and the opt-out mechanism of class action settlement, Google has enabled itself to use the orphan works it copied without permission, without fear of liability. Thus, a competitor’s only option to obtain a license similar to Google’s may be to scan works without permission and hope for a class action

²⁴ Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. Competition L. & Econ. 411, 423

²⁵ Sag, at 72.

²⁶ See Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, (2009) available at <http://ssrn.com/abstract=1431555>. (“[...] by definition, the orphaned works are the ones that no one has been willing to keep in print or even keep track of, so it seems unlikely that there is much demand for those works that cannot be met at least in part by an alternative work.”)

²⁷ Sag, at 45 FN 160. (“What remains to be seen is whether Google’s unique access to these orphan works rises to the level of a barrier to entry in any relevant market.”)

²⁸ See Hausman & Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*; see also Einer Elhauge, *Why the Google Books Settlement is Procompetitive*, (Journal of Legal Analysis, Winter 2010: Volume 2, Number 1), available at <http://ssrn.com/abstract=1459028>

lawsuit to settle all claims.²⁹ Such a result, however, does not represent sound legal advice, nor does it indicate good public policy.³⁰

The ASA could reduce barriers to entry by enabling the Registry and the UWF to license the orphan works to third parties. By doing so, the ASA would remove the advantage that the ASA bestowed upon Google and it would enable a competitor to place a more complete digital book search product into the market without fear of potential liability for copyright infringement. The ASA does provide a clause enabling the Registry and the UWF to license orphan works to the “extent permitted by law.” Congressional action, however, is likely required before the Registry and the UWF would be able to license the copyrighted works.³¹ The terms of the ASA do not go far enough to remedy the increased barrier to entry presented by Google’s access to the orphan works.³²

Without the orphan works, Google will not have the significant advantage over its competitors of providing a more complete product. The only true solution appears to be for Google to refrain from using the orphan works without explicit permission, or grant access to the orphan works to third parties.³³

An Expressly Non-Exclusive, De Facto Monopoly

When the OSA was first released there was a general concern that Google would be granted a monopoly of orphan works because only Google would be permitted to use the orphan books it had scanned and digitized.³⁴ The ASA sought to address this concern by granting Google non-exclusive use in the orphan works and including a “reseller provision,” which enabled Google’s competitors to sell orphan works in the Google

²⁹ Pamela Samuelson, *Reflections on the Google Book Settlement*, Presentation from OCLC/Kilgour Lecture, UNC (Apr. 14, 2009), available at <http://www.slideshare.net/naypinya/reflections-on-the-google-book-search-settlement-by-pamela-samuelson>; See also Eric M. Fraser, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, 2010 Stan. Tech L. Rev. 4, ¶ 79-80, available at <http://ssrn.com/abstract=1417722>.

³⁰ Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 25, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Feb. 4, 2010), available at <http://www.justice.gov/atr/cases/f255000/255012.pdf> (“The suggestion that a competitor should follow Google’s lead by copying books en masse without permission in the hope of prompting a class action suit to be settled on terms comparable to the ASA is poor public policy and not something the antitrust laws require a competitor to do.”)

³¹ Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement*, at 10 (Nov. 2009), available at <http://ssrn.com/abstract=1507172> (“ASA 6.2(b)(ii) authorizes the license of works by the registry and by the UWF ‘to the extent permitted by law’ just as the former OSA 6.2(b) did. My understanding is that Google does not believe that the provision actually enables either the registry or the UWF to license the works to third parties and that they instead believe that legislation would be required by Congress to make that operative. Be very clear: the settlement agreement is giving Google rights directly to use the orphan works.”).

³² See Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement*, at 11-12 (“[The UWF] would be situated to license the orphan works to third parties on a going forward basis. That would have been an elegant solution to the competitive issues raised by the current plan to grant a license to orphan works to Google and only to Google. The revised settlement makes real progress on these issues only to stop short of a visible and attainable real solution.”).

³³ Additionally, settlement may not be the proper mechanism in order to remedy the increased barriers to entry because granting the right to license orphan works to third parties would mean “using a lawsuit between A and B to create obligations between C and D—a result difficult to align with even a relaxed approach to Rule 23.” *Sag*, at 45.

³⁴ See Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* at 383.

Books database.³⁵ Neither provision, however, remedies the anticompetitive impact of the ASA.

