

The case against Google Books: Do stakeholders' anti-trust claims belong?

On September 20, 2005 a collection of published authors and the leading authors' interest group, the Authors' Guild, Inc., filed a class action complaint in U.S. district court against Google, Inc. The complaint alleged that Google had violated the copyrights of authors by digitizing their works, found in the University of Michigan's library system. After nearly three years of court proceedings and party negotiations, the parties filed a Proposed Settlement on October 28, 2008. The Proposed Settlement allows Google to continue digitizing books and allows full-text searches of these works. It does not automatically allow Google to display the books or even portions of these books; instead it provides several mechanisms for copyright holders to control the display, sale, and use of their works. It also addresses compensation for past uses and display of works, and arranges for the future profit splitting between Google and class members. The Proposed Settlement also creates the Books Rights Registry (the Registry) which is tasked with creating a publicly available list of rightsholders, actively searching for the rightsholders of orphaned works, and continuing to act on behalf of rightsholders who authorize it to do so.

The class member and *amicus curiae* briefs filed for and against the Proposed Settlement in *The Authors' Guild, Inc. et al v Google, Inc.* are filed by a myriad of organizations, companies, and even governments. While the original complaint and the subsequent Proposed Settlement aim only to resolve the alleged copyright infringement and allow the project to continue without further infringement allegations, stakeholder reasons for filing these briefs discuss copyright issues in addition to other, originally unrelated, matters. The three main concerns addressed are: (1) the Rule 23 viability of the class representatives, (2) potential copyright questions - especially related to the rights of "orphan" rightsholders, and (3) anti-competitive concerns that affect both economic and public interests. While it is impossible to completely untangle the various concerns voiced by the different stakeholders in this case, this paper will work to focus on the anti-competitive arguments and address other issues only as they influence the anti-competitive issues.

The recent Statement of Interest filed by the Department of Justice contends that the Proposed Settlement may result in the horizontal price fixing between Google and the rightsholders of the digitized commercially-available works.¹ Echoing this argument in their objection to the Settlement, Amazon.com likens the Registry to a cartel "operating with virtually no restrictions on its actions, with the potential to raise book prices and reduce output to the detriment of consumers and new authors or publishers who would compete with [the Registry]."² As the Antitrust Law and Economics Professors point out, there is no horizontal agreement between all of the rightsholders and Google; rather there is an offer from Google to use an algorithm to calculate the competitive price of each book separately.³ Sony, in its surprising *amicus curiae* advocating approval of the settlement, highlights rightsholders freedom to compete with each other by setting the prices on their books at competitive rates which will garner more sales than publications that are substitutes.⁴

¹Statement of Interest of the United States of America Regarding Proposed Class Settlement (Dkt. 720) at 17, *The Authors' Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 9, 2009)

² Objection of Amazon.com, Inc. to Proposed Settlement (Dkt. 206) at 1, *The Authors' Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 1, 2009)

³ *Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement* (Dkt. 315) at 7-9, *The Authors' Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 8, 2009); The Settlement Agreement §4.2(c)(ii)(2), http://www.googlebooksettlement.com/r/view_settlement_agreement.

⁴ *Amicus Curiae Brief of Sony Electronics Inc. in Support of Proposed Google Book Search Settlement* (Dkt. 314) at 13-14, *The Authors' Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 8, 2009)

Sony takes its arguments beyond responding to anti-competitive concerns to suggest that the Proposed Settlement will actually encourage competition in the e-book market and the e-book reader market. By using an open standard format for their e-books, Google will increase demand for e-readers, which will then increase the demand for more sources for e-books – fueling innovation and diversity in the market.⁵ Several other stakeholders also argue that the Proposed Settlement will encourage competition by making entrance into the market easier for competitors. Some of the ways in which the settlement will lower the barriers to entrance into the market are: (1) lowering costs of locating individual copyright holders by creating a publicly accessible database of rights holders, (2) authorize the Registry to license Google rivals to digitally distribute the publications of member rightsholders, and (3) by lowering the risks inherent in pursuing electronic distribution of copyrighted materials.⁶ The non-exclusivity clauses of the Proposed Settlement⁷ form the basis of above assertions and are also used in many pro-Settlement briefs as a broad, initial argument against the claim that the Proposed Settlement ushers in a monopoly for Google in the digital book market.⁸

