

The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement

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I. Introduction

In 2004, in keeping with its corporate mission “to organize the world’s information and make it universally accessible and useful,”¹ Google began an ambitious book search project aimed at creating an online searchable database of all of the world’s books.² It started by scanning and making searchable millions of books provided by major university libraries.³ In response to a user’s search query, Google would list books in its database containing the search term, and users could go on to view “snippets” of text surrounding the term.⁴ Google did not obtain permission from the rightsholders of each book, maintaining that its actions constituted fair use.⁵ A group of authors and publishers disagreed and brought a class-action lawsuit against Google alleging copyright infringement.⁶

After extended negotiations, the parties reached a proposed settlement agreement that went beyond the scope of the pleadings to create a business framework that would allow Google, not only to scan and display snippets, but to sell access to entire copyrighted works in its database.⁷ After some revisions, a proposed Amended Settlement Agreement (ASA) was

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¹ Google Company Overview, <http://www.google.com/about/corporate/company/>.

² See generally John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1.

³ See *About Google Books: History of Google Books*, <http://www.google.com/googlebooks/history.html>; Jeffrey Toobin, *Google’s Moon Shot*, NEW YORKER, Feb. 5, 2007, available at http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin.

⁴ See *About Google Books, Overview*, <http://www.google.com/googlebooks/about.html>.

⁵ See Eric Schmidt, *Books of Revelation*, WALL ST. J., Oct. 18, 2005, at A18, available at <http://googleblog.blogspot.com/2005/10/point-of-google-print.html> (“Copyright law . . . is all about which uses require permission and which don’t; and we believe . . . that the use we make of books we scan through the Library Project is consistent with the Copyright Act . . . [and does not need] copyright-holder permission.”).

⁶ See Class Action Complaint, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2005 WL 2463899 [hereinafter Class Action Complaint]; Complaint, *McGraw-Hill Cos. v. Google Inc.*, No. 05-8881 (S.D.N.Y. filed Oct. 19, 2005), 2005 WL 2778878 [hereinafter Publishers Complaint].

⁷ See Settlement Agreement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), available at http://www.googlebooksettlement.com/r/view_settlement_agreement [hereinafter Initial Settlement Agreement].

filed.⁸ The ASA triggered many objections from Google’s competitors,⁹ the Department of Justice,¹⁰ some rightsholders, and others.¹¹ Some argued that the Rule 23 class action mechanism could not be used to launch a broad business arrangement that would release claims for future acts not before the court. Others contended that the ASA should not be approved as its terms are inconsistent with copyright law; if reform is needed, it should be undertaken by Congress and not by private parties under the auspices of a class action settlement. Still others, most importantly the Department of Justice, also asserted antitrust objections. The district court held a fairness hearing in February 2010¹² and subsequently rejected the ASA on March 22, 2011.¹³

The proposed settlement was, of course, not just a private agreement and the judicial proceeding in which it was rejected was not an antitrust enforcement matter. However, I will set aside the threshold class action and copyright issues in this article and focus on the antitrust questions. From an antitrust perspective, did the court’s rejection of the ASA result in “a victory for the public good” in preventing one company from “monopolizing access to our common

⁸ Amended Settlement Agreement § 1.31, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), *available at*

http://www.googlebookssettlement.com/r/view_settlement_agreement [hereinafter “ASA”].

⁹ *See, e.g.*, Objections of Microsoft Corp. to Proposed Amended Settlement and Certification of Proposed Settlement Class and Sub-classes, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC); Objection of Amazon.com, Inc., to Proposed Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2009 WL 4888799 [hereinafter Amazon’s First Objections]; Objection of Amazon.com, Inc., to Proposed Amended Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2010 WL 451143 [hereinafter Amazon’s Second Objections]; Objections of Yahoo! Inc. to Final Approval of the Proposed Class Action Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2009 WL 2980749 [hereinafter Yahoo!’s Objections].

¹⁰ Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), *available at* <http://www.justice.gov/atr/cases/f250100/250180.pdf> [hereinafter DOJ First Statement of Interest]; Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, *Authors’ Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), *available at* <http://www.justice.gov/atr/cases/f255000/255012/pdf> [hereinafter DOJ Second Statement of Interest].

¹¹ A full list of the amicus briefs and letters filed either supporting or opposing approval of the ASA can be found on a website maintained by the New York Law School on the case. *See Library Documents*, THE PUBLIC INDEX, <http://thepublicindex.org/documents/libraries>.

¹² *See* Transcript of Fairness Hearing, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), *available at* <http://thepublicindex.org/docs/caseorder/fairness-hearing-transcript.pdf>.

¹³ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

heritage,” as Harvard Librarian Robert Darnton, a vocal opponent, claims?¹⁴ Or was it “a missed opportunity” and an unfortunate development for consumers, who are unlikely to see a comprehensive digital library and enjoy its many associated social benefits anytime soon?¹⁵

An antitrust claim made by the government and some objectors, with which the court agreed, was that the ASA would give Google a monopoly over the exploitation of the so-called “unclaimed” or “orphan” works—books whose rightsholders are unknown or cannot be located—stemming from the alleged de facto exclusivity over these books that the ASA would bestow on Google.¹⁶ Implicit in this argument is that unclaimed books or their digital distribution constitute the relevant market; otherwise having de facto exclusivity over them cannot provide a significant source of market power to Google. But it seems implausible that a small subset of out-of-print books with low commercial value can be so unique and valuable that having exclusivity over them would give someone market power. Based on a more realistic broader market definition—the digital distribution of all books—Google’s exclusivity over unclaimed books is unlikely to translate into substantial market power.

In any event, there must be “exclusionary conduct” and the likelihood of anticompetitive effects for the settlement to be objectionable on antitrust grounds.¹⁷ Yet, even with respect to unclaimed books, the effects of the ASA seem procompetitive, and not merely non-anticompetitive: while de facto exclusivity may not be ideal, the proposed settlement would revitalize tens of millions of out-of-print books (including the unclaimed), and there seems to be no less restrictive alternative.¹⁸ The agreement would also bring many social

¹⁴ Robert Darnton, *A Digital Library Better Than Google’s*, N.Y. TIMES, Mar. 23, 2011, at A31. See also Robert Darnton, *Google and the New Digital Future*, N.Y. REV. OF BOOKS, Dec. 17, 2009, available at <http://www.nybooks.com/articles/archives/2009/dec/17/google-and-the-new-digital-future/>; Robert Darnton, *Google & the Future of Books*, N.Y. REV. OF BOOKS, Feb. 12, 2009, available at <http://www.nybooks.com/articles/22281>. Darnton fervently opposes approval of the ASA.

¹⁵ See Gregory K. Leonard, *District Court Rejects the Google Books Settlement: A Missed Opportunity?*, THE ANTITRUST SOURCE, (Apr. 2011), www.antitrustsource.com.

¹⁶ See *Authors Guild*, 770 F. Supp. 2d at 683; DOJ Second Statement of Interest, *supra* note 10, at 12.

¹⁷ See, e.g., *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *U.S. v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (“First, to be condemned as exclusionary, a monopolist’s act must have ‘anticompetitive effect’. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice . . .”).

¹⁸ Professor Einer Elhauge and Mark Lemley have argued that, even if the ASA produces a monopolist of unclaimed books, having one is better than none. See Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010); Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, 2010-2 AMI: TIJDSCHRIFT VOOR AUTEURS-, MEDIA- & INFORMATIERECHT 55 (2010), available at <http://ssrn.com/abstract=1431555>. See also Jerry A. Hausmann & J. Gregory Sidak, *Google and the Proper*

benefits, particularly to the disadvantaged. As to the argument that exclusivity over unclaimed books would further Google’s alleged dominance in online search (an argument that the government briefly referenced),¹⁹ there are a few basic problems with this ambitious assertion that will be addressed.

The bottom line is that, rather than being anticompetitive, the ASA has procompetitive effects. That it enhances consumer welfare from a microeconomic perspective is almost without dispute: it would increase output for every category of books and also provide numerous efficiencies.²⁰ That it promises equal access to books to all—from the most privileged to the least privileged—is also important, at least where the potential anticompetitive effects are hypothetical (and the “monopoly,” if indeed there is one, would be an unintended result attributable to the operation of the copyright laws and not the ASA itself).

No one claims that the ASA is perfect or that no alternative option could possibly produce greater consumer benefits. Aside from the fact that the antitrust laws do not require an agreement with the best or most competitive outcome,²¹ the perfect is often the enemy of the good. The alternatives or fixes that some objectors prefer over the “monopoly” that they fear the ASA might confer on Google—public control, Congressional copyright reform allowing *free* use of unclaimed books, continuing with litigation and winning on fair use, and requiring price or other government regulation as a condition of approval—are not necessarily better than the ASA. Even if they were, there is little to be gained and much to lose by rejecting the good for the conjectural perfect.

