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Antitrust and the Google Books Settlement: The Problem of Simultaneity

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ABSTRACT

Google Books represents the latest attempt at the centuries-old goal to build a universal library. In 2004, Google started scanning books from libraries around the world. Although it made copyright licensing agreements with some publishers, it did not obtain permission from each rightsholder before scanning, indexing, and displaying portions of books from the stacks of libraries. Unsurprisingly, authors and publishers sued for copyright violations. Google settled the class action lawsuit in a sweeping agreement that has raised suspicion from librarians, users, and the government. In this paper, I analyze the antitrust and competition issues in the original and amended settlement agreements. I find that the simultaneous aspects of agreements and pricing pose serious antitrust problems. The settlement effectively gives Google simultaneous agreements with virtually all the rightsholders to in-copyright American books. The original agreement also would have required Google to set prices for books simultaneously. In a competitive market, both agreements and pricing would occur independently. Under current law, however, no potential competitor can make agreements with the rightsholders to orphan works. The simultaneity, therefore, concentrates pricing power, leading to cartel pricing (a problem under § 1 of the Sherman Act) and monopolization (a § 2 problem).

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INTRODUCTION

¶1 According to the company itself, “Google’s mission [is] to organize the world’s information and make it universally accessible and useful.”¹ In pursuit of that lofty mission, Google launched an ambitious project to digitize every book ever written anywhere in the world. Google formed agreements with some publishers for the right to digitize those publishers’ books. Google cannot reach agreements with the owner of every book’s copyright, however, in part because there are too many rightsholders² and in part because many books’ authors and publishers are long dead or out of business. Faced with the impossibility of reaching agreements with every rightsholder, Google instead went to libraries around the world and started scanning books straight from the stacks. Authors and publishers in turn sued Google for allegedly violating federal copyright law. The lawsuits purport to represent the rightsholders of almost all in-copyright books in America. Google and the plaintiffs recently reached a settlement agreement. Although the agreement has not yet been approved, the settlement has stirred up questions about, among other things, competition and antitrust law. In essence, active rightsholders gave Google what is effectively an exclusive license over orphan works to which they do not even own the rights.

¶2 The Google Books Settlement Agreement probably violates federal antitrust law.³ The central antitrust problems come from the simultaneity of key events under the settlement. Under the settlement, Google simultaneously reaches an agreement with almost all of the rightsholders to almost all in-copyright American books. The settlement agreement, at least before it was amended, then effectively would have required Google to set prices simultaneously. In a competitive market, neither event would occur simultaneously. To form a digital books association, an organization would have to reach independent, sequential agreements with each rightsholder. The class action allows Google to reach all of these agreements in one fell swoop. In a normal market, each competitor sets its own prices independently, treating the prices of competitive goods as constants and varying only its own price. Under the settlement agreement, Google sits at the helm and can coordinate prices to maximize profits for the group as a whole.

¶3 Taken together, these two instances of simultaneity cause two major antitrust problems. Simultaneously coordinating agreements with competitive rightsholders and then simultaneously coordinating pricing decisions gives rise to price fixing. Additionally, reaching simultaneous agreements with those rightsholders, including those no longer around to make agreements with others, allows Google to monopolize the market for digital books.

¶4 Google Books as a whole and the settlement in particular have raised several other concerns. Librarians have been particularly vocal, highlighting not only the fear of monopoly prices, but also concerns over user privacy, censorship, and the number of access terminals Google will house in public libraries.⁴ Authors’ groups have raised other concerns about the level of compensation and privacy of their contracts.⁵ Like many class actions, the class members have some level of heterogeneity so some disagree with the settlement terms. Others have tackled those issues better than I could, so I will steer clear of them and will focus instead on the antitrust and economic issues. More specifically, I focus on the antitrust and economic issues of the settlement agreement itself. I

¹ Google Corporate Information Page, <http://www.google.com/corporate> (last visited May 19, 2010).

² This paper uses the term “rightsholder” to mean the owner of a book’s copyright, typically the author or publisher. I use this term to maintain consistency with the settlement agreement, although by definition the capitalized version of “Rightsholder” that appears in language quoted from the agreement only covers those rightsholders covered by the settlement.

³ The Department of Justice is also interested in the settlement. See Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild v. Google, Inc.*, No. 05-8316 (S.D.N.Y. Feb. 4, 2010), 2010 WL 979111.

⁴ See, e.g., Robert Darnton, *Google & the Future of Books*, 56 N.Y. REV. OF BOOKS 2 (2009).

⁵ See, e.g., Lynn Chu, *Google’s Book Settlement Is a Ripoff for Authors*, WALL ST. J., Mar. 28, 2009, at A9, available at <http://online.wsj.com/article/SB123819841868261921.html> (extended version available at <http://www.writersreps.com/feature.aspx?FeatureID=156>).

tend to think that Google Books is an incredible product that itself poses few competitive problems that need fixing. The settlement agreement on the other hand, raises several red flags.

¶5 I explain these concerns in three parts. Part I presents the background of the Google Books project and associated lawsuits, including the copyright violations that prompted the lawsuits. Part II highlights the most relevant sections of the settlement agreement and, more importantly, how those parts interact with each other. Part III explains the anticompetitive effects of the agreement, using economic and industrial organization analysis to tackle tough interpretive problems under the federal antitrust laws.

I. BACKGROUND OF GOOGLE BOOKS AND LAWSUIT

¶6 Examining the antitrust implications for the settlement requires understanding what led up to the lawsuit. The Google Books project forms the heart of the settlement, so the first section below traces the history, scope, and mechanisms of the ambitious project. The second section provides a brief overview of the alleged copyright violations that led to the lawsuit. Understanding the rough sketches of the copyright law will help to unpack the relationship of the parties in the settlement, which of course forms the basis for an antitrust analysis. The last section briefly explores the two primary lawsuits that prompted the settlement. The nuances of copyright law, class actions, and the settlement agreement itself are very complicated. I will distill these complex areas into the critical linkages between Google, book publishers, authors, users, copyright law, the courts, and the new body called the Registry.

A. Google Books Project

¶7 Through Google Books,⁶ Google plans to create a digital corpus of all of the world's books. That audacious plan deserves repeating. Google wants to make digitally available every book ever published anywhere in any language.⁷ Google hopes to unlock, through worldwide accessibility and indexing that enables searching, not only the latest titles rolling off of American presses, but also ancient Greek tomes that have been inaccessible to all but a few for centuries. Authors have written tens of millions of books; Google wants them all.

¶8 Collecting all of those books requires getting access to them and digitizing them. Publishers help with some of that. Through Google's Partner Program, publishers provide digital or physical copies of current and recent books. For books not published by participants in its Partner Program, Google must turn to libraries. Through Google's Library Project, some of the world's most prestigious libraries have offered to help Google. Harvard, Princeton, Stanford, Columbia, Oxford, the New York Public Library, the Library of Congress, and more than a dozen other libraries in America, Spain, Japan, and around the world have opened up their stacks to Google's ambitious project. Google must then scan the books, which it does at a rate of about one thousand pages an hour per machine. The process involves varying levels of automation and manual scanning based on the fragility and rarity of each book. So far Google has scanned more than seven million books.⁸

¶9 Once Google scans a book, it adds the book to its database. It uses character recognition to convert the images of each page to text so that each book becomes searchable and cross-referenced. Google then categorizes the books to determine how users can interact with the scanned images and

⁶ Google initially called the project "Google Print," then in 2005 renamed it "Google Book Search." As of 2009 Google calls it "Google Books." About Google Books, <http://books.google.com/googlebooks/history.html> (last visited May 22, 2010); Posting of Hicham Alaoui to Inside Google Books, What's in a Logo?, <http://booksearch.blogspot.com/2009/06/whats-in-logo.html> (June 1, 2009, 19:18 PST).

⁷ See Google Books Library Project, <http://books.google.com/googlebooks/library.html> (last visited May 22, 2010) ("Our ultimate goal is 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."). If Google's latest efforts are any indication, Google will actually make any book available in any user's native language. It already translates everything from websites to blog posts, and recently started automatically translating emails.

⁸ Posting of David Drummond to The Official Google Blog, New Chapter for Google Book Search, <http://googleblog.blogspot.com/2008/10/new-chapter-for-google-book-search.html> (Oct. 28, 2008, 07:14 PST).

text. For very old books, users have full access without use limitations. Users may search the entire book, read from any page in the book, and even download the full book in either text or PDF form to read, print, or manipulate in virtually any way. For modern books, partner publishers determine the restrictions on users. Some publishers may want only a listing of the book; others offer a preview of the book by making available only select pages. Still others might make the book fully accessible, with or without limitations on downloading and printing. For some modern books, Google cannot locate the publisher. For these books, Google offers a snippet of the page, generally an image of a few lines that surround a user's search term. This last category has proved to be the most challenging.

