

BOOK SEARCH SUIT SETTLEMENT RAISES COMPETITION LAW ISSUES

by
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Google is a company of modest ambitions. As it puts it in its brief corporate statement, Google's mission is to "organize the world's information and make it universally accessible and useful." Organize it, put it online, display it and make a few dollars at the same time. Google's Book Search is a core piece of this vision. Think of the world's great libraries, all merged into one collection and all available online through any device connected to the Internet. Universal access indeed.

But creating such a wonder isn't a simple undertaking. Books have to be found, bought, or borrowed and copied. The resulting digital files need to be sliced and diced to make them as useful as possible but also preserved so that looking at books online is very much like looking at them offline. This is a substantial technical undertaking, plus one needs to figure out a business model for accessing the books. In the past—and still today of course—individuals purchased books or borrowed them from libraries, who in turn had purchased the books. Will digital copies be purchased in the same fashion or will different rules apply? Were these technical and economic challenges not enough, one would confront the really hard problem, namely, how can an 18th century legal system be matched with early 21st century opportunities?

Google moved forward nonetheless and launched Google Book Search ("GBS") in pursuing its goal of organizing the world's information. Even though Google was sensitive to copyright values, the service relied on mass copying and thus Google undertook a substantial legal risk in setting it up. That risk was realized with the lawsuits by the Authors Guild and the Association of American Publishers. But a settlement is now on the table and if approved by a federal district court at a hearing in early June, 2009, the settlement agreement will create an important new copyright collective and will legitimate broad-scale online access to United States books registered before early January, 2009. This is exciting as successful new book platforms are rare—since Gutenberg have there been any?—and Google's is of breathtaking ambition.

Google digitized books through partnership agreements that it struck with libraries, but without licenses from rightsholders, it isn't clear what Google could do with its digital collection. Google might have litigated a fair use claim to limit its exposure for copyright infringement, but it has instead chosen to settle the lawsuit. The settlement agreement itself operates as a rights license. That license sits between Google, as owner of its digital files collection, and the rightsholders and the registry which the settlement creates to act on behalf of the rightsholders.

The settlement agreement is exceeding complex but, as I have in a longer consideration of the settlement,¹ I focus here on three issues that raise antitrust and competition policy concerns. First, the

¹*The Google Book Search Settlement: A New Orphan-Works Monopoly?*, John M. Olin Law & Economics Working Paper No. 462 (Apr. 2009), available at <http://ssrn.com/abstract=1387582>.

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agreement calls for Google to act as agent for rightsholders in setting the price of online access to consumers. Google is tasked with developing a pricing algorithm that will maximize revenues for each of those works. Direct competition among rightsholders would push prices towards some measure of costs and would not be designed to maximize revenues. As I think that that level of direct coordination of prices is unlikely to mimic what would result in competition, I have real doubts about whether the consumer access pricing provision would survive a challenge under Section 1 of the Sherman Act.

Second, and much more centrally to the settlement agreement, the opt-out class action will make it possible for Google to include orphan works in its book search service. Orphan works are works as to which the rightsholder can't be identified or found. That means that a firm like Google can't contract with an orphan holder directly to include his or her work in the service, and that would result in large numbers of missing works. The opt out mechanism—which shifts the default from copyright's usual out to the class action's in—brings these works into the settlement. Rightsholders affirmatively need to opt out of the settlement or their works will become part of the broad license the settlement creates.

The great accomplishment of the settlement is precisely in the way that it uses the opt-out class action to sidestep the orphan works problem. But this gives Google an initial monopoly—and possibly a long-running one—over the use of the orphan works. This emerges *directly* from the court's role in this case because, again, the settlement agreement between Google and active rightsholders could have been implemented as a private matter without a lawsuit, though, again, with perhaps substantial antitrust attention. But the lawsuit is the device by which the initial orphan works monopoly is created: without the lawsuit, Google would acquire *no* rights to use the orphan works.

But the settlement agreement also creates market power through this mechanism. Absent the lawsuit and the settlement, active rightsholders could contract directly with Google, but it is hard to get large-scale contracting to take place and there is, again, no way to contract with orphan holders. The opt-out class action is the vehicle for large-scale collective action by active rightsholders. They have little incentive to compete with themselves by granting multiple licenses of their works or of the orphan works. Plus under the terms of the settlement agreement, active rightsholders benefit directly from the revenues attributable to orphan works used in GBS.

We can mitigate the market power that will otherwise arise through the settlement by expanding the number of rights licenses available under the settlement agreement. Qualified firms should have the power to embrace the going-forward provisions of the settlement agreement. We typically find it hard to control prices directly and instead look to foster competition to control prices. Non-profits are unlikely to match up well with the overall terms of the settlement agreement, which is a share-the-revenues deal. But we should take the additional step of unbundling the orphan works deal from the overall settlement agreement and create a separate license to use those works. All of that will undoubtedly add more complexity to what is already a large piece of work, and it may make sense to push out the new licenses to the future. That would mean ensuring now that the court retains jurisdiction to do that and/or giving the new Registry created in the settlement the power to do this sort of licensing.

Third, there is a risk that approval by the court of the settlement could cause antitrust immunities to attach to the arrangements created by the settlement agreement. As it is highly unlikely that the fairness hearing will undertake a meaningful antitrust analysis of those arrangements, if the district court approves the settlement, the court should include a clause—call this a no *Noerr* clause—in the order approving the settlement providing that no antitrust immunities attach from the court's approval.

We are at a key time for Google Book Search. Rightsholders need to opt out, if they wish to do so, by May 5, 2009. Opting out keeps individuals works out of GBS but doing that won't prevent the settlement itself from going forward. Objections to the settlement need to be filed with the federal district court by May 5, 2009 in anticipation of the fairness hearing set for June 11, 2009.²

²The settlement administration site is <http://www.googlebooksettlement.com/>.