I conclude by suggesting a compromise that might satisfy the court’s copyright concerns and still facilitate the creation of a relatively large digital library, assuming that the class action hurdle can also be overcome. Of course, the compromise would have to make business sense for the parties, and I do not claim to know if it does.

Antitrust Scrutiny of Orphan Works, 5 J. COMPETITION L. & ECON. 411 (2009) (providing a positive economic analysis of the settlement agreement).

¹⁹ See DOJ Second Statement of Interest, *supra* note 10, at 22 (devoting only one paragraph in a 25-page brief to this argument, and noting that it was a complaint of Google’s competitors).

²⁰ See Elhauge, *supra* note 18, at 8-12, 29-57. Even the DOJ and critics of the ASA generally acknowledge this. See *infra* notes 66-69 and accompanying text.

²¹ See, e.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (stating that the Sherman Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”). *Trinko* involved a unilateral refusal to deal but the same principle applies to the settlement agreement at issue.

II. The Google Book Search Project, the Proposed Settlement Agreement, and the Rejection of the Settlement

Google began its bold book search project by entering into agreements with several major research libraries, including Harvard, Michigan, Oxford, Stanford and others, to scan and index the contents of their library collections to make them digitally searchable.²² It also had agreements with some publishers authorizing Google to do the same with their books.²³ In response to a user's search query, Google lists books in its digitized collection that contain the search term. If a specific book in the search results is already in the public domain (out-of-copyright), the user may download or view it online in its entirety.²⁴ If a book is still in-copyright, Google displays "snippets" of text surrounding the search term to provide the user with some context,²⁵ unless the rightsholder has directed Google not to do so. For books provided to Google by a participating publisher, more text may be previewed if the publisher authorizes it. Search results also include links to sources from which a specific book can be borrowed or purchased.²⁶

Google has apparently spent hundreds of millions of dollars on research and development of advanced scanning technology and in otherwise implementing the massive project.²⁷ To date, it has scanned and digitized over 12 million books.²⁸ About two million,

²² See Toobin, *supra* note 3. For a list of the library partners in the project, see *Google Books Library Partners*, <http://www.google.com/googlebooks/partners.html>. The participating libraries receive, in return, digitized copies of all their books for preservation and other uses. ASA, *supra* note 8, § 7.2 (a). The agreements between several libraries and Google can be found on a website maintained by the New York Law School. See Library Documents, THE PUBLIC INDEX, available at <http://thepublicindex.org/documents/libraries>.

²³ See generally Schmidt, *supra* note 5.

²⁴ See *What You'll See When You Search on Google Books*, <http://www.google.com/googlebooks/screenshots.html> (showing different viewing versions depending on the copyright status of the book).

²⁵ See *id.*

²⁶ For a sample page, see <http://books.google.com/books?id=yNFN1OpnkBkC>.

²⁷ While there are no exact figures on the cost of the project to Google so far, it was reported in an article published in 2007 that Google had already spent \$100 million on scanning. See David Chen, *Google's Book Search Library Project Faces Legal Challenges*, ILL. BUS. L.J., Nov. 21, 2007, available at http://iblsjournal.typepad.com/illinois_business_law_soc/2007/11/googles-book-se.html. See also Memorandum of Law in Support of Plaintiffs' Motion for Final Settlement Approval at 2, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2010 WL 563051 (stating that Google had "spent hundreds of millions of dollars researching, developing, patenting and implementing cutting edge digital scanning technology.").

²⁸ See *Authors Guild*, 770 F. Supp. 2d at 670.

mostly those obtained from publishers participating in the Google books project, are in-copyright and in-print.²⁹ Another two million are books in the public domain—very old books with clearly expired copyrights.³⁰ The rest are out-of-print (or commercially unavailable) books that are still in-copyright or have uncertain copyright status.³¹ Of the out-of-print books, it is unclear how many have rightsholders who are truly unknown or cannot be found—the “unclaimed” or so-called “orphan” works--and how many have rightsholders who *could* be identified and located with some effort but there has been insufficient (or no) demand for their books to justify the transaction costs in doing so.³²

In theory, Google could have conducted a book-by-book search for the rightsholders of the millions of out-of-print books supplied by the research libraries and obtained rights clearances before digitizing and adding them to its database. In practice, the transaction costs would have been prohibitive.³³ Thus, rather than take that path, Google has consistently asserted that scanning books, indexing to make them searchable, and displaying snippets in response to user searches constitute “fair use” under copyright law and required no rights clearance,³⁴ a position with which some authors and publishers disagreed.

In 2005, the Authors Guild brought a class action suit against Google alleging that its actions constituted copyright infringement.³⁵ Shortly thereafter, a few publishers brought a similar suit, which was consolidated with the authors’ suit.³⁶ As expected, Google asserted “fair

²⁹ In-print books are termed “commercially available” books in the Google books settlement agreement--defined as books that are in-copyright and available for purchase new from any vendor. *See ASA, supra* note 8, § 1.31. In this article, I will use the more colloquial term “in-print” rather than “commercially available” to refer to these books.

³⁰ *See Competition and Commerce in Digital Books: Hearing Before the House Comm. on the Judiciary, 110th Cong. 5* (2009).

³¹ *See infra* notes 107-110 and accompanying text (explaining why older out-of-print books sometimes have unclear copyright status).

³² *See Hausman & Sidak, supra* note 18, at 420 (citing estimates that range from 12 percent to 70 percent of all books).

³³ *See, e.g., Katharina de la Durantaye, Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 229* (2011) (discussing the unclaimed works problem); *infra* Part III.A.

³⁴ *See Schmidt, supra* note 5; Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc. at 7, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2005 WL 3309666; *see also* 17 U.S.C. § 107 (2006) (defining fair use using four factors, which include “the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work”).

³⁵ Class Action Complaint, *supra* note 6.

³⁶ Publishers Complaint, *supra* note 6.

use,” a defense that many copyright scholars believe is strong.³⁷ After lengthy negotiations, the parties filed a proposed settlement that went well beyond attempting to resolve the original dispute over Google’s scanning and displaying of snippets without copyright permission. In response to various objections filed, including antitrust and other concerns raised by the Department of Justice, the parties filed a complex, 166-page long, Amended Settlement Agreement (ASA) that modified some terms but did not change the basic structure of the initial settlement.³⁸ More objections were filed, including a second Statement of Interest from the DOJ.

A. The Proposed Amended Settlement Agreement (ASA)

The ASA was audacious and, even as amended, controversial.³⁹ It did not attempt to merely settle claims raised in the complaint – that scanning copyrighted texts and displaying

³⁷ See, e.g., Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91-94 (2006) (arguing that scanning books to index them for searchability is fair use); Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010) (concluding that Google’s fair use defense is strong but that the cost of litigation could be extremely high). The DOJ also seemed to believe that Google had stayed within the bounds of fair use. See United State Second Statement of Interest, *supra* note 10, at 7 (describing Google’s book search as “staying within colorable ‘fair use’ grounds”). See also Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (advocating broad fair use for search engines).

³⁸ ASA, *supra* note 8. The major changes in the ASA involved ensuring the protection of rightsholders of unclaimed works by providing for the appointment of an Unclaimed Works Fiduciary to represent their interests and control funds collected for them; addressing some DOJ concerns regarding horizontal price fixing among rightsholders by changing a few pricing provisions; and narrowing the class to exclude many foreign rightsholders. See, e.g., ASA §§ 1.13, 1.19, 4.2(b), 4.5(b), 6.2.

³⁹ For analyses critical of, or objecting to, the ASA, see, e.g., James Grimmelman, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, AM. CONST. SOC’Y FOR L. & POL’Y (April 15, 2009) [hereinafter Grimmelman, *The Google Book Search Settlement*]; James Grimmelman, *The Amended Google Books Settlement is Still Exclusive*, COMPETITION POL’Y INT’L ANTITRUST J., Jan. 2010(2) [hereinafter Grimmelman, *The Amended Google Book Search Settlement is Still Exclusive*]; James Grimmelman, *How to Fix the Google Book Search Settlement*, 12 J. INTERNET L. 10, [at 1] (2009) [hereinafter Grimmelman, *How to Fix the Google Book Search Settlement*]; Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 499, 2009), available at <http://ssrn.com/abstract=1507172> [hereinafter Picker, *Assessing Competition Issues*]; Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009) [hereinafter Picker, *A New Orphan-Works Monopoly?*]; Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, GCP: THE ANTITRUST CHRON., (Oct. 29 2009), available at <http://ssrn.com/abstract=1499482> [hereinafter Picker, *Framing Baselines*]; Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010) [hereinafter Samuelson, *Google Book Search and the Future of Books*]; Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479 (2011) [hereinafter Samuelson, *The Google Book Settlement as Copyright Reform*]; see also *supra* note 14.

snippets without copyright permission constituted copyright infringement.⁴⁰ Instead, it aimed to launch a joint venture between Google and rightsholders that would allow Google to sell access to *entire* copyrighted works, splitting earned revenues with the rightsholders.⁴¹ In effect, the ASA sought to use the Rule 23 class action mechanism to enable Google to overcome the unclaimed-works impediment to the creation of a comprehensive digital library:⁴² unless rightsholders opted out, their works would be covered by the ASA, thus obviating the need for Google to locate the rightsholders of tens of millions of out-of-print books for individual rights clearances before making available the full content of their works.