B. Copyright violations

¶10 Many people believed that Google Books involved massive copyright infringement.⁹ Some of Google's activities surely escaped any copyright problems. Copyright law allows copyright owners to authorize others to copy their works. As a result, Google can scan and make available books through its Partner Program, which involves contracts and agreements with rightsholders. Ordinary contracts set out the terms for how Google and Google's users may use the copyright content covered by the contracts. Additionally, copyright does not cover very old books in the public domain.¹⁰ Google may scan books in the public domain and may allow its users to do almost anything with those scans without fear of copyright liability.

¶11 Google faced challenges with books that were neither in the public domain nor covered under agreements with publishers. For these books, Google still scanned the books, indexed them, and made them searchable online. It displayed to users a few lines of the book at a time in the form of snippets.

¶12 Copyright law gives rightsholders exclusive rights to reproduce, publicly distribute, and publicly display copyrighted works.¹¹ Books, of course, are the most obvious class of copyrighted literary works.¹² Google may have violated the rightsholder's exclusive rights of reproduction every time it scanned the pages of a book and every time it made a digital copy on its computer systems. In other words, Google may have infringed a book's copyright several times before it even displayed a snippet of the book to a single user. Displaying those snippets of the book on the Google Books service may have further infringed by violating the rightsholder's exclusive rights to publicly distribute and publicly display the book. Google did not scan the books blind to copyright laws, however. Google relied on fair use, an important limitation on copyright owners' exclusive rights.¹³ Fair use, an equitable doctrine codified by statute, has some guiding principles but lacks crisp boundaries. For example, Google might rely on the fact that its snippets offer only a few lines out of a book ("the amount and substantiality of the portion used in relation to the copyrighted work as a whole"¹⁴) or that offering short snippets would not diminish the market for the book itself ("the effect of the use upon the potential market for or value of the copyrighted work"¹⁵).

⁹ See, e.g., Elisabeth Hanratty, Note, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10 (2005); Nari Na, Note, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J.L. & PUB. POL'Y 417 (2007); Emily Anne Proskine, Note, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 BERKELEY TECH. L.J. 213 (2006).

¹⁰ Determining whether a book is in the public domain or protected by copyright is a complicated inquiry. Books published before 1923 are definitely in the public domain. For books published after 1923, the copyright term may depend on several factors including whether it was published with notice, whether the publisher renewed the copyright, and whether it was a work of corporate authorship, among others. Ignoring those complicated issues, books published between 1923 and 1977 have a copyright term of 95 years from the publication date; after 1977 a book's copyright extends to 70 years after the author's death. For perspective, a book written today by a 25-year-old with a 75-year life expectancy would remain protected by copyright for 120 years. See 17 U.S.C. §§ 301-305 (2006).

¹¹ 17 U.S.C. § 106 (2006).

¹² 17 U.S.C. § 101 (2010).

¹³ 17 U.S.C. § 107 (2010).

¹⁴ 17 U.S.C. § 107(3) (2010).

¹⁵ 17 U.S.C. § 107(4) (2010).

¶13 The issue of orphan works, one of the most vexing problems of copyright law, plagues the Google Books project. Orphan works, simply put, are copyrighted works whose rightsholders cannot be located. The United States Copyright Office issued a comprehensive report on this problem of orphan works that goes into more detail.¹⁶ After an author dies or a publisher gets acquired or goes out of business, tracing who owns the copyright can be nearly impossible. Poor recordkeeping during publisher mergers and acquisitions can make even publishers unaware of which out-of-print but in-copyright books remain in their control. With most works published since 1923 still protected by copyright, it is understandably very difficult to make contracts for millions of out-of-print books. Orphan works legislation has been proposed in Congress but has not passed.¹⁷ The orphan works problem prevents Google from simply making contracts with rightsholders. If no one knows who owns the rights or where to find the rightsholder, Google cannot make an agreement even if the rightsholder would have agreed to Google's terms.

C. The lawsuits

¶14 In 2005, both the Author's Guild of America and the Association of American Publishers sued Google for copyright infringement.¹⁸ One suit involved several major publishers; the other was a class action complaint claiming a class consisting of "all persons or entities that hold the copyright to a literary work that is contained in the library of the University of Michigan."¹⁹ The lawsuits claimed that both the initial copying and the subsequent display of brief excerpts from copyrighted books constituted copyright infringement.

¶15 Google responded to both lawsuits by claiming, among other things, that it does not need permission from the copyright owners to scan and display portions of the books.²⁰ It based this claim in part on fair use limitations to copyright protection.²¹ Although the lawsuits sparked a tremendous amount of discussion in both the popular press and academic literature, copyright scholars may be disappointed because in all likelihood the important fair use issues will probably not be decided in this case.

II. THE SETTLEMENT

¶16 In October 2008 the parties announced a settlement, which they amended in November 2009.²² The settlement agreement clocks in at 141 pages, not including fifteen attachments. Naturally, the following description, somewhat shorter than 141 pages, does not include all of the complexities of the complete agreement. Instead, it continues my effort to expose the most important aspects that relate to the settlement's effect on competition. Most notably, the settlement reorganizes copyright law by giving Google a license to copy and distribute some forms of most in-copyright books. It also sets up a new organization, called the Registry, and sets out terms for pricing.

¹⁶ U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

¹⁷ See, e.g., Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

¹⁸ McGraw-Hill Co. v. Google, Inc., No. 05-8881, 2005 WL 2778878 (S.D.N.Y. Oct. 19, 2005); Authors Guild v. Google, Inc., No. 05-8136, 2005 WL 2463899 (S.D.N.Y. Sept. 20, 2005).

¹⁹ Complaint at ¶ 20, Authors Guild v. Google, Inc., No. 05-8136, 2005 WL 2463899 (S.D.N.Y.). Note that the University of Michigan was one of the earliest participants in the Library Project.

²⁰ See Answer at ¶ 31, Authors Guild v. Google, Inc., No. 05-8316, 2005 WL 3309666 (S.D.N.Y. Nov. 30, 2005).

²¹ See *id.*, Fifth Affirmative Defense.

²² Amended Settlement Agreement, Authors Guild v. Google, Inc., No. 05-8316 (S.D.N.Y. Nov. 9, 2009), available at http://www.googlebooksettlement.com/r/view_settlement_agreement. The Original Settlement Agreement, Amended Settlement Agreement, and other relevant documents are available at <http://www.googlebooksettlement.com>. The site contains a helpful file showing the changes made between the Original and Amended agreements.

A. Reorganization of copyright

¶17 Recall that pre-settlement, Google scans three types of books. Table 1 shows the three categories: public domain books, in-copyright books with an agreement with the publisher, and in-copyright books without such an agreement. Table 2 shows the categories after the proposed settlement: in- and out-of-copyright books.

Status of book	Source of book	Scope of uses			
		Full-text search	Display	Downloading, copying, printing	Payment to rightsholder
Out-of-copyright (public domain)	Library Project	Yes	Full	Yes	No
In-copyright, with publisher agreement	Partner Program	Yes*	Typically full access or 20% preview*	No*	Yes*
In-copyright, no agreement	Library Project	Yes	Snippet (a few lines)	No	No

Table 1: Pre-settlement

* May be modified by contract

Status of book	Scope of uses			
	Full-text search	Display	Downloading, copying, printing	Payment to rightsholder
Out-of-copyright (public domain)	Yes	Full	Yes	No
In-copyright	Yes*	Typically 20% preview free; full with payment*	Limited*	Yes*

Table 2: Post-settlement (proposed)

* May be modified by contract

¶18 Notably, the settlement abolishes the “in-copyright, no agreement” category. The settlement agreement itself will become the default agreement; for most rightsholders, it will take the place of an independent agreement with Google. This default arrangement is the main feature of the settlement. The settlement agreement gives Google the right to scan, copy, and distribute almost any American book ever written.

¶19 Although Google’s power under the settlement is very broad, it is not unlimited. Most importantly, copyright owners may opt out of the settlement if they do so by a particular date.²³ Publishers that opt out of the settlement may either bargain separately with Google or choose not to participate at all and have their copyrighted works pulled from the service. The settlement on its terms does not apply to books with unregistered copyright, music scores, periodicals, personal

²³ That date is in flux. Originally, copyright owners had until May 5, 2009 to opt out; the judge in the case extended the deadline to September 4, 2009. See Order, Authors Guild v. Google, No. 05-8136 (S.D.N.Y. Apr. 28, 2009), available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/extension/Extension%20042809.pdf>. After the settlement is effective, even those who did not opt out may still request removal from Google Books for 27 months after the Jan. 5, 2009 Notice Commencement Date, or March 2011. Order Granting Preliminary Settlement Approval, Authors Guild v. Google, No. 05-8136 (S.D.N.Y. Nov. 14, 2008), available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/111408-signed-prelim/111408%20Signed%20Prelim%20Approv.pdf>.

papers, and some other types of works (§ 1.19).²⁴ Nor does the settlement apply to books in the public domain (roughly, those published before 1923), but Google has always been able to scan those.