The non-exclusivity clauses are also used to address another concern brought up by some stakeholders – the potential of Google to gain monopoly control of “orphaned” works. Some, such as Amazon.com, are concerned that Google will maintain a monopoly of these unclaimed publications because, they argue, the Registry is not allowed to offer additional licenses for these orphaned works to potential competitors.⁹ However, as Randal Picker explains, the non-exclusivity clauses in the Settlement could be interpreted to give the Registry the ability to re-license these works. Any confusion or concern remaining could be resolved by altering these clauses to specifically give the Registry the power to relicense these works.¹⁰ Others also argue that the settlement will diminish the need for concern because it will create financial incentive for unknown rightsholders to step forward and claim their rights while also empowering the Registry to search out many of these rightsholders and make them aware of the Proposed Settlement and their rights as described in it. These efforts would make around 80% of the unknown copyright holders known.¹¹ Even if Google maintains a monopoly over these works, the public will benefit from having something that was previously unavailable to them made accessible, and the orphaned works will be subject to the same *competitive* pricing algorithm that Google will use for other works in its collections which will limit Google’s ability to price these works supracompetitively.¹²

There is concern that the class representatives and the board governing the Registry, which do not include holders of orphaned rights, will fail to adequately represent the rights of these

⁵ *Amicus Curiae* Brief of Sony Electronics at 8-11.

⁶ *Id.* at 2; *Amicus Curiae* Brief of Antitrust Law and Economics Professors at 15-16, 19; Brief of *Amicus Curiae* Computer and Communications Industry Association (CCIA) on Proposed Settlement (Dkt. 302) at 9-11, *The Authors’ Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 8, 2009)

⁷ The Settlement Agreement §§2.4, 3.1(a).

⁸ *Amicus Curiae* Brief of Sony Electronics at 12-13; *Amicus Curiae* Brief of Antitrust Law and Economics Professors at 17; Brief of *Amicus Curiae* CCIA at 10.

⁹ Objection of Amazon.com at 25.

¹⁰ Picker, Randal C., *The Google Book Search Settlement: A New Orphan-Works Monopoly?* (July 18, 2009). *Journal of Competition Law & Economics, Forthcoming*; *U of Chicago Law & Economics*, Olin Working Paper No. 462. Available at SSRN: <http://ssrn.com/abstract=1387582>, pp. 402-406; *Amicus Curiae* Brief of Antitrust Law and Economics Professors at 18.

¹¹ *Amicus Curiae* Brief of Antitrust Law and Economics Professors at 13; *Amicus Curiae* Brief of Sony Electronics at 7 (citing The Settlement Agreement §6.1).

¹² *Amicus Curiae* Brief of Antitrust Law and Economics Professors at 13.

absent class members and collude with Google to set anti-competitive prices and deny access to these works by competitors.¹³ Concerns such as these address not only anti-competitive issues, but also issues related to Federal Rule of Civil Procedure 23, which is the guiding principle of class action lawsuits. This has led to general questions about the appropriateness of using the United States court system to settle the issues of the case. There is concern that approval of the Proposed Settlement will usurp the power of Congress to manage copyright legislation and rights.¹⁴ Concerns have also been expressed that approval of the Proposed Settlement will occur without a thorough examination of the anti-competitive issues and their influence on groups not specifically a party to the class action and, consequently, protect Google from future anti-trust investigations. However, a slight modification to the Proposed Settlement that states the Google Book Settlement is not immune to future anti-trust investigations would resolve this concern.¹⁵

While anti-trust issues are a paramount concern for many of the stakeholders, they are not a part of the original complaint and as such should not be a main focus of the Court when deciding whether to approve the Proposed Settlement. The arguments are incredibly complex and deserve a thorough investigation performed by the Justice Department and other relevant agencies with the expertise to do so. Considering the arguments put forth by different parties, I believe it would be safe for the Court to declare that Google does not appear to be intentionally creating an anti-competitive market and that any monopoly-like profits are the result of “the continual creation of monopoly ... that explains most of the technical achievements of modern industry” and will be corrected by the eventual entry of competitive entities into the market.¹⁶ The responsibility for a more rigorous examination of potential anti-competitive issues can remain the responsibility of the appropriate agencies, which will be ensured by the addition of a clause expressly stating that approval of the Proposed Settlement will not protect it from future antitrust investigations, as discussed above. Furthermore, the approval of this settlement will not preclude the Copyright Office or Congress from instituting laws or regulations that affect the rights of orphaned works. These bodies can, and should, continue to review the relevant issues and use their expertise to manage these rights.

¹³ Statement of Interest of the United States of America at 22; Brief of *Amicus Curiae* Public Knowledge in Opposition to the Proposed Settlement, (Dkt. 781) at 25-29, *The Authors’ Guild, Inc. et al v Google, Inc.*, 05-cv-8136(DC)(S.D.N.Y. Sept. 29, 2009)

¹⁴ Objection of Amazon.com, Inc. at 41; Brief of *Amicus Curiae* Public Knowledge at 31; Statement of Interest of the United States of America at 2.

¹⁵ Picker, *The Google Book Search Settlement*, pp. 406-407.

¹⁶ *Amicus Curiae* Brief of Sony Electronics at 14 (citing *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)).