Under the ASA, Google would have a non-exclusive right to continue to digitize most books published before January 5, 2009 and allow the public to freely search its digital library.⁴³ For out-of-print books, readers would be able to freely preview 20 percent of their content, instead of just snippets, in response to a search;⁴⁴ for in-print books, rightsholders would control how much, if any, content may be previewed.⁴⁵ Google could sell to colleges and other entities “institutional subscriptions,” a new product consisting of the full texts of all out-of-print books, except those specifically excluded by their rightsholders, and all in-print books whose rightsholders have elected inclusion.⁴⁶ It would also provide each public library and non-profit college with at least one public access terminal with a free license to fully view the institutional subscription database.⁴⁷ As an aside, another social value that Google is committed to provide under the ASA is to greatly broaden access to books for the blind and visually impaired by using

⁴⁰ The portion of the ASA that settles the actual infringement claims in the pleadings provides that Google is released from liability for scanning, indexing and displaying snippets in exchange for a cash payment of at least \$45 million to rightsholders whose works were digitized without their permission before May 5, 2009 (\$60 per book and \$15 per insert). See ASA, *supra* note 8, §§ 2.1(b), 5.1.

⁴¹ See, e.g., *id.* § 4.1 (institutional subscriptions), § 4.2 (consumer purchases).

⁴² The ASA defines the settlement class as consisting of all holders of a U.S. copyright in books and inserts as of January 4, 2009. This would encompass all works covered by a copyright as of that date, including unclaimed works. See *id.* §§ 1.13, 1.19, 1.75. This means that, had the ASA been approved, Google would have received a license to distribute unclaimed books without having to identify and locate their rightsholders for permission because of the opt-out class action mechanism. See Fed. R. Civ. Proc. Rule 23.

⁴³ See *Authors Guild*, 770 F. Supp. 2d at 669-70 (summarizing major terms).

⁴⁴ See ASA, *supra* note 8, §§ 4.1, 4.3.

⁴⁵ *Id.* §§ 3.2–3.3.

⁴⁶ *Id.* § 4.1.

⁴⁷ *Id.* §§ 1.117, 1.69, 1.21, 4.8. The number of free-access terminals Google would provide each nonprofit college is based on the number of students enrolled (one for every 10,000 students at four-year colleges and every 4,000 at two-year community colleges). *Id.* § 4.8 (a)(i). The only difference between the free access license and the institutional subscription is that readers cannot download, copy or paste using the free terminal, though they may print pages for a fee. *Id.*

technologies to vocalize digitized text, increase font sizes and provide “refreshable Braille displays” all at no higher price.⁴⁸ Unsurprisingly, social justice groups and representatives of disadvantaged communities were among the ASA’s strongest supporters.⁴⁹

Google could also sell online access to individual books in its digital library to consumers,⁵⁰ sell advertising on displayed book pages,⁵¹ and make certain other prescribed uses of the copyrighted works.⁵² All of Google’s rights under the ASA are non-exclusive⁵³ and subject to rightsholders’ perpetual right to have their books removed from Google’s database (or not be digitized in the first place if they have not yet been digitized), or to have them excluded from any or all of the permitted uses,⁵⁴ even if they had not opted out of the class action.⁵⁵ In fact, for in-print books, Google may *not* make any display use of the copyrighted works without the rightsholders’ prior authorization.⁵⁶ It is only for out-of-print books that the default is to permit use unless the rightsholder instructs Google otherwise.

⁴⁸ See *id.* § 7.2 (g); see also Statement of Marc Maurer, President of the National Federation of the Blind, Transcript of Fairness Hearing, *supra* note 12, at 14-17; Letter of the National Federation of the Blind in support of approval of the ASA, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 5-CV-8136-DC), available at http://thepublicindex.org/docs/amended_settlement/NFB_request_appear.pdf.

⁴⁹ See, e.g., Comments of Disability Organizations of or for Print-Disabled Persons in Support of the Proposed Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 5-CV-8136-DC), available at <http://thepublicindex.org/docs/letters/NFB.pdf>; Statement of Lateef Mtima, Institute for Intellectual Property and Social Justice, Professor of Howard University, in support of the ASA at the Fairness Hearing, Transcript of Fairness Hearing, *supra* note 12, at 5-9; *supra* note 48. See generally Lateef Mtima and Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise, Digitizing Textual Information*, 55 N.Y.L. Sch. L. Rev. 77 (2011).

Letters supporting approval of the ASA also came from various civil rights groups, minority, disabled and other less privileged communities, and smaller colleges, including the National Association for Equal Opportunity in Higher Education, filed Sept. 9, 2009; Leadership Conference on Civil Rights, filed Sept. 3, 2009; League of United Latin American Citizens, filed Aug. 12, 2009; National Association of Federally Impacted Schools, filed Aug. 7, 2009; American Association of People with Disabilities, filed Aug. 5, 2009; Abilene Christian University, filed Aug. 28, 2009; and others. All letters are available at <http://thepublicindex.org>.

⁵⁰ ASA, *supra* note 8, § 4.2 (consumer purchases).

⁵¹ *Id.* § 4.4.

⁵² See *id.* §§ 3.1, 4.1-4.8.

⁵³ *Id.* §§ 2.4, 3.1(a).

⁵⁴ *Id.* §§ 1.124, 3.5(a)(i) (do not scan/removal rights); 3.2(e)(i), 3.5(b) (exclusion rights).

⁵⁵ In this respect, the ASA operates differently from most class action settlements, which generally apply to all class members who do not opt out by the class-action opt out date set forth in the class action proceedings.

⁵⁶ ASA, *supra* note 8, §§ 3.2-3.3.

Google would retain 37 percent and pay rightsholders 63 percent of all revenues received from these uses,⁵⁷ including from the sale of advertising on the displayed pages,⁵⁸ subject to the right of either the individual rightsholder or Google to negotiate a different revenue split for in-print books.⁵⁹ The payments would be made to a non-profit “Book Rights Registry” (Registry), to be established with initial funding from Google, for distribution to rightsholders in accordance with allocation plans and procedures specified in the ASA.⁶⁰ In addition to administering payment distributions, the Registry’s other tasks would include locating and registering rightsholders, creating and maintaining a database of this information that would be made available to the public,⁶¹ and otherwise acting as the intermediary between rightsholders and Google.⁶² It may also represent rightsholders in dealings with any third party, including Google’s potential competitors.⁶³ Because of potential conflicts of interest between the named plaintiffs and rightsholders of unclaimed works, the ASA calls for the appointment of an “Unclaimed Works Fiduciary” (Fiduciary) to represent the interests of the latter.⁶⁴ Monies that are due to rightsholders of unclaimed works would be escrowed until claimed, and funds that remain unclaimed by a rightsholder after ten years would be donated to certain charities.⁶⁵

The ASA drew mixed reactions. Supporters, the court, and even many opponents generally applauded it for greatly facilitating and broadening access to books for all,⁶⁶ with the

⁵⁷ *Id.* § 2.1(a) (the revenue split is actually 70% for rightsholders minus 10% for operating costs, which comes out to a 63/37 split).

⁵⁸ *Id.* § 4.5(a) (applying the same split for revenues received from the sale of advertising on pages and other uses).

⁵⁹ *Id.* § 4.5(a)(iii).

⁶⁰ *Id.* §§ 2.1 (c), 6.2(a), (b).

⁶¹ *Id.* § 6.6(d)

⁶² *Id.* § 6.1(b)–(d).

⁶³ *Id.* §§ 6.2 (b)(i), 6.1 (a).

⁶⁴ *Id.* § 6.2.