¶20 The settlement alters the copyright landscape for Google in two important ways, one for works with locatable copyright owners and one for orphan works. First, the settlement agreement flips the default arrangement for bargaining with known copyright owners. Before the settlement, Google could do very little with a copyrighted book without actively contracting with the rightsholder. At best, it could offer snippet views of the books, and even this practice formed the basis for the claims in the major lawsuits against Google. To be able to scan, index, and display copyrighted works without fear of copyright liability, Google had to seek out copyright owners and make individual agreements with each owner. Google could make things a bit easier by offering boilerplate licenses and a come-and-get-it, pull-marketing approach,²⁵ but it could not escape the requirement of a full agreement with each party. In this pre-settlement world, Google Books can only function as an opt-in system. Make no mistake: every other entity in America lives firmly in that opt-in world, as does Google until a court approves the settlement.

¶21 This switch in the default copyright arrangement matters. Contracting with the copyright owner of every book published since 1923 involves unimaginable transaction costs, even restricting the pool to owners who can still be found and putting aside orphan works for the moment. Unlike a Coasian world, the default position will matter due to these high transaction costs.²⁶ In this case, the switch in default position undoubtedly enables Google to create its universal digital library in a way not possible in the normal opt-in world.²⁷ At the same time, the shift may also cause legions of copyright owners to unwittingly give up their rights, an unfortunate reality in most opt-out class action settlements. Regardless, no other firm has ever been able to so dramatically flip the default position of copyright law.

¶22 The settlement also dramatically alters the landscape as to orphan works. Currently, no one can copy orphan works without fear of litigation. Contracting with orphan works' rightsholders is literally impossible because, by definition, the rightsholders cannot be located. The author may have died in 1950 without heirs, the publisher may have gone out of business or burned to the ground in 1940, or a string of publisher acquisitions in the 1930s may have resulted in muddled records. The settlement agreement, if approved, would suddenly unlock a treasure trove of orphan works. Google will be able to scan, copy, index, display, and sell access to every orphan work. No other firm has ever been able to legally copy orphan works.

B. Registry, rights, and revenue

¶23 The settlement also creates a new organization called the Registry (§§ 1.125 and 6.1–6.7).²⁸ The Registry, the first organization of its kind, will have several responsibilities and will sit between Google and the rightsholders included in the settlement agreement. It will receive payments from Google and distribute them to rightsholders. To do this, it will attempt to locate the appropriate copyright owners and will maintain a database of those copyright owners (§ 6.1). Google wants to digitize every book in the world. The Registry, therefore, will keep track of and act on behalf of the rightsholders to every book in the world, or at least at first the American books covered under the settlement agreement. No one has ever accomplished such a feat; if successful, the Registry itself will be an important contribution.

²⁴ This and all future parenthetical notations refer to the text of the Amended Settlement Agreement, *supra* note 22.

²⁵ For example, publishers may sign up at <http://books.google.com/partner> even if they have not been contacted by Google first.

²⁶ See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

²⁷ For more on how default positions affect life and commerce, see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale 2008).

²⁸ It also creates an Unclaimed Works Fiduciary (§ 6.2(b)(iii)).

¶24 Most importantly as far as antitrust analysis is concerned, the settlement agreement sets out the different business models for Google Books. Like the rest of the agreement, these provisions are quite complicated but understanding their rough contours is enough to understand the bulk of the competitive implications. Google will support two different business models, consumer purchases and institutional subscriptions. The settlement agreement does not establish specific prices (other than some initial pricing bins, § 4.2(c)(i)–4.2(c)(ii)(1)). Instead, it prescribes pricing methods or objectives. Table 3 describes the pricing strategies for the two initial business models.

Business model	Pricing methods and objectives
Consumer purchases	Two options: (1) <i>Specified price</i> : price identified by rightsholder; or (2) <i>Settlement controlled price</i> (default): “determined by an algorithm (the ‘Pricing Algorithm’) that Google will design to find the optimal price for each such Book in order to maximize revenues for the Rightsholder for such Book.” (§ 4.2(b)(i)).
Institutional subscriptions	“(1) the realization of revenue at market rates . . . and (2) the realization of broad access to the Books by the public” (§ 4.1(a)(i)).

Table 3: Pricing strategies

¶25 For consumer purchases, the settlement provides rightsholders with two different pricing options. The first option allows rightsholders to set a specific price; that seems innocuous enough. The second option, however, establishes a pricing algorithm to maximize profits. I will return to this provision soon.

¶26 The institutional subscription pricing objectives specify two seemingly contradictory goals, revenue at market rates and broad access. The juxtaposition is not lost on the parties, however, as they note, “Plaintiffs and Google view these two objectives as compatible, and agree that these objectives will help assure both long-term revenue to the Rightsholders and accessibility of the Books to the public” (§ 4.1(a)(i)). The agreement offers a few more hints about how the subscription price will be determined. Google and the Registry will consider the pricing of similar products, how many books are available, and the features of the subscription. Subscribing institutions will pay based on the number of users and the type of institution (for example, corporate, education, government). Google may offer both the full catalog and discipline-based collection subsets.

¶27 In addition to those business models, the settlement agreement also briefly describes an advertising-based model, public access service, and the potential for new models including on-demand printing, PDF downloading, and consumer subscriptions. None of these alternative business models will be available at launch. Acting as a representative for copyright owners, the Registry may agree to these and other models and may bind rightsholders, orphan and active alike. At launch, however, Google may only use the consumer purchase and institutional subscription models.

¶28 Google being Google, the settlement agreement allows Google and certain qualified researchers to use the scanned books for non-display and non-consumptive purposes (§§ 2.2, 7.2(b)(vi)). These uses include things like indexing the geographic places mentioned in books and performing linguistic and automated translation analysis (§§ 1.93–1.94). Essentially, these uses unlock the power of the world’s largest digital corpus beyond reading the text and appreciating the content and expression for their own sake. The settlement agreement places strong limits on these uses, however. Google may make use of the corpus for its own non-display uses and algorithms, but the agreement forbids most other commercial uses (without approval from both Google and the Registry) and expressly forbids

uses “that compete with services offered by the Rightsholder of those Books or by Google” (§ 7.2(d)(ix)).

¶29 Regardless the business model, the agreement specifies that Google will keep 37 percent of the revenues and the rightsholders will get most of the other 63 percent (§ 2.1). The actual revenue split is a bit more complicated because it depends on some contingencies including actual usage, Registry costs, and orphan works distributions.²⁹ The 37/63 split provides a good rule of thumb for both consumer purchases and subscriptions.

III. ANTITRUST AND ANTICOMPETITIVE EFFECTS

A. Defining the market

¶30 Defining the market is a determinative step in antitrust analysis. Defining a market too narrowly might make an ordinary competitor look like a monopolist, while an overly broad market definition might excuse anticompetitive conduct. Defining the relevant market for the settlement agreement is tricky, like it is in many antitrust cases. Two characteristics of this situation make it difficult to define a market. First, Google Books hardly exists at all right now; the market is almost entirely speculative. Second, Google Books offers intellectual property; consumers can often access the same content, but with different convenience characteristics, at different prices through many different channels.

¶31 Peculiarly, Google Books today is nothing like the envisioned post-settlement Google Books. Notably, Google currently does not charge users for any books. Measuring cross-price elasticities of demand, a common way of delineating a market, is difficult when the product is free.³⁰ The settlement, on the other hand, describes a service that collects money either per book for consumers or per user for institutions. The product characteristics will also change, as illustrated by Table 1 and Table 2. While Google Books currently only offers snippets of text for many books, users will be able to read the entirety of most books post-settlement. Not all product characteristics have been decided. Google may, for example, release handheld devices on which users may access the service. Google already offers public domain books, but not in-copyright books, to users of the Sony Reader, the Apple iPhone, and Google’s own Android mobile platform.³¹

¶32 That same text is often available through many other channels, which will provide varying levels of competition for Google Books. The level of competition depends on the product characteristics of the substitute, the copyright and publication status of the content, and the type of reader. Unfortunately it is very difficult to predict how much Google Books will compete with the substitute forms because Google Books has yet to charge for content. The next several paragraphs highlight some of the different potential competitive products, including their relevant product characteristics.

¶33 Consumers interested in a book on Google Books may often purchase the same text in the traditional, tangible form of a hardbound or paperback book in local bookstores or online through stores like Amazon.com. Recently, Amazon, Apple, Sony, and others have started to offer some books in digital form for reading on handheld devices like the Amazon Kindle, Apple iPad, and Sony Reader. To provide these digital books, Amazon, Apple, Sony, and others must strike agreements with individual rightsholders, so they offer a limited catalog and no orphan works.

¶34 Out-of-print books are harder to find, but are sometimes available for purchase at used bookstores or through networks of used bookstores such as alibris.com. These markets operate under normal patterns of supply and demand, except that orphan works have a completely fixed quantity, resulting in completely inelastic supply.

²⁹ See Amended Settlement Agreement, Attachment C, *supra* note 22.

³⁰ Note that even free products can subject a company to antitrust scrutiny. This happened most famously when Microsoft gave away its Internet Explorer browser for free. See Findings of Fact, *U.S. v. Microsoft Corp.*, 65 F. Supp. 2d 1, 35–37 (1999).