Supporters of the ASA point to the fact that the ASA grants Google non-exclusive rights to use the orphan works. Nevertheless, because of current copyright law, the ASA grants Google a de facto monopoly in the orphan works. Google is able to exploit orphan works without fear of copyright infringement liability because of the terms of the ASA and the opt-out requirement of the settlement. Thus, “[t]he ASA would grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit,” while Google’s competitors would be required to go through the “painstaking” and “costly” process of seeking permission before even scanning copyrighted books.³⁶

The practicality of the reseller provision has been challenged as well. One such objection stated that the provision “would install ‘resellers’ as weak sub-distributors of Google. Because only Google hosts the digital copies, Amazon would be effectively referring its customers to Google. . . . [This] creates incentives for customers to migrate to Google faster than they otherwise would.”³⁷ In fact, the objection to the reseller provision in the ASA demonstrates the overall anti-competitive effects of the ASA; specifically, Google’s competitors are presented with two options: (1) navigate through copyright liability and attempt to establish an online database comparable to Google’s, or (2) act as a “middleman” by licensing the rights of the works in the Google Books database from Google. The first option concerns the increased barriers to enter the market as discussed above, the second option presented to Google’s competitors demonstrates Google’s de facto monopoly in the orphan works.

Nevertheless, several commentators have suggested that Google’s potential monopoly in orphan works is either overstated, or not a monopoly at all.³⁸ Professors Hausman and Sidak assert that “[o]rphans finding readers creates an economic incentive for authors (parents) to come forward and claim their progeny, because authors will receive payment for use of their books;” thus, the amount of orphan works will be reduced over time by the existence of Google Book Search.³⁹ Supporters of the ASA assert further that access to orphan works is not completely controlled by Google because

³⁵ See Amended Settlement Agreement § 4.5(b)(v)(2), *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/Amended-Settlement-Agreement.pdf (“To the extent that Google makes Books available through Consumer Purchases pursuant to this Agreement, Google will allow resellers to sell access to such Books to their end users.”).

³⁶ *The Authors Guild et al.*, at 679.

³⁷ Objection of Amazon.com, Inc. to Proposed Amended Settlement, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Jan. 27, 2010), available at http://thepublicindex.org/docs/amended_settlement/amazon.pdf.

³⁸ See Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, (“Critics overstate the breadth of the ‘orphan works problem’ for books, and they overlook the ways that the settlement will help others license most out-of-print books. Second, the Google orphan works ‘monopoly’ is not a monopoly at all. It is not illegal to be the first to introduce a new innovation... Finally, even if the result of the settlement were a monopoly, monopoly alone is not bad or illegal *per se*. One provider of these books is better than zero, and Google is not violating the antitrust laws because it is not engaged in ‘monopolization.’”)

³⁹ Hausman & Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, at 420.

Google scanned physical copies of the books that are being held at libraries; therefore, Google does not possess a monopoly over a product that is already available elsewhere.⁴⁰

Although the ASA does not explicitly grant Google exclusive use of orphan works, anti-competitive and fairness issues are raised by the ASA with respect to the licensing of those works. Whether the amount of orphan works will be reduced over time—reducing the impact of a potential de facto monopoly—or whether there really is not much demand for orphan works in the first place, Google’s competitors still must face the consequences of copyright law, or contract with Google.⁴¹ Therefore, Google has awarded itself a de facto monopoly to exploit orphan works.

Entrenching Market Power

The court’s decision appears to be concerned with Google’s relative power in two separate, but closely connected, online search markets. First, the ASA would give Google control over the newly created digital book search market by prohibiting third parties from displaying snippets from books scanned by Google, unless the third party has entered into an agreement with Google.⁴² Second, the ASA would entrench Google’s market power in the broader online search engine market because competitors would be unable to provide as complete of an online search engine as Google without access to Google’s digital book search database.⁴³ The impact of the former and the latter is to grant Google a significant advantage in the digital book search market before any competitor may establish itself as a viable alternative.⁴⁴ As a result, Google’s control of the digital book search market will further entrench its market power in the online search engine market. In turn, Google’s increasing market power in the online search engine market could be used to further entrench its power in the newly created digital book search market.

The possession of a potentially one-of-a-kind, massive digitized library of books does not immediately raise antitrust concerns.⁴⁵ The fundamental concern in the antitrust context is with Google’s possession of orphan works, which requires competitors to approach Google to use such works that Google had no right to prior to the ASA. The court discussed the unfairness of such an arrangement when it stated, “[i]ndeed, the ASA would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.”⁴⁶

The principal concern with the entrenchment of Google’s power in the online search engine market is that by prohibiting competitors from accessing the orphan works,

⁴⁰ Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, (“It is also a bit odd to talk of Google having a monopoly over works that are already available at libraries and used bookstores throughout the country.”).