⁶⁵ *Id.* § 6.3 (a)(i)

⁶⁶ *See, e.g.* *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011). (“The benefits of Google’s book project are many. Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books.”); Statement of Paul Courant, University of Michigan Librarian and professor of Economics, Transcript of Fairness Hearing, *supra* note 12, at 17-21 (noting the benefit of making the libraries of the greatest universities broadly available to all); Stanford University Computer Science Dept. Professors, Letter to Judge Chin Supporting Approval of Amended Settlement Agreement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV-8136-DC) (extolling the “revolution” that the settlement agreement would bring in terms of “the speed with which we can find and get what we want from books” and comparing it to the Gutenberg revolution); Letter from Gregory Crane to Judge Denny Chin in support of the Settlement Agreement at 3, *Authors’ Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), *available at* <http://thepublicindex.org/docs/letters/Crane.pdf> (applauding the agreement’s ability to advance “access

greatest beneficial impact on the disadvantaged and the visually disabled,⁶⁷ for attempting to address the almost universally recognized unclaimed books problem in the face of Congressional inaction,⁶⁸ providing a tool for new research opportunities,⁶⁹ as well as benefiting authors and publishers (had it been approved).

But there was also opposition from some copyright owners, Google's competitors Microsoft, Yahoo! and Amazon, the Department of Justice, and others.⁷⁰ Some objectors,

to the published record of humanity"); Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1310 ("Access to books in the GBS corpus will be dramatically affected if the judge in the Authors Guild v. Google case decides to approve the proposed settlement agreement. The biggest change will be far broader access to out-of-print books"); Darnton, *Google & the Future of Books*, *supra* note 14 ("Who could not be moved by the prospect of bringing virtually all of the books from America's greatest research libraries within the reach of all Americans, and perhaps eventually to everyone in the world with access to the Internet?"). Samuelson and Darnton are both fierce opponents of the ASA. See also Library Association Comments on the Proposed Settlement at 2, Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), available at http://thepublicindex.org/docs/letters/acrl_ala_arl.pdf (welcoming the much greater access to books that the ASA would provide); Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, *supra* note 39, at 5 ("The reading public gets access to the enormous all-time backlist of American arts and letters.").

⁶⁷ See *supra* notes 48-49 and accompanying text. See also DOJ First Statement of Interest, *supra* note 10, at 26 (stating strong support for Google's commitment in the ASA to provide "accessible formats and comparable user experience to individuals with print disabilities").

⁶⁸ See, e.g., DOJ First Statement of Interest, *supra* note 10, at 1 (noting, with apparent approval, that the ASA "has the potential to breathe life into millions of works that are now effectively off limits to the public."); Samuelson, *The Google Book Settlement as Copyright Reform*, *supra* note 39, at 522-23 (acknowledging that the ASA offers a solution for the unclaimed-books problem and would achieve "an important measure of copyright reform" but disapproving of it because the solution would only work for Google); Library Association Comments on the Proposed Settlement, *supra* note 66, at 5 (recognizing that the ASA would efficiently "cut the Gordian knot" of high transaction costs involved in obtaining rights clearances for out-of-print books, which stand in the way of the creation of a comprehensive digital library).

⁶⁹ See ASA, *supra* note 8, §§ 7.2 (d), 1.93 (making available the entire corpus of digital books freely available for "non-consumptive research" to "qualified users" at two designated locations); Letter from Michael A. Keller to Judge Denny Chin at 6, Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), available at <http://thepublicindex.org/docs/letters/Stanford%20Libraries.pdf> (describing how nonconsumptive research using Google's digital books database makes possible advances in linguistic analysis); Letter from Gregory Crane to Judge Denny Chin in support of the Settlement Agreement, *supra* note 66, at 3 (explaining that the ability to research the digital database would allow the classic department to "explore larger, more challenging research projects than were ever feasible before").

⁷⁰ See *Authors Guild*, 770 F. Supp. 2d at 681-82 (citing examples of some authors' opposition); Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Association of American Publishers, Inc. et al., and Google Inc., *The Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), 2010 WL 451144; Letter from Pamela Samuelson to Judge Denny Chin re: Supplemental Academic Author Objections to the Google Book Search Settlement (Jan. 27, 2010), available at

including the DOJ, argued that Rule 23, the class action mechanism, should not be used “to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.”⁷¹ Others, particularly Google’s competitors, Amazon and Microsoft, contended that the ASA would turn copyright law on its head by requiring rightsholders of unclaimed books to opt out instead of requiring the user to obtain advance permission from them as the copyright laws require.⁷² Others, including the DOJ, also asserted antitrust objections.⁷³ The government’s two principal antitrust concerns were that (1) certain pricing mechanisms specified in the ASA might constitute horizontal price fixing agreements among *rightsholders* in violation of Section 1 of the Sherman Act;⁷⁴ and (2) the ASA would give Google a *de facto* monopoly with respect to the distribution of unclaimed works, and also further Google’s dominance in the online search market, in possible violation of Section 2 of the Sherman Act.⁷⁵

[http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/893/;](http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/893/)

supra notes 9-11 and accompanying text.

⁷¹ See, e.g., DOJ Second Statement of Interest, *supra* note 10, at 2; Transcript of Fairness Hearing, *supra* note 12, at 117-24; Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1357 (2010) (arguing that approval of the ASA could “create a dangerous precedent that would encourage class action lawyers to address important public policy questions by bringing lawsuits that begin with a legitimate dispute over a specific issue, but are later enlarged to transform the structure of affected industries and their markets.”).

⁷² See, e.g., Objections of Microsoft Corp. to Proposed Amended Settlement and Certification of Proposed Settlement Class and Sub-Classes, *supra* note 9, at 2–7, (arguing that the class action mechanism cannot be used to achieve legislative reform of copyright laws); Amazon’s First Objections, *supra* note 9, at 7-15.

⁷³ See, e.g., DOJ First Statement of Interest, *supra* note 10, at 16-25; DOJ Second Statement of Interest, *supra* note 10, at 16-23; Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, *supra* note 39, at 3 (arguing that the settlement agreement operates as “a joint agreement among rightsholders with Google as to how Google will price online access to their works going forward” in possible violation of Section 1 of the Sherman Act, and also “creates unique access for Google to orphan works” giving Google “an initial monopoly—and possibly a long-running one—over the use of the orphan works”); Eric M. Fraser, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, 2010 STAN. TECH. L. REV. 4 (contending that the ASA gives Google simultaneous agreements with rightsholders and that the simultaneity concentrates pricing power, leading to cartel pricing and monopolization); Grimmelmann, *How to Fix the Google Book Settlement*, *supra* note 39, at 13–14 (alleging that the Registry poses an antitrust threat, and Google also poses an antitrust threat since it will have “market power” and would be “the only game in town for scanning and search books on anything resembling this scale”); Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1333–35 (claiming that only Google would be able to offer an institutional subscription product, which would then, “over time, lead to price gouging for institutional subscription products”). Darnton, *Google & the Future of Books*, *supra* note 14 (arguing that, under the settlement agreement, Google would “enjoy what can only be called a monopoly—a monopoly of a new kind, not of railroads or steel but of access to information.”).

⁷⁴ DOJ Second Statement of Interest, *supra* note 10, at 16-21.

⁷⁵ *Id.* at 21-23.

B. District Court's Rejection of the ASA

After holding a fairness hearing in February 2010, Judge Denny Chin rejected the ASA on March 22, 2011.⁷⁶ Class action and copyright issues were more central to the court's decision than antitrust concerns. With respect to class action, Judge Chin fundamentally agreed with the DOJ that the class action mechanism may not be used to release claims for future acts that are beyond the scope of the pleadings.⁷⁷ Nor should it be used to implement copyright reforms better left to Congress.⁷⁸ On copyright issues, the court was concerned that the ASA's opt-out provisions would be inconsistent with copyright law, which does not place the onus on copyright owners to do anything to exclude others from exploiting their works; rather, the user must obtain the rightsholders' prior consent.⁷⁹ Though he recognized that copyright law presented an impediment to innovation that technological developments have made possible, Judge Chin held that courts "should encroach only reluctantly on Congress's legislative prerogatives" to address these problems.⁸⁰

One commentator, Gregory Leonard, has characterized the court's approach to class action and copyright issues as "cautious," though perhaps understandably so as it might otherwise have been charged with judicial activism.⁸¹ He argues, however, that there are precedents for "activist" legal rulings, some of which have led to positive societal changes. Citing examples from patent cases, Leonard argues that "it is not unheard of for the rights of intellectual property owners to be abridged 'in the public interest.'"⁸² And he suggests that the court could have taken a "more adventurous approach" given the relatively mild abridgment of intellectual property rights present in the ASA as compared with the patent cases, especially in

⁷⁶ Though Judge Chin was elevated to the Second Circuit Court of Appeals sometime after the fairness hearing, he continues to sit by designation on the case in the Southern District of New York.