³¹ See Google Mobile Blog, Google Book Search for iPhone and Android, <http://googlemobile.blogspot.com/2009/02/google-book-search-for-iphone-and.html> (last visited July 15, 2010); Sony, The eBook Store, http://ebookstore.sony.com/google-ebooks/?in_merch=Homepage_Google_ePub_Rt_1 (last visited July 15, 2010) (“Together with Google, Sony brings you access to over 500,000 public domain books for free.”).

¶35 Public domain books are more complicated. Some public domain books are widely available. The Bible, for example, the most widely available book in the world, is available through every channel described thus far.³² Many public domain books are still in print. Many publishers still print public domain books by Mark Twain, for example. Other books are no longer being printed and are difficult or even impossible to find in used bookstores. Thousands of public domain books are available online through sites such as Project Gutenberg.³³ Users can download these books to computers and many handheld devices such as the Amazon Kindle or Apple iPad. Many other public domain books, however, are not so easily accessible.

¶36 Libraries present another strange wrinkle. When defining a market in most antitrust inquiries, economists do not frequently have opportunity to consider free sources of close substitutes. To be sure, libraries do not provide a perfect substitute for Google Books. The product characteristics of books in libraries are very different from those in bookstores and Google Books. Two key characteristics are convenience and usage parameters. Books in a library are generally free to browse and sometimes check out, but that typically requires a trip to the library. For popular books, a trip to the local library may suffice. For out-of-print rare books or orphan books, however, libraries would not dampen prices on Google Books very much. For these rare books, researchers often make international trips to distant libraries and must sometimes seek approval for access to the books. Some institutions charge membership fees for patrons not associated with the institution.

¶37 Additionally, the physical books offered by bookstores and libraries have different usage parameters than those on Google Books. For example, users may search through the text of books on Google. Even though it is not searchable, a book in print is yours to keep (except those from the library). In contrast, Google may change the terms of digital books on a whim.³⁴ Google Books will limit printing, for example, so giving pages to a colleague may be difficult; by contrast, only copyright law limits photocopying of a paper book. Additionally, Google Books may require an active internet connection, to say nothing of the merits of reading text on a screen versus on print. Different types of customers will prefer different product characteristics for different books. For example, a professor doing research may cherish the ability to search through the text of a book with no index, but the same professor on sabbatical reading fiction on a beach may prefer a paperback book that can get wet.

¶38 Defining the market for Google Books is difficult because the market is immature and the intellectual content of the books is available through so many channels with different product characteristics. Google Books is still in its infancy, and the broader digital books market is still just getting started. Physical bookstores, digital book devices, and libraries provide different levels of competition for different types of books and users. Bookstores and the Amazon Kindle might be great substitutes for popular novels, and libraries might be good substitutes for common academic books, though not for the researcher who wants to search through the text. 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.

B. Price fixing of digital books

¶39 The Google Books settlement creates a market that is very different from a normal competitive market. Instead of each publisher setting the price of books independently in a competitive market, Google, and in some cases the Registry, collect power to set prices simultaneously. This amalgamation of sellers “walks and quacks like a cartel.”³⁵ Section 1 of the Sherman Act prohibits

³² Modern translations of the Bible may remain protected by copyright, such as the New International Version, first published in 1978. Other common translations are in the public domain, such as the King James Version, first published in 1611. See Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 1 (2001).

³³ Project Gutenberg, <http://www.gutenberg.org> (last visited July 15, 2010).

³⁴ For an examination of the characteristics of digital books, see generally Randal C. Picker, *The Mediated Book* (Univ. of Chi. Law & Econ., Working Paper No. 463, May 5, 2009), available at <http://ssrn.com/abstract=1399613>.

³⁵ James Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 J. INTERNET L. No. 10, 10, 13 (2009); see also BLACK'S

agreements “in restraint of trade.”³⁶ Allegations of price fixing generally require proof of an actual agreement between competitors.³⁷ That requirement of an agreement places the Google settlement outside the domain of the sort of “naked restraint” that leads to an obvious violation of § 1 of the Sherman Act.³⁸ Instead, it requires a more nuanced analysis that fully considers the economic realities of the settlement.

1. Finding the agreement

¶40 To start, the settlement agreement is not strictly a horizontal agreement between competitors to fix price or restrict output, but it has a similar effect. Figure 1 illustrates simple examples of four different situations involving licensing intellectual property from three rightsholders to five end users.

¶41 Diagram (a) illustrates a competitive market. Each rightsholder makes independent licensing agreements with each user, for a total of fifteen separate agreements. Diagram (b) depicts a traditional cartel. Each of the rightsholders makes a pricing agreement with the other rightsholders and the users buy from the cartel. Diagram (c) presents the marketplace for musical performance rights, which introduces an intermediary between the rightsholders and users. These intermediaries will be discussed below in the context of institutional subscriptions, but briefly, ASCAP (or BMI) makes independent licensing agreements with each rightsholder, and then users make licensing agreements with ASCAP, for a total of eight separate agreements. Diagram (d) best represents the Google Books settlement.

¶42 Google did not make a series of independent vertical agreements like ASCAP. Instead, the class action brought the parties together and the class members, through the class representatives, made one simultaneous agreement with Google in the form of the settlement agreement. The Google arrangement shares some of the features of ASCAP, in that Google and the Registry together serve as an intermediary to reduce transaction costs. But the fact that the agreements are not independent from each other distinguishes Google from ASCAP and brings it closer to the cartel situation. The difference between a cartel and Google, which has antitrust significance, is that a cartel involves actual agreements between horizontal competitors.

¶43 ASCAP, however, illustrates the idea that multiple vertical agreements can still lead to a § 1 violation. Antitrust law, of course, favors the competitive environment depicted in diagram (a) and forbids the cartel in (b) under § 1. Joint ventures and intermediaries, like the ASCAP situation depicted in (c), are not so easy to classify. As a result, ASCAP and BMI have been subjects of repeated litigation and are both subject to consent decrees. Those arrangements have the potential for socially beneficial effects such as reducing transaction costs, but they also increase the opportunities for cartel behavior through centralized decisionmaking.

LAW DICTIONARY 227 (8th ed. 2004) (defining a cartel as a “combination of producers or sellers that join together to control a product’s production or price.”).

³⁶ 15 U.S.C. § 1 (2004).

³⁷ *Compare* Interstate Circuit, Inc. v. U.S., 306 U.S. 208, *passim* (1938) (affirming liability for letter sent by upstream movie exhibitor simultaneously to multiple downstream movie distributors that competed with each other, where the letter concerned price-setting for second-run exhibitors), *with* Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (holding that “conscious parallelism” does not “conclusively ... [constitute] a Sherman Act offense).

³⁸ *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (quoting *White Motor Co. v. U.S.*, 372 U.S. 253, 263 (1963)).