⁴¹ *Id.* (“And by definition, the orphaned works are the ones that no one has been willing to keep in print or even keep track of, so it seems unlikely that there is much demand for those works that cannot be met at least in part by an alternative work.”)

⁴² *The Authors Guild et al.*, at 682-683.

⁴³ *Id.* at 683.

⁴⁴ See Suarez, *Continued DOJ Oversight of the Google Book Search Settlement*, at 210.

⁴⁵ Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, (“It is not illegal to be the first to introduce a new innovation. If it were, we wouldn’t have made much progress as a society.”)

⁴⁶ *The Authors Guild et al.*, at 669.

Google's search engine will be more complete than a competitors' search engine (e.g., Yahoo! or Microsoft). The court cites *United States v. Griffith*, 334 U.S. 100, 109 (1948), to demonstrate how Google, similar to the owners of movie theaters in *Griffith*, would further entrench its market power in the online search market by denying competitors the ability to search orphan works.⁴⁷ Google's de facto monopoly of orphan works would exist until Congress passes legislation enabling the Registry and the UWF to license works to third parties. Thus, Google's exclusive use—practically speaking—of orphan works will enable it to further establish its dominant market position in the online search engine market.

Google's increasing market power in the online search engine market may have further anticompetitive effects. Google's use of its online search engine could be used to entrench its power in the newly created online book search market by directing consumers to purchasing books within its digital book search database, rather than directing consumers to competitors' digital book search databases.⁴⁸ The possibility of such a result is speculative, however, the opportunity for Google to parlay its market power between two different, but closely connected markets demonstrates the anticompetitive effects of the ASA.⁴⁹ Furthermore, the increased market power that Google is achieving is not a result of business acumen, or prowess. Google is achieving this increase in market power because it has granted itself the right to use orphan works that it copied without permission, which is not a result that antitrust policy should allow.⁵⁰

Google Book Search, Public Policy, and Antitrust Law

The ASA has sparked an interesting debate regarding the intersection of public interest concerns and antitrust policy. Specifically, several commentators' support for the ASA appears to turn on whether the public interest emphasis on greater access to information outweighs general antitrust policy against anticompetitive and unfair conduct.⁵¹ Additionally, some commentators argue that there are no valid antitrust concerns and, therefore, there is no balancing of competing interests in this case.⁵² In his work entitled *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition*, Christopher A. Suarez suggests the following public interests are implicated by the settlement: (1) ensuring

⁴⁷ *Id.*, at 683.

⁴⁸ Suarez, *Continued DOJ Oversight of the Google Book Search Settlement*, at 210.

⁴⁹ See *Id.*, at 209-212, for a more expansive discussion on the prospect of Google tying its digital book search product with its online search engine.

⁵⁰ See e.g., *The Authors Guild et al.*, FN 20 ("Nor is it merely Google's competitors that have raised antitrust concerns. For example, amicus curiae Public Knowledge, a non-profit public interest organization 'devoted to preserving the free flow of information in the digital age,' objects that the ASA would grant Google 'a monopoly in the market for orphan books.' It argues that 'public access to orphan books must be open to all comers on a level playing field.' In addition, the Institute for Information Law and Policy at New York Law School argues: 'The heart of the [ASA] is that it would give Google a license to sell complete copies of out-of-print books unless their copyright owners object. It is all but certain that many orphan copyright owners will be unable to object. This sweeping default license will operate only in Google's favor, instantly giving it dominant market position.'")(*internal citations omitted*)

⁵¹ See e.g., Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* at 383.

⁵² See e.g., Lemley, *An Antitrust Assessment of the Google Book Search Settlement*.

broad access to information; (2) the public is entitled to highly-innovative book digitization solutions; and (3) the public should have a say in how digitized books are distributed and priced.⁵³

The ASA was objected to on more than just antitrust grounds, but the discussion concerning the ASA with respect to its anticompetitive impacts demonstrate the overall importance of continued scrutiny of the Google Book Search settlement process. Adequately representing inactive parties, balancing the laudable goal of providing access to information with a competitive market, and addressing the proper role of the class action settlement opt-out mechanism are all issues that are raised by the ASA.⁵⁴