⁷⁷ *Id.* at 678-69. The case alleged that Google's book scanning and display of "snippets" constituted copyright infringement, and Google defended on the grounds of fair use. Google did not display the full contents of the scanned books and, accordingly, there were no allegations in the complaint that it did. Yet the ASA would allow Google to sell full access to copyrighted works. The court, therefore, concluded that the released claims exceeded the scope of the pleadings and that "the released conduct would not arise out of the 'identical factual predicate' as the conduct that is the subject of the settled claims." *Id.* The court was also concerned that the interests of at least certain class members, such as academic authors, might be at odds with those of the named plaintiffs. *Id.* at 679-80.

⁷⁸ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677-78 (S.D.N.Y. 2011).

⁷⁹ *Id.* at 680-82.

⁸⁰ *Id.* at 680.

⁸¹ Gregory K. Leonard, *District Court Rejects the Google Books Settlement: A Missed Opportunity?*, ANTITRUST SOURCE, at 3-4 (April 2011) available at <http://www.antitrustsource.com>.

⁸² *Id.* at 4.

light of the strong public interest served by the ASA.⁸³ I will put aside these issues and focus on the antitrust questions.

In a short discussion, the court agreed with the DOJ and Google’s competitors that the ASA “would give Google a de facto monopoly over unclaimed works”⁸⁴ and “would arguably give Google control over the [online] search market.”⁸⁵ Interestingly, the opinion did not refer to the antitrust concern that had most occupied the DOJ’s attention—that some of the pricing mechanisms might restrict competition among rightsholders—suggesting that the Court was unpersuaded by the claim or at least did not consider it of much significance; I will only briefly summarize the issue here before turning to the monopoly of unclaimed works question in the next section.

The horizontal price fixing issue that the court did not address arises from certain revenue sharing and pricing provisions in the ASA. They include a revenue-split formula between rightsholders and Google,⁸⁶ which either side may renegotiate for in-print books,⁸⁷ and the default use of a pricing algorithm to establish prices for individual book licenses available for consumer purchase.⁸⁸ The main antitrust arguments were that, because the named plaintiffs represent all rightsholders, the term relating to a revenue-sharing split resembles horizontal price fixing at the wholesale level, and the term relating to the default use of a pricing algorithm amounts to horizontal price fixing at the retail level, both of which may be per se illegal under Section 1 of the Sherman Act.⁸⁹

In theory, the government has a point. An agreement among competitors delegating to a common agent the authority to set prices for their goods can be construed as an illegal horizontal price fixing agreement.⁹⁰ Under the ASA, however, the competitors (rightsholders)

⁸³ *Id.*

⁸⁴ *Authors Guild*, 770 F. Supp. 2d at 682.

⁸⁵ *Id.* at 683.

⁸⁶ ASA, *supra* note 8, §§ 2.2, 2.4, 4.5

⁸⁷ *Id.* § 4.5 (a).

⁸⁸ *Id.* § 4.2 (b), (c). Institutional subscriptions are priced differently. They are to be priced to achieve two objectives: realizing market rates for each book, and realizing “broad access” by the public. *Id.* § 4.1 (a)(i).

⁸⁹ DOJ First Statement of Interest, *supra* note 10, at 17-22; DOJ Second Statement of Interest, *supra* note 10, at 16-20. *See also* Fraser, *supra* note 73, at 15-17; Amazon’s Second Objection, *supra* note 9, at 18-24; Yahoo!’s Objections, *supra* note 9, at 22-23.

⁹⁰ *See, e.g.*, *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 134-35 (1969) (finding it unlawful for competitors to delegate pricing authority over their goods to a common sales agent); *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540-41 (4th Cir. 1958) (same).

retain the right to set prices for their own books if they so choose.⁹¹ Moreover, the default algorithm is to be *unilaterally* designed by Google to mimic competitive pricing,⁹² and Google has some latitude in discounting.⁹³ There are also clear efficiencies that make it highly unlikely that any court would consider these provisions to be per se illegal.⁹⁴ For example, a standard revenue-split and a default pricing formula would both greatly reduce the transaction costs involved in the creation of the institutional subscription product and the licensing of individual out-of-print books to consumers, which are generally not sufficiently profitable to support individual negotiations. In fact, it would be virtually impossible to offer unclaimed books without the default provisions, either within the institutional subscription or for individual license to consumers.⁹⁵ In this and other respects, the ASA situation closely parallels *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*,⁹⁶ in which the Supreme Court held that a blanket license of all participating rightsholders' music compositions was not per se illegal because the arrangement reduced transaction costs and facilitated the creation of a new product.⁹⁷ Judge Chin's silence on the horizontal price-fixing claim, despite its being the main antitrust focus of the DOJ and others, suggests that he probably did not find it compelling.⁹⁸

⁹¹ ASA, *supra* note 8, §§ 4.2 (b)(i)(1), 4.2(c).

⁹² *Id.* §§ 4.2 (b)(i)(2), 4.2(c)(ii).

⁹³ *Id.* § 4.5 (b)(i) (Google may unilaterally discount any book by up to Google's 37 percent share).

⁹⁴ *See, e.g.,* Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008) (rejecting a per se challenge to a revenue split agreement and suggesting that it was more a profit-sharing than a price-fixing agreement, and finding that the proper standard for evaluating the agreement was whether it was reasonably related to the efficiency enhancing benefits of the arrangement); *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1 (1979) (declining to apply the per se rule to a blanket license of copyright owners' music compositions, though the arrangement literally fixed prices, in part because of efficiencies and the creation of a new product).

⁹⁵ Though the DOJ asserted, in its first Statement of Interest, that the provisions for the default pricing formula were not "reasonably necessary to achieve the stated benefit of the Proposed Settlement—breathing new commercial life into millions of long-forgotten, commercially unavailable works," see DOJ First Statement of Interest, *supra* note 10, at 22, it did not explain its assertion, and it is puzzling how it would be possible to offer unclaimed books without a default pricing provision since, by definition, the rightsholders are not available to make the pricing decision.

⁹⁶ 441 U.S. 1 (1979).

⁹⁷ *Id.* at 9, 20-23. Though the DOJ has attempted to distinguish BMI, Elhauge has responded quite persuasively that the distinctions, if anything, make the ASA's new product more procompetitive than the blanket license in BMI. *See* Elhauge, *supra* note 18, at 59-60.

⁹⁸ Furthermore, the ASA included a waiver to any *Noerr-Pennington* immunity. *Noerr* grants antitrust immunity to joint efforts to petition the government, which covers activities relating to lawsuits. *See* *Eastern Railroad Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961). Without the waiver, the parties might have a claim later that the court's approval of the settlement agreement, over antitrust objections, gave the parties antitrust immunity with respect to the conduct authorized by the agreement, regardless of its competitive effects. In that case, wanting absolute certainty that the pricing

III. Does De Facto Exclusivity Over Unclaimed Works Confer “Monopoly Power”?

A. The Unclaimed Works Problem

The court’s antitrust concerns centered, instead, on unclaimed works and the monopoly issue. The term “unclaimed works” or “orphans” refers to the subset of out-of-print books still under copyright whose rightsholders cannot be located after a diligent search.⁹⁹ By definition, out-of-print books are books that do not have sufficient demand to be commercially available for sale new,¹⁰⁰ and are found mostly on library stacks or perhaps in a few used book stores. They tend to be unclaimed today because it is very difficult to keep track of a book’s rights ownership over its long copyright,¹⁰¹ especially when there is usually no commercial reason to do so given the short marketable life of most books.¹⁰²

Digitization, however, has made it possible to profitably revive these books. Whereas costs generally make the physical republication and distribution of out-of-print books unprofitable (due to insufficient demand), their digital distribution under a blanket license is economically feasible, even if demand for any one book is low or intermittent, since costs are minimal once the books are digitized. However, the transaction costs involved in having to identify and locate their rightsholders and conduct individual negotiations for rights clearances are prohibitively high, discouraging anyone from undertaking the effort.¹⁰³ Google’s unwillingness to incur these costs when it embarked on its book search project, despite its

provisions would have little or no anticompetitive effects might be understandable. The waiver, however, diminishes the risks of waiting to see the actual effects of the seemingly innocuous default pricing mechanisms. If the ASA is approved and the price-fixing concerns turn out to be real and substantial, the DOJ could easily bring an action against the Registry at that time.

⁹⁹ See DOJ First Statement of Interest, *supra* note 10, at 3 n.1.

¹⁰⁰ ASA, *supra* note 8, § 1.31.