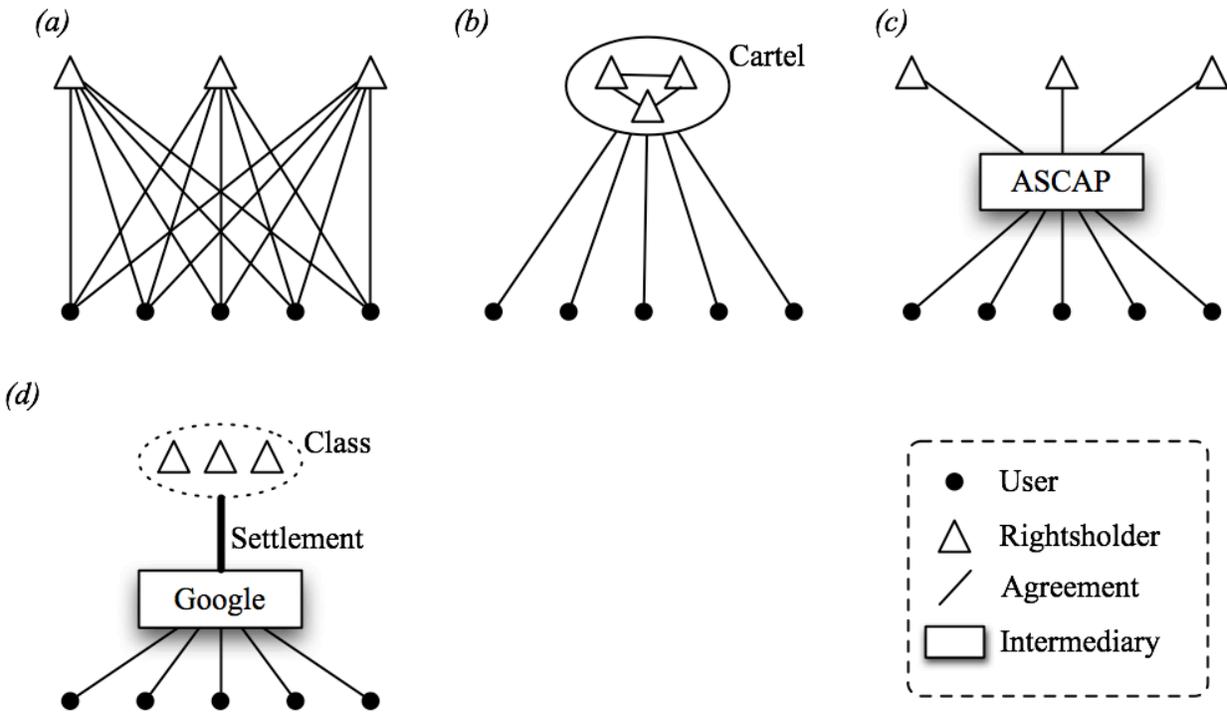


Figure 1: Independent versus simultaneous agreements

¶44

The Google Books settlement agreement sits somewhere between the agreements depicted in (b) and (c). The similarities in the illustrations were not accidental. Under the settlement, the rightsholders lack the connecting lines that represent “naked” agreements between competitors in the cartel situation. The dotted line around the rightsholders, however, represents the fact that the class action brings the competitors together and they simultaneously form one single agreement (the settlement agreement) with Google, represented by the thick agreement line. Under the class action, the parties effectively agree through inaction, by not opting out, to have one party bargain with Google. Ordinarily class action settlements do not arouse antitrust suspicion, but the settlement transferred to one party (Google) the class members’ economic interests.³⁹ It made that transfer of interests and authority for all parties in one fell swoop. ASCAP, on the other hand, had to make independent agreements with each rightsholder so each rightsholder has a separate agreement line to ASCAP. In each of these three cases, the centralized decisionmaking authority should raise suspicion under § 1 because the central decisionmaker will naturally want to raise prices and decrease output compared to a competitive situation if the amalgamation concentrates enough market power.

³⁹ Consider this statement from Judge Richard Posner:

Only if a patent settlement is a device for circumventing antitrust law is it vulnerable to an antitrust suit. Suppose a seller obtains a patent that it knows is almost certainly invalid (that is, almost certain not to survive a judicial challenge), sues its competitors, and settles the suit by licensing them to use its patent in exchange for their agreeing not to sell the patented product for less than the price specified in the license. In such a case, the patent, the suit, and the settlement would be devices – masks – for fixing prices, in violation of antitrust law.

Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 991–92 (N.D. Ill. 2003) (citing HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 31.1c (2002)).

2. Pricing mechanisms

a) Consumer purchases

¶45 The settlement describes two different pricing mechanisms for consumer purchases (see Table 3). The first option allows publishers to set prices for individual books. This should not arouse suspicion because it does not involve any kind of coordination between competitors. If anything, it provides a check on the next pricing arrangement. The second option, named the “settlement controlled price,” is the default option under the settlement. Under that option, Google will use its expertise in algorithms to create a confidential “pricing algorithm” “design[ed] to find the optimal price for each such Book” (§ 4.2(b)(i)). Google will change the price of a book in an effort to determine the demand curve for each book (§ 4.2(c)(ii)). After Google determines the demand curve, the settlement requires Google to set a price “to maximize revenues for the Rightsholder for such Book” (§ 4.2(b)(i)). This default option, turning over pricing power to Google, concentrates decisionmaking power in one firm.

1. The original agreement

¶46 It is important to understand the history of the pricing algorithm. The original October 2009 agreement specified a “pricing algorithm” “design[ed] to find the optimal such price for each Book” (Orig. § 4.2(b)(i)) in which Google would change the price of a book *and the price of similar books* in an effort to determine the demand curve for each book (Orig. § 4.2(c)(ii) (emphasis added)). The original agreement would have required Google to set a price “to maximize revenue for each Rightsholder” (Orig. § 4.2(b)(i)). The original agreement not only would have turned pricing power over to Google, but it also would have concentrated decisionmaking power in one firm and allowed Google to coordinate prices across products to achieve industry-wide cartel behavior.

¶47 If the marginal cost of providing a digital book is nearly zero in the absence of fixed costs⁴⁰ that revenue-maximizing requirement would maximize profits for both a monopolist and a competitive seller. The difference lies in what price a monopolist would be able to charge compared to a competitive seller. In a competitive market, each publisher would act independently and competition would push the price down to where $p = c$. For digital books, c is almost zero, so the price would approach zero.

¶48 Even without Google or the Registry, the market for books is not perfectly competitive because books are differentiated products. Copyright law provides a rightsholder with a legal monopoly. The market for books does not look like a pure monopoly, however, because despite product differentiation, consumers will still switch between books, preserving some element of competition. For example, Richard Posner’s antitrust book provides competition for Robert Bork’s antitrust book, but neither should sell for just the marginal cost of producing the book because each judge’s book is different from the other and different consumers may prefer one to the other. Others may prefer both books, suggesting that books may be both substitutes and complements for each other.⁴¹ In economics parlance, the model that best fits the market for books is monopolistic competition with differentiated products.⁴²

⁴⁰ Throughout this paper, I assume away fixed costs. Each digital book has two types of fixed costs. First, authors and publishers incur fixed costs in making the original book, including writing and printing. Then, except for modern books that are born digital, someone must incur a fixed cost to scan the book. Neither form of fixed costs affects the analysis here. The fixed costs of the first form are sunk for all of the books covered under this settlement because the settlement agreement on its terms covers only books that have already been written. I ignore the second form of fixed costs because Google has articulated plans to digitize every book, no matter how obscure. Going forward, books created after the settlement agreement will probably have no digitization costs because the publisher may provide Google with an electronic file of the book rather than having Google scan it. See Google, Adding Books, <http://books.google.com/support/partner/bin/answer.py?hl=en&answer=106169> (last visited July 15, 2010) (describing the process for uploading PDF copies of books).

⁴¹ For an analysis of book markets, see generally Marcel F. M. Canoy, Jan C. van Ours & Frederick van der Ploeg, *The Economics of Books* (Univ. of Munich Ctr. for Econ. Studies & IFO Inst. for Econ. Research, Working Paper No. 1414, Feb. 2005), available at <http://ssrn.com/abstract=668861>.

⁴² See generally DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION ch. 7 (4th ed. 2004).

¶49 For a seller in monopolistic competition selling q units of a digital book at price p with marginal cost c , profits are given by $\pi = (p - c) q$ in a Bertrand pricing game. If $c = 0$, then $\pi = pq$. The price depends on the demand for that book, which is a function of the prices of other digital books and other exogenous factors Z (such as the price of tangible books, the availability of the particular book in print form in stores and libraries, and the reputation of the author). The inverse demand function, therefore is: $P_i(p_1, p_2, \dots, p_{n-1}, Z)$. When trying to maximize profits, a seller in monopolistic competition would have to take those other prices as given, so $\pi_i = P_i(p_1, p_2, \dots, p_{n-1}, Z) q_i$. Competition between digital books would drive profits down to marginal cost c (close to free), plus a premium reflecting the market power from the differentiated aspect of individual books.

¶50 A monopolist, on the other hand, would maximize total profits over all digital books: $\Pi = \pi_1 + \pi_2 + \dots + \pi_n$. Each profit function takes the same form, where the price of a particular book is a function of the prices charged for other books:

$$\Pi = \sum_{i=1}^n P_i(p_1, p_2, \dots, p_n) \cdot q_i$$

¶51 That industry profit function is actually the same for a monopolist and a competitive market (or monopolistic competition). The difference comes from how a monopolist would solve the system of equations that make up the above summation:

$$\begin{cases} \pi_1 = P_1(p_2, p_3, \dots, p_n) \cdot q_1 \\ \pi_2 = P_2(p_1, p_3, \dots, p_n) \cdot q_2 \\ \vdots \\ \pi_n = P_n(p_1, p_2, \dots, p_{n-1}) \cdot q_n \end{cases}$$

¶52 Instead of treating the prices of other books as exogenous, it could treat the price of each book as a variable and set all the prices simultaneously to maximize profits. In a normal market, each competitor would independently solve its own equation in that system, treating the other prices as constants. The monopolist, on the other hand, would solve the system simultaneously, setting the prices of all books to maximize total profits. Being able to adjust prices simultaneously follows directly from aggregating pricing power in one decisionmaker. Google, therefore, acting as that one decisionmaker under the original agreement, would have set the same price as a cartel if it wanted to maximize industry profits.

¶53 Google does, in fact, want to maximize industry profits both because it has the economic incentive to do so; the original settlement agreement actually would have required that result. Google's compensation is a direct percentage of the revenue (§ 2.1), so Google will want to maximize total revenue. If $c = 0$, then Google's optimal behavior will be to maximize total profits for digital books. Additionally, and more importantly from the perspective of finding an agreement between competitors for § 1 purposes, following the original settlement agreement's requirement "to find the optimal [] price for each Book and, accordingly, to maximize revenue for each Rightsholder" (Orig. § 4.2(b)(i)(2)) would have required behaving as a monopolist. Absent coordination, competitors would have to set prices for each book individually while holding the prices of other books constant. If Google had done that, it would have violated the settlement's requirement to maximize revenue for each rightsholder because all rightsholders would be better off if Google set all book prices simultaneously.⁴³ Everything in the agreement suggests Google would have been required to set cartel prices, including the statements about how Google must develop the algorithm. In other words, the default pricing mechanism for consumer purchases would have required Google to set a cartel price for goods from different producers.