The current proceedings appear to be in a state of flux, the decision by the district court rejecting the ASA brought closure to several areas; however, many concerns still loom large with respect to the terms of the ASA.⁵⁵ A status conference was initially set for April 25, 2011, but it was postponed for June 1, 2011, and was postponed again until July 19, 2011. On July 19, 2011, Federal Judge Denny Chin told the respective parties that another unsuccessful round of negotiations would push the case toward trial.⁵⁶ As it stands, the parties to the Google Books Settlement are presented with several different options including, but not limited to, appealing the decision or modifying the ASA.⁵⁷ Yet, as Randal C. Picker has stated, the “at least temporary disruption of [Google Book Search] has re-energized ideas for alternatives to it.”⁵⁸

Conclusion

Nevertheless, the court rejected the ASA on March 22, 2011, stating, “[i]n the end ... the ASA is not fair, adequate, and reasonable. As the United States and other objectors have noted, many of the concerns raised in the objections would be ameliorated if the ASA were converted from an “opt-out” settlement to an “opt-in” settlement. I urge the parties to consider revising the ASA accordingly.”⁵⁹

Class action settlement was not the appropriate mechanism for implementing the type of institutions and procedures set out under the ASA concerning the future of Google Book Search.⁶⁰ At the outset the lawsuits concerned allegations that Google had infringed on copyrights when it undertook its ambitious Google Print Library Project. At some point during the settlement negotiations, however, Google Book Search was no

⁵³ Suarez, *Continued DOJ Oversight of the Google Book Search Settlement*, at 181-184.

⁵⁴ For an in-depth discussion on how the ASA sought to achieve what could not have been achieved through litigation see Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*

⁵⁵ The opinion issued by the court covered seven different “major objections,” including the following: adequacy of class notice, adequacy of class representation, scope of relief under Rule 23, copyright concerns, antitrust concerns, privacy concerns, and international law concerns.

⁵⁶ *NY Judge Hearing Google Book Case Grows Impatient*, Las Vegas Sun, July 19, 2011, available at www.lasvegassun.com/news/2011/jul/19/us-google-book-battle

⁵⁷ For a more detailed and creative analysis of the “paths forward” for the parties involved, see “GBS March Madness: Paths Forward for the Google Books Settlement,” available at <http://www.librarycopyrightalliance.org/bm~doc/gbs-march-madness-diagram-final.pdf>

⁵⁸ See Randal C. Picker, *After Google Book Search: Rebooting the Digital Library*, at 8 (Chicago John M. Olin Law & Econ. Working Paper No. 559, 2011), available at <http://ssrn.com/abstract=1864031>

⁵⁹ *The Authors Guild et al.*, at 686.

⁶⁰ Sag, *The Google Book Settlement and the Fair Use Counterfactual*, at 69 (“Indeed, many of the defaults established by the Settlement do not even require that a rightsholder opt-in; rather, they place the burden on the rightsholder to opt out.”)

longer envisioned as an online library system much like a card catalog, but instead became “a complex and large-scale commercial enterprise.”⁶¹

New legislation presents a solution to one of the largest issues surrounding discussion of the ASA: protecting the interests of the inadequately represented rightsholders of orphan works. With respect to such legislation, Randal C. Picker suggests that the “animating principle” should reflect what “orphan rights holders would do were they actually present.”⁶² Critics have suggested that leaving to Congress what could be accomplished by the ASA is inappropriate.⁶³ However, the ASA “tilt[ed] the tables powerfully in favor of one, and only one, model of the new digital library,” and did not present an adequate representation of the interests of the silent rightsholders associated with orphan works.⁶⁴

The ASA is not fair to Google’s competitors; thus, the court rightfully rejected it. The parties should heed the court’s advice and convert the settlement agreement from an opt-out to an opt-in agreement. By doing so the orphan works issue would no longer prevent the ASA from being fair. If Google were to agree to such terms it would demonstrate that it still wishes to uphold its ultimate goal when it announced the beginning of its project nearly seven years ago, to “help users discover new books and publishers discover new readers.”⁶⁵

⁶¹ *The Authors Guild et al.*, FN 13.

⁶² Picker, *After Google Book Search: Rebooting the Digital Library*, at 11.

⁶³ See Elhauge, *Why the Google Books Settlement is Procompetitive*, at 29 (“In short, it would be risky to block the settlement based on speculation that Congress might perhaps do better, unnecessary to do so given that Congress could equally take any desirable action with the settlement, and counterproductive to do so given that blocking the settlement makes Congressional action less likely.”).

⁶⁴ Picker, *After Google Book Search: Rebooting the Digital Library*, at 13.

⁶⁵ Official Google Blog, “Google Checks Out Library Books,” available at http://www.google.com/press/pressrel/print_library.html (last visited: May 28, 2011)