¹⁰¹ Copyright protection extends for the life of the author plus 70 years for most books published after 1977. 17 U.S.C. § 302 (2000). For most books published between 1923 and 1963, the period is 95 years after publication. See Copyright Terms and the Public Domain in the United States, <http://copyright.cornell.edu/resources/publicdomain.cfm> (detailing the various terms of copyright protection). During the long period of a copyright, rights ownership could have been assigned to another or devised to the author’s heirs. Publishers holding rights could have been acquired, relocated or gone out of business. See United States Copyright Office, *Report on Orphan Works: A Report on the Register of Copyrights 22-34* (2006).

¹⁰² Another factor adding to the difficulty of identifying rightsholders of out-of-print works is that a copyright sometimes reverts from the publisher to the author if the publisher lets a work go out of print, and it is often unclear whether there has been reversion. See ASA, *supra* note 8, Attachment A, Article IV (funding and providing a process for resolving reversion issues).

¹⁰³ See DOJ First Statement of Interest, *supra* note 10, at 23 (implying that the task of “identifying and negotiating with millions of unknown rightsholders” would be practically insurmountable absent the ASA when it said that Google’s potential competitors would be unable to get comparable rights as Google under the ASA because of these problems).

readiness to spend hundreds of millions of dollars on other aspects of the venture, is probably the best indication of how daunting, and expensive, the task is.¹⁰⁴

But a good percentage of the presently unclaimed books would probably not remain unclaimed if the ASA were implemented.¹⁰⁵ Under the ASA business plan, out-of-print books would be revived and could generate revenue. This should encourage their rightsholders to step forward to “claim” them and their share of the revenues, converting them to claimed status. Simultaneously, the Registry to be established under the ASA and initially funded by Google would be actively attempting to locate and register these rightsholders.¹⁰⁶

The true number of unclaimed books is also expected to be below the current level for another reason: the vast majority of books published between 1923 and 1963 are almost certainly already out-of-copyright but are presently all treated as unclaimed because we have no way of separating the out-of-copyright from the unclaimed. That is because for books published during this period, copyright protection lasts 95 years after publication but *only* if an appropriate renewal form has been filed in the 28th year.¹⁰⁷ Since the commercial life of most books is short, it is estimated that fewer than seven percent of these copyrights were renewed.¹⁰⁸ Unfortunately, poor record keeping by the Copyright Office has made it extremely difficult to filter out the miniscule number that did comply with the renewal requirement and are still in-copyright.¹⁰⁹ Consequently, all must be treated as in-copyright (and unclaimed) because of the potential exposure to substantial damages for copyright infringement should a mistake be

¹⁰⁴ See James Grimmelman Brief of Amicus Curiae at 9, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV-8136-DC) (“Google itself could never, under any circumstances, have privately negotiated the permissions” to unclaimed books); Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement*, *supra* note 39 (recognizing the “impossibility” for Google to have reached individual agreements with rightsholders without a class action settlement).

¹⁰⁵ Estimates as to the actual number of unclaimed books vary. They range from 12% to 70% of all out-of-print books. See Hausman & Sidak, *supra* note 18, at 420; Elhauge, *supra* note 18, at 47 (citing a recent study by the Carnegie Mellon University Library showing that at least 80 percent of currently unclaimed books *could* be located).

¹⁰⁶ ASA, *supra* note 8, § 6.1 (providing that the “Registry will use commercially reasonable efforts to locate Rightsholders of Books and Inserts”). The Registry is to receive \$34.5 million in initial funding from Google. *Id.* §§ 5.2, 6.4.

¹⁰⁷ See , Copyright Terms and the Public Domain in the United States, <http://copyright.cornell.edu/resources/publicdomain.cfm>;

The Online Books Page, <http://onlinebooks.library.upenn.edu/renewals.html>.

¹⁰⁸ See Barbara Ringer, Study No. 31: Renewal of Copyright (1960), reprinted in Library of Congress Copyright Office, *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary*, United States Senate, U.S. Govt. Printing Office.

¹⁰⁹ See Samuelson, *The Google Book Settlement as Copyright Reform*, *supra* note 39, at 502-03 (describing deficient Copyright Office records).

made.¹¹⁰ The ASA is expected to free up 93 percent of these old books to the public domain and reduce the total volume of unclaimed books by creating and funding a process to clarify which books published during this period are out of copyright and which are not,¹¹¹ and to make this information available to the Copyright Office in digital form accessible to the public.¹¹²

The unclaimed works problem benefits no one: for out-of-print books, rightsholders currently earn nothing from them and most readers do not have access to the collective wealth of knowledge that these books hold. The ASA would have benefited many of these rightsholders by generating new sources of income and new audiences for their works.¹¹³ Welfare gains for the public would have been substantial. Anyone with internet access would be able to freely view up to 20% of the content of these works, and anyone at a free-access terminal to be provided by Google at each public library and college could view the entire texts of all such books.¹¹⁴ And, anyone associated with a university and other institution with a paid blanket license to the database (the institutional subscription) would have access to these books in their entirety on any computer with internet access at *any* location.¹¹⁵ One may also purchase a license to an individual book.¹¹⁶

The ASA's ability to unlock the value of out-of-print books and convert the dream of a comprehensive digital library into reality is probably one of the settlement's greatest potential benefits. Ironically, it is also the source of the DOJ's second antitrust concern--the one that the district court found meritorious--that the ASA might give Google a monopoly over the distribution of unclaimed works.¹¹⁷ The theory is that Google would have de facto exclusivity over the distribution of unclaimed books. This de facto exclusivity would, in turn, create a monopoly in the sale of comprehensive digital subscriptions to libraries and other institutions, and also arguably allow Google to maintain its dominance in the online search business.¹¹⁸

B. De Facto Exclusivity Over Unclaimed Books?

¹¹⁰ See 17 U.S.C. § 504 (c)(1) (providing substantial damages for copyright infringement: rightsholders may elect actual damages plus the infringer's profits or statutory damages of at least \$30,000 per infringed book).

¹¹¹ ASA, *supra* note 8, § 3.2(d)(v) & Attachment E.

¹¹² *Id.*, § 6.6(d).

¹¹³ See *generally infra* Part II.A.

¹¹⁴ See *supra* notes 44, 45-47 and accompanying text.

¹¹⁵ See ASA, *supra* note 8, § 4.1.

¹¹⁶ See *id.* § 4.2.

¹¹⁷ See *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011).

¹¹⁸ See DOJ First Statement of Interest, *supra* note 10, at 23-24; see also DOJ Second Statement of Interest, *supra* note 10, at 21-22.

On the issue of whether the ASA would give Google de facto exclusive rights over the distribution of unclaimed books, it seems hard to dispute that it does. While all rights granted Google under the ASA, including the right to exploit unclaimed books, are non-exclusive,¹¹⁹ no one can feasibly obtain a license to use these books comparable to the one Google would have under the ASA because their rightsholders, by definition, cannot be found to give copyright permission.¹²⁰

Professors Einer Elhauge and Mark Lemley have disagreed with this analysis, stressing that potential competitors are free to follow Google’s lead in scanning books and displaying snippets so as to trigger a similar class action, and then settling the suit on similar terms.¹²¹ But as Professor James Grimmelman, a vocal critic of the settlement, has pointed out, one cannot reach the final goal of a settlement on comparable terms without the active cooperation of rightsholders every step of the way.¹²² And, there are no guarantees that they would cooperate since their incentives could be quite different the second time around.¹²³ In any event, as the DOJ sensibly noted in its second Statement of Interest, it seems to be poor public policy to advocate such a course of action as a means of competition.¹²⁴ On this issue, those raising monopolization concerns seem to have the better argument.

But having de facto exclusivity over the distribution of unclaimed books, in and of itself, does not have much antitrust significance.¹²⁵ The law of monopolization, or Section 2 of the Sherman Act,¹²⁶ requires two elements: the possession of monopoly power in the relevant

¹¹⁹ ASA, *supra* note 8, §§ 2.4, 3.1(a).

¹²⁰ See DOJ First Statement of Interest, *supra* note 10, at 23-24.

¹²¹ See Elhauge, *supra* note 18, at 13-14; Lemley, *supra* note 18.

¹²² See Grimmelman, *The Amended Google Books Settlement is Still Exclusive*, *supra* note 39, at 4-5 (analyzing why Google’s potential rivals would not be able to replicate the ASA by following Google’s path without the cooperation of rightsholders, and why rightsholders might make different choices at various junctures if they choose to litigate at all).

¹²³ See *id.*, at 5.