⁴³ Of course, each rightsholder would prefer that Google increase the prices of other rightsholders' books to stimulate demand for its own books, but that would harm other rightsholders, and under the settlement agreement Google cannot discriminate between rightsholders.

¶54 Solving that system of equations over millions of books requires not only significant computing power, but also a sophisticated algorithm. Google has skills in both, and the settlement agreement expressly would have required the development of such an algorithm. Moreover, extracting the full monopoly profit requires knowing the entire matrix of price elasticities. Determining that matrix involves making incremental price changes across all books, an unrealistic goal in most markets. It must know all of the prices and observe how all quantities change. Again, the settlement agreement anticipates those experiments, and the Internet is well-suited for such frequent price changes. The relevant text of the settlement agreement would have read:

The Pricing Algorithm shall base the Settlement Controlled Price of an individual Book upon aggregate data collected with respect to Books that are similar to such Book. Based on the Pricing Algorithm, Google may change the price of an individual Book over time in response to sales data and in order to collect additional data to establish the optimal price for such Book (Orig. § 4.2(c)(ii)(2)).

¶55 The economics of the preceding few pages serve as more than just a complicated statement that concentrating pricing power in one firm leads to higher prices than if individual firms made uncoordinated pricing decisions. After reading the text of § 4.2(c)(ii) of the original settlement, it should be clear that the settlement agreement actually would have required Google to engage in cartel pricing. This is the agreement that the class representative struck with Google. The biggest unknown here is how much substitute products will dampen Google's ability to charge high prices. Unfortunately, that question is impossible to answer before Google's product launches. Although companies like Amazon have some sense of the tradeoff consumers face between paper books and digital books, that company's experience is limited to a particular device and a very narrow category of books. No one knows the cross-price elasticities between digital books and paper books for most of the books Google will have in its catalog.

2. Controversy and change

¶56 The original settlement agreement received extensive criticism, including from the original draft of this article, which I posted to the internet in June 2009. In response to the criticism, the parties agreed to an Amended Settlement Agreement, which they filed with the court and posted online in November 2009. The following two excerpts show the changes made to the sections concerning the pricing of individual books. All changes are bolded, with insertions double-underlined and deletions in strikethrough text:

In this option, the Rightsholder permits the price for which its Book authorized for Consumer Purchase is to be sold to be determined by an algorithm (the "Pricing Algorithm") that Google will design to find the optimal ~~such~~ price for each ~~such~~ Book ~~and, accordingly, in order~~ to maximize ~~revenue for each Rightsholder~~ revenues for the Rightsholder for such Book and without regard to changes to the price of any other Book (but Google may use historical price data of other Books in designing the Pricing Algorithm). (§ 4.2(b)(i)(2))

The Pricing Algorithm shall base the Settlement Controlled Price of a Book, on an individual Book by Book basis, upon aggregate data collected with respect to Books that are similar to such Book and will be designed to operate in a manner that simulates how an individual Book would be priced by a Rightsholder of that Book acting in a manner to optimize revenues in respect of such Book in a competitive market, that is, assuming no change in the price of any other Book. Based on the Pricing Algorithm, Google may change the price of an individual Book over time in response to sales data and in order to collect additional data to establish the optimal price for such Book. (§ 4.2.(c)(ii)(2)).

¶57 These changes remove some, but not all, of the competitive problems from the settlement agreement. Most important, it eliminates Google's ability to coordinate pricing decisions across

competitors.⁴⁴ Google's algorithm can no longer solve the system of pricing equations simultaneously across all prices. Instead, when the algorithm determines a specific price for a book, it must treat the other prices as constants. Second, the amended agreement specifies prices should maximize the revenue of each owner with respect to each book, rather than across books. The original provisions providing for coordinated pricing across all books with the goal of maximizing revenue were among the most troubling sections of the original agreement and the changes are welcome. The amended agreement, however, did not resolve all of the competitive problems.

b) Subscription pricing

¶58 The settlement agreement provides less of a concrete statement about subscription pricing than it does for consumer purchases, even though the agreement takes more words to describe subscription pricing than consumer purchase prices. As shown in Table 3, the settlement sets out the following two objectives of subscription pricing: "(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public" (§ 4.1(a)(i)). Google will propose the pricing strategies and the Registry will approve them, acting in the interests of rightsholders, subject to arbitration. Each institution's price will depend on the type of institution, the number of students or employees at the institution, and the scope of access (full catalog or subsets). Google may offer discounts from the list price for subscriptions only if the Registry agrees (§ 4.1(a)(vi)).

¶59 Even though the pricing mechanisms work differently for purchases and subscriptions, they share an important feature. Both of them will result in cartel pricing instead of competitive prices. In a competitive market, each supplier would price its goods separately, subject to competitive forces from competing suppliers. The settlement agreement, on the other hand, unites all producers and requires one organization to act on behalf of all of them. The very first listed goal of the Registry is to "represent the interests of Rightsholders" (§ 6.2(b)(i)). The only sensible and nondiscriminatory way to represent the interests of all of the rightsholders is to try to maximize the sum of the total revenues for all rightsholders. Maximizing the revenues across all rightsholders has the same economic effect as acting as if all revenues flowed to only one party.

¶60 Readers familiar with intellectual property and antitrust may have already considered that this arrangement of centralized bargaining and licensing for millions of creative works shares striking similarities with ASCAP and BMI, reinforced by the diagrams in Figure 1. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have for decades offered licenses to play copyrighted music. If a restaurant wants to play music for its guests, it may pay ASCAP or BMI a licensing fee and play music from the organization's extensive catalog. Both performance rights organizations (PROs) offer both individual licenses and blanket licenses; these licenses parallel consumer purchases and institutional purchases from Google Books.

¶61 Both ASCAP and BMI have faced antitrust scrutiny almost from their inceptions in 1914 and 1939, respectively. As a result, both organizations signed consent decrees with the federal government in 1941.⁴⁵ These consent decrees have been modified several times, most recently in 2001.⁴⁶ Courts and commentators have repeatedly emphasized the economic justifications behind licensing organizations like ASCAP and BMI. Like Google and the Registry, ASCAP and BMI allow thousands of prospective licensors to turn to one (or two) organizations instead of locating and bargaining individually with the rightsholders of millions of creative works. But the same courts and commentators recognize that aggregating licensing authority also involves aggregating market power.

⁴⁴ Einer Elhauge argued with "a close reading of the text and possible resort to the canon favoring competitive interpretations," the original agreement did not allow for coordinated pricing. Elhauge, *supra* note *, at 37. I disagree.

⁴⁵ See *U.S. v. Broad. Music, Inc.*, 1940-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941); *U.S. v. Am. Soc'y of Composers, Authors and Publishers*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

⁴⁶ See *U.S. v. Am. Soc'y of Composers, Authors and Publishers*, 2001-02 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. 2001) (Second Amended Final Judgment), available at <http://www.ascap.com/reference/ascapaf2.pdf>.

¶62 Courts must balance the economic efficiency gains with the anticompetitive effect of price coordination. Judge Richard Posner noted that “[t]he effect [of ASCAP and BMI] is to eliminate price competition among the members of each association but at the same time to eliminate the prohibitive costs to the performing entities of dealing separately with each composer.”⁴⁷ In 1979, the Supreme Court held that ASCAP and BMI’s blanket license met the literal definition of price fixing, but should nevertheless be examined under the rule of reason.⁴⁸ This rule of reason analysis has led to different results in various cases involving associations that aggregate sellers. For example, the Court refused to condemn a dental association’s practice of prohibiting dentists from advertising discounts or low prices,⁴⁹ yet it rejected colleges’ use of the NCAA as an exclusive sales agency for television rights.⁵⁰ Courts have not articulated clear guidelines for when organizations like these run afoul of antitrust laws.

¶63 ASCAP and BMI are the closest litigated examples of situations like that in the Google Books settlement, so they can provide useful context for Google’s practices even if there are differences between the situations. For example, the music organizations have been forbidden since 1941 from offering only blanket licenses. At least initially, Google would offer only subscriptions to institutions, a large customer base. This blanket or subscription option limits entry because a subscriber has no incentive to give a portion of its book search business to Google (books that only Google has, for example) and choose a different supplier for the rest.⁵¹ ASCAP’s blanket license, though, links price to the licensee’s revenues; Google’s probably would not. The Google Books settlement does not on its terms prevent an institution from purchasing licenses to individual books, but throughout the whole document it distinguishes *consumer* purchases from *institutional* subscriptions, even listing consumer subscriptions as a potential new business model (§ 4.7(c)). The post-settlement Google Books service very well might restrict purchases to consumers just like iTunes does,⁵² which should raise the same problems as the ASCAP blanket license.

¶64 The blanket/subscription license is certainly not the only issue. The settlement agreement essentially requires supracompetitive pricing for consumer purchases, as described in the prior section. Unsurprisingly, ASCAP and BMI have been sued repeatedly over the price of their non-blanket licenses, as well.