¹²⁴ DOJ Second Statement of Interest, *supra* note 10, at 21 (“The suggestion that a competitor should follow Google’s lead by copying books *en masse* without permission in the hope of promoting a class action suit to be settled on terms comparable to the ASA is poor public policy and not something the antitrust laws require a competitor to do.”).

¹²⁵ Exclusivity arrangements generally do not raise antitrust concerns unless the firms involved have substantial market power, in which event they could have foreclosure effects. The de facto exclusivity in the ASA resembles an exclusive distributorship rather than exclusive dealing—the supplier (rightsholder) is confining sales of unclaimed books to a single retailer (Google), rather than the retailer agreeing not to handle the goods of other suppliers. Courts have long been very lenient with exclusive distributorships. See, e.g., *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957).

¹²⁶ 15 U.S.C. § 2.

market, and exclusionary conduct.¹²⁷ In antitrust law, we usually cannot speak in terms of whether a firm possesses monopoly power without delineating the relevant market, and finding that the firm in question has substantial market share within that market (from which market power can be inferred).¹²⁸ It is only then that having exclusivity over a specific product or service can have anticompetitive effects. Having even 100 percent *share* of the unclaimed works “market” would not give Google monopoly power and the ability to charge monopoly prices¹²⁹ if consumers have reasonable substitutes.¹³⁰ Defining the relevant market, therefore, is important.

C. Market Definition and Market Power

Most ASA opponents voicing antitrust concerns about the settlement agreement seem to implicitly assume that the relevant market consists only of unclaimed books, such that having de facto exclusive rights over their distribution would give Google some sort of monopoly power.¹³¹ Even the district court, in rejecting the ASA, simply stated broadly that the ASA would

¹²⁷ U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (defining illegal monopolization to include 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.”). The second element is often referred to as the “exclusionary conduct” element.

¹²⁸ Defining the market and determining a firm’s percentage share in that market is, in effect, a surrogate for market power. Some courts recognize that it is possible to establish market power *directly*, e.g., evidence of defendant’s ability to charge profit maximizing prices. *See, e.g.*, Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001); Toys “R” Us v. Federal Trade Commission, 221 F.3d 928 (7th Cir. 2000); Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999). But in this case, since there is presently no institutional subscription and, in fact, no output for unclaimed works, no direct evidence of Google’s market power is possible. Thus, to determine whether exclusivity over unclaimed works is likely to give Google any monopoly power, we *must* define the relevant market.

¹²⁹ The fear that Google might be able to charge monopoly prices for the institutional subscription is a principal antitrust concern of many ASA objectors. *See, e.g.*, Library Association Comments, *supra* note 66, at 7-9; Darnton, *Google & the Future of Books*, *supra* note 14 (arguing that Google may “entice subscribers with low initial rates, and then, once they are hooked, ratchet up the rates as high as the traffic will bear”); Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1335-35 (expressing concern that Google may engage in “price gouging” in the sale of institutional subscriptions).

¹³⁰ *See, e.g.*, U.S. v. E.I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377 (1956) (defining the market based on reasonable substitutability on the demand side).

¹³¹ *See, e.g.*, Grimmelman, *How to Fix the Google Book Search Settlement*, *supra* note 39, at 14 (arguing that the ASA would give Google market power); Darnton, *Google and the Future of Books*, *supra* note 14 (claiming generally that the ASA would give Google a monopoly over access to information); Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1334-35 (arguing that Google’s de facto exclusive license to distribute unclaimed works would allow it to charge supracompetitive prices for institutional subscriptions).

impermissibly give “Google a de facto monopoly over unclaimed works.”¹³² Though less vague, the DOJ’s monopoly assertions were also premised on the notion that unclaimed books constitute the relevant market and, therefore, having de facto access to them would be a significant source of market power to Google in the sale of its institutional subscription to libraries, colleges and other institutions.¹³³

In this case, it is doubtful that the relevant market can be defined as narrowly as unclaimed works or the digital distribution of unclaimed works. A market is basically the smallest grouping of products a firm would need to control in order to be able to raise prices profitably without competitive constraints. If consumers have reasonable substitutes, having de facto exclusive rights over unclaimed works would not allow Google to raise prices with impunity.¹³⁴ And, the relevant market would *not* consist of only unclaimed books.

Technically, the copyright laws do ensure that each copyrighted work is differentiated from other works and, therefore, unclaimed works (being copyrighted) have no literal substitutes. But common experience should inform us that many unclaimed works are probably not so unique that reasonable substitutes are unavailable. In most cases, one can probably find comparable content in other books—books that are either in-print or out-of-print but claimed. There will no doubt be some rare or highly specialized books for which there are no good substitutes. But the people who wish to buy these unique books may be few in number. And it seems implausible that a single seller of a small group of books, each with a limited number of possibly price-insensitive buyers, would be able to leverage any power in this small market segment into other book segments.

Bear in mind that, had the ASA been approved, most books remaining unclaimed over time would likely be ones with the lowest commercial value. As Google puts out-of-print books to different uses under the ASA, revenues would be generated for those with at least some reader interest, which would in turn encourage their rightsholders to register to claim their

¹³² See Authors Guild, 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011).

¹³³ See DOJ First Statement of Interest, *supra* note 10, at 24 (“This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database—*i.e.*, one that does not include the millions of orphan works—cannot compete effectively with the seller of a comprehensive product.”).

¹³⁴ See *Cellophane*, 351 U.S., at 380 (appraising the cross-elasticity of demand and determining whether the product in question has reasonable substitutes; if it does, the reasonable substitutes should be included in the market definition).

works.¹³⁵ No doubt, the rightsholders of some out-of-print books that have commercial value may never be located, or may choose not to identify themselves to collect their money for whatever reason. But it is reasonable to assume that most books that stay unclaimed would probably be those that have generated minimal (or no) income, giving their rightsholders little incentive to claim their books. Given that, it is hard to imagine that this small subset of out-of-print books, mostly unread by anyone despite the convenience of digital viewing of all books, is likely to be so unique and valuable that no reasonable substitutes can be found for most of them among the other categories of books. Thus, the relevant market is unlikely to consist only of unclaimed books. And even if a limited number of the unclaimed books have no good substitutes, there should still be little antitrust concern so long as the effects, as discussed in a later section, are not anticompetitive.

An alternative formulation--the sale of institutional subscriptions (which include unclaimed works)--would not change this analysis. If unclaimed works do not constitute a separate market with antitrust significance, then a comprehensive digital-book database including these books to which institutions may subscribe also should not be so unique that subscribers have no reasonable substitutions. It bears remembering that, except for unclaimed works, Google's rights are completely non-exclusive under the ASA and there are no restrictions on competition. Any firm seeking to compete with Google in offering subscriptions to libraries, universities and other institutions, therefore, has a variety of options. It may obtain licenses for the digital distribution of *in-print* books or of all or any portion of out-of-print but *claimed* books, enabling it to offer subscriptions to a database comprising various combinations of these book segments.

There is little reason to assume that, to sell a digital subscription in competition with Google, one *must* be able to include the subset of books that remains abandoned and likely has the least value. As Lemley has noted, a potential competitor such as Amazon might well prefer to "cream skim" the top one million works and avoid the expense of scanning the unprofitable or less profitable ones.¹³⁶ Given the diversity of needs of different institutions, subscriptions covering a narrower range of books may prove more attractive to some than the broad blanket license offered through Google's institutional subscription. For colleges and libraries, another

¹³⁵ See *supra* notes 46, 50-52 and accompanying text. The Registry is also tasked with locating rightsholders of out-of-print books to register them so that they may collect their share of profits. ASA, *supra* note 8 § 6.1(b).

¹³⁶ Lemley, *supra* note 18.

firm's more limited subscription service may well be a satisfactory substitute for Google's paid institutional subscription since it would be complemented by the free Google terminal with free comprehensive access that each college and library is entitled to receive under the ASA regardless of whether it purchases an institutional subscription from Google. In short, the sale of Google's institutional subscriptions is unlikely to constitute a relevant market because narrower subscription services could be reasonable substitutes for many buyers.

It seems, then, that the relevant market should at least encompass the digital distribution of *all* books. If the correct market definition includes all works, there would be no basis to conclude that Google's de facto exclusivity over unclaimed works would give it market power. Google currently has minimal, if any, market share in this relevant market. Had the ASA been approved, it is true that Google would likely be the dominant digital distributor of *out-of-print* books in the short-term because many out-of-print books are probably unclaimed at the outset, and no one except Google would have access to them. But its initial substantial share in this book segment would not necessarily endure. The ASA is expected to induce rightsholders of an increasing number of out-of-print books to claim them. Once books become claimed, anyone is free to license them either directly from the rightsholders or through the Registry. In time, one would expect Google's rivals to secure licenses for their distribution, should the enterprise prove profitable, diminishing Google's share in the out-of-print segment of the market.