¶65 The market structure of music licensing is not the same as that for digital books. When ASCAP and BMI agreed to the first settlement decrees, the music licensing market was basically a duopoly between the two firms. Not so in the case of Google Books, which has no real competitor at present or on the horizon for the subscription product. The closest substitute for Google Books for institutions is building and stocking a library. Institutions cannot rely on competition to reduce subscription prices, and indeed orphan works may prevent real competition from ever emerging in the subscription space, as the next section will illustrate. While ASCAP and BMI had to acquire market power by signing thousands of agreements with individual artists and record companies, the class action’s opt-out nature will effectively give Google an instant monopoly. Moreover, neither ASCAP nor BMI operate for profit. Google most certainly does operate for profit, although the Registry does not.

¶66 Perhaps most importantly, the antitrust issues from seventy years ago are still alive and kicking for ASCAP and BMI. The consent decrees have been repeatedly modified in cases involving the government. Private parties have sued the organizations for antitrust violations more than a dozen

⁴⁷ RICHARD A. POSNER, ANTITRUST LAW 30 (2d ed. 2001).

⁴⁸ See *Broad. Music, Inc. v. CBS*, 441 U.S. 1 (1979).

⁴⁹ See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

⁵⁰ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984).

⁵¹ Cf. RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE 33 (2007) (“Under the relentless ‘all or nothing’ logic of the blanket license, the broadcaster received no price reduction by cutting back on the hours that it used ASCAP material, so it had to pay a very high cost for using substitute sources of supply.”).

⁵² See iTunes Store Terms and Conditions § 10(b)(ii) (May 10, 2010), available at <http://www.apple.com/legal/itunes/us/terms.html> (last visited July 20, 2010) (“You shall be authorized to use the Products only for personal, noncommercial use.”).

times. The Second Circuit recently declared in 2005 that the organizations must operate under consent decrees “[b]ecause of the inherently anti-competitive conditions under which BMI and ASCAP operate.”⁵³

C. Monopolization of digital books

¶67 The previous section foreshadowed that the settlement agreement creates and protects a monopoly in digital books. In this case, the parties can reach a result through settlement that they could not have reached without a lawsuit. The class action’s opt-out nature and the inclusion of orphan works in the class combine to deter, or sometimes prevent, effective entry into providing digital books services.

1. The law of monopolization

¶68 Section 2 of the Sherman Act condemns “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize”⁵⁴ Illegal monopolization generally has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”⁵⁵

¶69 The leading antitrust treatise provides the following definition of exclusionary conduct:

[A]cts that:

(1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and

(2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.⁵⁶

¶70 To get to the interesting issues, I will assume that Google has monopoly power in the market for digital books, or at least in the narrower markets of digital library subscription services or digital orphan works. This is almost certainly true. No other firm offers or has announced plans to offer such a large quantity of digital books, especially in a subscription model. Some projects offer public domain books and Amazon and Sony together offer considerably fewer than half a million books, far fewer than Google’s more than seven million.⁵⁷ Sony offers over one million public domain books, but those books actually come from Google Books.⁵⁸ The books from Sony and Google are purchases, not subscriptions, and may only be read on handheld devices such as the Amazon Kindle, Apple iPad, or Sony Reader. These companies offer only books with active rightsholders or public domain books. Amazon also allows users to search some books for free on its website.⁵⁹ Some publishers and authors offer digital books,⁶⁰ and some libraries have their own scanning projects.⁶¹

⁵³ U.S. v. Broad. Music, Inc., 426 F.3d 91, 93 (2d Cir. 2005).

⁵⁴ 15 U.S.C. § 2 (2006).

⁵⁵ United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

⁵⁶ PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651(a), at 96 (Aspen 3d ed. 2008); see Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005) (describing the evolution of this definition and its alternatives); see also U.S. v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (providing a more detailed test).

⁵⁷ See Amazon’s Kindle Store, <http://www.amazon.com/kindle-store-ebooks-newspapers-blogs> (last visited May 13, 2010) (“Choose from over 275,000 of the most popular books, magazines, and newspapers.”); Sony’s eBook Store, <http://ebookstore.sony.com/download> (last visited May 13, 2010) (“Shop at The eBook Store from Sony, among tens of thousands of eBooks.”).

⁵⁸ See Sony’s eBook Store, http://ebookstore.sony.com/google-ebooks/?in_merch=Homepage_Google_ePub_Rt_1 (last visited May 13, 2010) (“Together with Google, Sony brings you access to over one million public domain books for free.”).

⁵⁹ See Amazon.com, Search Inside the Book, <http://www.amazon.com/Search-Inside-Book-Books/b?ie=UTF8&node=10197021> (last visited July 20, 2010).

⁶⁰ See, e.g., LAWRENCE LESSIG, CODE (version 2.0, Basic Books 2006), available at www.scribd.com/doc/35951/code-v2 (last visited July 20, 2010).

All of the other projects combined, however, fail to offer anything close to the breadth and depth of Google's collection.

2. *Lawsuits can enable anticompetitive agreements*

¶71 In a prototypical lawsuit, a plaintiff sues a defendant and if the parties settle the defendant makes a payment to the plaintiff in exchange for a release of liability. The defendant may be better off if he values the release of liability more than the settlement payment, particularly if the settlement allows the defendant to continue the alleged unlawful practice. Generally, however, the settlement itself does not make the defendant better off because the parties could have bargained and reached the same terms as the settlement without a lawsuit.

¶72 Here, the settlement leaves Google better off than it ever could have been without a lawsuit. Prior to the settlement, Google could at best offer, for free, only a few lines of text from copyrighted works without obtaining permission from the rightsholder. Obtaining permission from orphan works' authors is literally impossible and even obtaining permission from active rightsholders involves tremendous transaction costs. Under the settlement agreement, Google will be able to display full books and charge for the books or the service. Even though it must share the revenues with the rightsholders and pay a multimillion-dollar settlement, shared revenue is better than no revenue and full access is better than snippet access. Without a lawsuit, this agreement would not have been possible.

¶73 This is not the only case of a lawsuit opening doors for otherwise-impermissible agreements. The most recent high-profile class of cases involves reverse settlements in patent infringement actions involving generic pharmaceuticals. These cases typically involve a brand name drug company plaintiff suing a generic manufacturer defendant for patent infringement. To settle the case, the *plaintiff* makes a payment to the *defendant* and the defendant agrees to stop selling a generic version of the drug. The payment flows in the opposite direction than in most lawsuits. Without a lawsuit, these types of agreements would almost certainly run afoul of the antitrust laws, at least if the underlying patent would not actually protect the name brand drug. The lawsuit, therefore, allows the parties to reach a result that would otherwise be impossible but for the lawsuit.

¶74 Federal courts are split over whether these reverse settlements violate the antitrust laws.⁶² Commentators, too, have reached different conclusions.⁶³ The Google settlement is different enough from these reverse patent settlements that the underlying legal and economic issues in the patent cases do not illuminate the Google Books settlement very much. Most notably, the pharmaceutical companies used litigation to block entry into an existing business; here the litigation enables a business model, although it may ultimately limit competitive entry. Additionally, the copyright owners in the Google case had real claims, as opposed to the alleged "sham" claims in the pharmaceutical cases. Regardless of the factual differences between the cases, the reverse patent settlement cases demonstrate that settlement agreements can lead to antitrust problems if they enable anticompetitive agreements that would not be possible absent a lawsuit.

3. *The class action settlement limits entry*

¶75 The plaintiffs' decision to file a class action lawsuit under Rule 23 has dramatic consequences for the competitive landscape because potential entrants probably cannot duplicate the agreement that Google will have with almost all copyright owners. A class action requires a very large number of

⁶¹ See, e.g., The University of Chicago Library, Digital Activities and Collections, <http://www1.lib.uchicago.edu/e/dl/program.php3> (last visited July 20, 2010).

⁶² Compare *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006) (no antitrust liability), *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (same), and *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008) (same), with *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003) (per se antitrust liability), and *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799 (D.C. Cir. 2001).

⁶³ See C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1558 n.15 (2006) (collecting citations).

plaintiffs with similar claims and common issues.⁶⁴ It was probably the appropriate method of suing Google. Google did the same thing to all members of the class. Without permission, it either intended to or actually scanned copyrighted books, indexed them, copied them on internal servers, made them publicly searchable, and displayed snippets of the books. If a court decided the copyright issue for one claim, it would effectively decide the issue for all claims because they would be nearly identical. This situation is the model class action suit. Granted, rightsholders are not completely homogenous. Rightsholders differ in size, popularity, and type. The self-published author of an out-of-print trade book might have different interests than a large, popular, fiction publisher such as Random House. Although the different types of rightsholders may prefer different remedies, the virtually identical claims and legal issues make a class action a sensible choice.

¶76 The question becomes whether settling a class action lawsuit in a particular way can have anticompetitive effects. Three key qualities of the settlement, the simultaneity of the agreements with rightsholders, the opt-out provision, and the inclusion of orphan works, make it difficult for a potential competitor to ever fully enter this market. Under the simultaneously-in/opt-out regime, as described above, almost every rightsholder from 1923 to 2009 is bound by the settlement agreement unless it actively opts out.⁶⁵ This feature reduces transaction costs for Google to nearly zero, while competitors would face very large costs in making agreements with each active rightsholder.

¶77 At this stage, it becomes useful again to divide books into those with active rightsholders and orphan works. For active books, the simultaneous inclusion and opt-out provision make agreements more convenient for Google. For this subset of books, however, the simultaneity should not create antitrust problems. Competitors would have to spend a great deal time and money to make individual agreements with active rightsholders, but they could do so. ASCAP and BMI, for example, built up their associations through a series of independent agreements and still actively recruit artists. The same is not true for the other class of books.

¶78 These simultaneously-in/opt-out provisions have a special effect for orphan works. By definition, orphan works' owners will not opt out because they cannot be located; many owners of rights to orphan works do not even realize they own the rights because they acquired them unwittingly through an inheritance or other forgotten transaction. As a result of the simultaneous nature of the class action settlement, Google will immediately have the rights to scan, copy, and display all orphan works.

¶79 Without more creativity than anyone has mustered so far, a potential entrant can gain access to the full market, including orphan works, through only three methods: (1) new orphan works legislation from Congress, (2) an agreement with the Registry, or (3) another class action lawsuit. Various groups have tried and failed to create orphan works legislation but it remains a definite, if uncertain, possibility. It is not clear whether the settlement agreement permits the Registry to license other parties to engage in similar activities.⁶⁶ Even if it does, granting such licenses may not be in the Registry's best interests because increased competition could drive down profits to the rightsholders.

¶80 A potential competitor could take the third option and follow Google's path. In other words, it could infringe and get sued. It would have to rely on the claimants, however, to closely follow the procedure used in the case against Google. It would have to hope that the claimants would bring a class action representing most rightsholders, as the parties did in the case against Google, and it would have to hope that a court would certify the class. Moreover, it would then have to hope that the parties would settle under terms similar to those in the Google agreement. Namely, the potential competitor would have to hope that it could reach a settlement that simultaneously bound, under an opt-out condition, the relevant rightsholders, including the owners of the rights to orphan works.

⁶⁴ See FED. R. CIV. PROC. 23(a).

⁶⁵ Section 1.16 provides some actual boundaries of the settlement class.

⁶⁶ For a discussion of whether the Registry may make such third-party licenses, see Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009).

¶81 Does this allow for real competition? Judge Hand's oft-quoted statement about competition might shed some light on the question: "The successful competitor, having been urged to compete, must not be turned upon when he wins."⁶⁷ This statement does not necessarily excuse Google. Earlier in the same paragraph, Judge Hand explained: "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."⁶⁸ Google faced some minor competition, at least initially. In my opinion, Google no doubt exhibited "superior skill, foresight, and industry" in designing the ambitious scanning project. It made early agreements with major universities, funded the project with enough capital to scan almost every book imaginable, and heavily researched the technical aspects of scanning, indexing, and searching books.⁶⁹ The Google Books program itself, then, should not lead to antitrust liability.

¶82 Google also exhibited skill and foresight during this litigation. Through the litigation, Google accomplished what others have only dreamed about. If approved, the settlement will secure rights to copy and distribute millions of books that were previously effectively locked up because their rightsholders could not be determined or located. While this result required skill and foresight, two of the three terms in Judge Hand's list, it lacks the industrial character that Judge Hand included in his description. Antitrust law should not punish *productive* skill and foresight. We should applaud, if not reward, Google for the technical accomplishments, skilled negotiations with active rightsholders and libraries, and the ambition required to launch such a massive project. We should not necessarily applaud its accomplishments in the settlement, however.

¶83 To be fair, *ex ante* Google was on the same playing field as potential competitors. Congress had not acted on the orphan works problem and, absent enabling legislation, no one had proposed good workable solutions to unlocking the value contained in the millions of orphaned books. Google filled the metaphorical stacks of its digital library by doing the only thing it could. It first infringed (allegedly) and then settled under a carefully constructed agreement that grabs the rights to use orphan works and memorializes them on paper, hopefully with a court's stamp of approval. If Google wanted to include orphan works in its digital library, this practice was its best, and possibly only, option. Maybe Google should not be punished for solving this vexing problem; in fact, maybe it should be rewarded for taking such a large legal risk. After all, Google could not have guaranteed the terms of the settlement.

¶84 The settlement agreement, however, goes beyond what is necessary to secure the rights to use orphan works. Google reached an agreement that not just enables, but in fact requires supracompetitive profits. It secured the rights to orphan works in a way that limits competitive entry. Without congressional intervention, a potential entrant can gain access to orphan works only by first breaking the law and risking statutory damages of up to \$150,000 per book and possibly criminal penalties including jail time.⁷⁰ This is not ordinary business risk. Breaking the law and hoping for a particular kind of lawsuit and a particular kind of settlement does not allow for real competition.

CONCLUSION

¶85 In 2004, Google set out on a mission to scan and index every book ever written. It signed agreements with many rightsholders to scan, index, and display many of their books. Obtaining permission from every rightsholder was an impossible task, particularly for books whose rightsholder cannot be located. Instead of waiting decades, and sometimes more than a century, for those books to enter the public domain, Google instead started scanning anyway, without permission. It claimed that its scanning and limited display deserved a fair use exception from copyright laws. Book publishers and authors did not agree, so they sued Google. The lawsuit turned into a class action representing the rightsholders of most American books published between 1923 and 2009, including

⁶⁷ U.S. v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, U.S. Patent No. 7,508,978 (filed Sep. 13, 2004) (one of Google's patents for book scanning technology).

⁷⁰ 17 U.S.C. § 504(c)(2) (statutory damages); 17 U.S.C. § 506(a) (criminal infringement); 18 U.S.C. § 2319 (criminal penalties).

authors who have died and publishers that have gone out of business. The class settled with Google in an action that will, in one fell swoop, give Google the right to scan, price, and sell digital books and digital book subscription services.

¶86 The fact that Google obtains the rights to those books simultaneously, rather than in independent transactions, combined with the fact that Google will set prices for all of the books simultaneously, rather than independently for each book, establishes a skewed marketplace for digital books. The rightsholders, who are ordinarily competitors, did not make an express agreement among themselves to set prices. This situation, therefore, is not the simple case of a naked restraint under § 1 of the Sherman Act. Unfortunately, it has the same economic effect as if the competitors did make express agreements with each other. The class action collected under one roof the pricing and licensing authority for all books. When Google sets prices, it will solve the profit equations for all rightsholders simultaneously, which will lead to higher prices than if the competitors solved the equations independently and could not adjust the prices of their competitors' products. In fact, concentrating pricing power in one organization would actually lead to the same prices as a forbidden cartel.

¶87 Similar situations have arisen before. Most notably, ASCAP and BMI collect pricing power for music performance rights. Even though these PROs reached agreements with artists independently, rather than simultaneously in the case of the Google settlement, they have been the subject of repeated antitrust inquiries and now operate under consent decrees that allow courts to function as quasi-regulators.

¶88 Moreover, the fact that Google will simultaneously secure agreements with nearly all relevant rightsholders, including orphan works, limits the opportunity for competitors to enter the market. Potential competitors cannot reach agreements that cover orphan works because the rightsholders cannot be found. Procedural aspects to the Google Books lawsuit will give Google a monopoly in digital rights for orphan works.

¶89 After reaching these conclusions, several questions linger. First, this is a new market so it remains unclear how much substitute goods will dampen Google's market power. For many books, the same intellectual content is available in several forms, most notably in traditional libraries and from traditional bookstores. Additionally, some publishers may prefer to set lower prices for strategic reasons, and others will opt out of the settlement altogether and negotiate independently. It also remains unclear whether the Registry will have the authority to negotiate with potential competitors to Google.

¶90 Finally, the appropriate course of action remains a mystery. Google is undoubtedly providing a valuable product. Because of the orphan works problem in copyright, before Google no one had figured out how to license the content of abandoned books. Google is the first company to devote the capital to a massive scanning project and incur the tremendous legal risk involved in scanning without permission. Allowing Google to proceed might be the best course of action because any other course might shut down this valuable product before it gets started. Concentrating pricing power is the only realistic pricing option for private parties when the rightsholders to many books cannot be located or determined to set their own prices. Unlike in France, no regulatory agency sets book prices in America. The only other obvious option for prices is to have courts serve as quasi-regulators like they do for ASCAP or BMI, but that seems premature in this market. For now, cartel pricing might be preferable to the alternatives of judicial quasi-regulation or shutting down the market altogether. The simplest way to solve these potential competitive problems might be to require the Registry to allow entry by extending the licenses to potential entrants. This has its own problems, however, including the legal question of whether the Registry can use its authority under the class action to bind class members to future transactions with organizations not involved in the initial lawsuit. It would also allow entrants to gain from the licenses after Google proves the market, when they did not take the initial business and legal risk that may have made the licenses cheaper for Google in the first place.

¶91 These are complicated issues, but the important things to recognize are that this situation is not unlike those we have encountered in the past, but the added elements of simultaneity in both agreements and pricing pose serious problems.