Moreover, the ASA only approves the right of Google to provide digital *online* access to books,¹³⁷ not to sell digital books for devices such as the Kindle, iPad, Nook or the Sony e-reader. Yet it is probably safe to assume that most readers prefer reading books on devices than online. To secure a license to offer digital books on a device, Google would have to negotiate with the Registry or individual rightsholders outside of the ASA and would merely be a late comer with no competitive edge attributable to the ASA over the incumbents.

More importantly, *in-print* (not out-of-print) books are the ones with the most consumer demand¹³⁸ and Google is unlikely to become a dominant player in their digital distribution. Digital rights for newer in-print books are usually held by their existing publishers, and the ASA requires Google to obtain digital licenses from them before even snippets may be

¹³⁷ ASA, *supra* note 8 §§ 1.35, 1.77, and 4.7.

¹³⁸ See BOOK INDUSTRY STUDY GROUP, USED-BOOK SALES: A STUDY OF THE BEHAVIOR, STRUCTURE, SIZE, AND GROWTH OF THE U.S. USED-BOOK MARKET (2006) (reporting that, of the total non-textbook sales of \$21 billion in 2004, \$600 million was from the sale of used books). In other words, at least 97 percent of all revenues from non-textbook sales came from the sale of in-print books.

displayed in response to searches.¹³⁹ Thus, with respect to the digital distribution of in-print books, Google would simply be a potential newcomer who has to negotiate with the publisher (or author) in order to compete. Given that Google does not derive special benefits from the ASA for the segment of books with the highest consumer demand, it is difficult to see how the proposed settlement would give Google monopoly share in the digital distribution of *all* books. Stated differently, de facto exclusivity over a residual, ever less important, portion of out-of-print books (the unclaimed works) is unlikely to permit Google to exercise market power in the digital distribution of books.

D. Barriers to Entry

Of course, market share data cannot be viewed in isolation in evaluating market power. In contemporary antitrust analysis, courts often look at entry barriers to qualify inferences drawn from market shares. Ease of entry could rebut the inference of market power from high market shares.¹⁴⁰ Conversely, where market shares are not substantial but high entry barriers are present, courts have found market power to exist.¹⁴¹

What constitutes an entry barrier depends on whether the broader Bainian or narrower Stigler approach is taken. Under the Stigler model, only challenges that potential new entrants face but that the incumbent did not (when it entered the market) are considered entry barriers.¹⁴² Using this narrow definition, there are few, if any, entry barriers in the digital books distribution business since Google initially had to confront the same daunting challenges that its potential rivals would face: an unclaimed works problem with seemingly no workable solution, a legally uncertain fair-use doctrine, high costs of entry, and uncertain commercial success.

¹³⁹ See ASA, *supra* note 8, §§ 3.2 – 3.3.

¹⁴⁰ See, e.g., *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (stating that looking only at market share to infer market power can be “misleading” but finding that barriers to entry existed to protect Microsoft’s operating systems market share); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.2d 90 (2d Cir. 1998) (finding that, though a 70 percent share of the relevant market was strong evidence of monopoly power, it was rebutted by ease of entry); *Reazin v. Blue Cross & Blue Shield of Kansas Inc.*, 899 F.2d 951 (10th Cir. 1990) (considering also entry barriers, supply and demand elasticities and other factors when drawing inferences from market share data).

¹⁴¹ See, e.g., *Syfy Enters. v. American Multicinema Inc.*, 903 F.2d 659 (9th Cir. 1986) (finding monopoly power with below 70 percent market share where entry barriers were high).

¹⁴² George J. Stigler, *THE ORGANIZATION OF INDUSTRY* 67 (1968). Under this approach, scale economies would *not* be considered an entry barrier since the incumbent faced the same problem of having to begin production and achieve lower costs through high output when it first entered the market.

Under the Bainian approach, any market condition that provides an incumbent with protection from new entry constitutes an entry barrier.¹⁴³ Applying this broader definition, entry barriers do exist (though are not the consequence of the ASA) with respect to unclaimed books but not other segments of the market. For unclaimed books, unless and until Congress enacts legislation dispensing with the need for rights clearances if the rightsholders cannot be located, no one can obtain a license to exploit these books because the requisite permission cannot be obtained. While the ASA includes a provision explicitly allowing the Fiduciary to license unclaimed works to others “to the extent permitted by law,”¹⁴⁴ current copyright law probably does *not* permit the Fiduciary to license these works to others without the rightsholders’ permission. It is the Rule 23 opt-out class action mechanism that would allow the terms of the ASA (including giving Google a distribution license) to cover unclaimed works without their rightsholders’ explicit consent—they are members of the class and did not opt out. What the ASA provision provides, therefore, is merely authorization to the Fiduciary to license unclaimed works to third parties, without the need for the rightsholders’ individual permission, *if* (and when) Congress passes appropriate legislation making it legal to do so.

The real question on this issue is whether legal entry barriers (not of the ASA’s making) existing for a small subset of the market have enough significance to support a conclusion that Google could exercise monopoly power in the digital distribution of all books—a market in which it currently has minimal, if any, market share and is unlikely to gain dominant share for the most commercially valuable segment of the market (in-print books). I do not think it does.

A few ASA opponents have also suggested that the enormous costs involved in digitizing millions upon millions of books serve as an entry barrier for a Google competitor attempting a mass digitization effort.¹⁴⁵ In terms of financial ability to bear the costs, Google’s most logical competitors, Microsoft, Amazon, and Yahoo!, clearly have the necessary capitalization to create a digital library;¹⁴⁶ whether or not they deem it a good investment is another matter. Indeed, Microsoft had a book digitization project but made a business decision to withdraw, apparently

¹⁴³ Joe S. Bain, BARRIERS TO NEW COMPETITION 3 (1956). Under this definition, economies of scale would constitute an entry barrier because new entrants cannot realistically gain sufficient market share upon entry to operate at optimal efficiency and would have higher costs than the incumbent, which typically has higher and more optimal output rates.

¹⁴⁴ ASA, *supra* note 8 § 6.2(b)(i).

¹⁴⁵ See, e.g., Darnton, *Google and the Future of Books*, *supra* note 14 (“Google alone has the wealth to digitize on a massive scale.”).

¹⁴⁶ See Hausman & Sidak, *supra* note 18, at 412 (observing that Microsoft, Amazon and Yahoo! have \$200 billion, \$38 billion and \$25 billion, respectively, in market capitalization).

concluding that it was more worthwhile to direct its resources elsewhere.¹⁴⁷ As to the possible argument that sunk costs constitute an entry barrier¹⁴⁸ irrespective of the potential rivals' capital resources, the sunk costs required for new entry are no greater than they were for Google when it entered the picture.

The ASA itself also does not increase entry barriers for others. If anything, it would have *diminished* entry costs, and hence the risk of entry, for future entrants by putting into place a system and processes that increase efficiencies and reduce transaction costs.¹⁴⁹ This includes creating procedures for disentangling copyrights,¹⁵⁰ establishing agents (the Fiduciary for unclaimed books and the Registry for others) that could aggregate and license rights on behalf of rightsholders in dealing with third parties,¹⁵¹ and providing monetary incentives for rightsholders of currently unclaimed books to claim their works¹⁵² so that the body of books from which potential new entrants are excluded becomes increasingly smaller and less important as time passes.

In short, despite the de facto exclusivity over unclaimed books that Google would enjoy, had the ASA been approved, it is unlikely to give Google monopoly power in an antitrust sense.

IV. Exclusionary Conduct and Anticompetitive Effects

Though I have just concluded otherwise, for purposes of further discussion, let us assume that the digital distribution of unclaimed books is the relevant market and that Google's de facto exclusivity in that market does give it monopoly power in the sale of subscription services, as the DOJ contends and as the district court accepts. Even then, the mere possession of monopoly power in a relevant market does not offend Section 2 of the Sherman Act. There must additionally be an exclusionary act in the acquisition or maintenance of that monopoly

¹⁴⁷ See, e.g., *Book Search Winding Down*, BING (May 23, 2008, 2:45 AM), <http://www.bing.com/community/blogs/search/archive/2008/05/23/book-search-winding-down.aspx> (noting, in its announcement that it was ending its book search project, that it hoped to move to "more sustainable strategies" where "our investments will help increase the discoverability of all the valuable content that resides in the world of books and scholarly publications.").

¹⁴⁸ See Robert S. Pindyck, *Sunk Costs and Risk-Based Barriers to Entry* (MIT Sloan School Working Paper 4723-09, Feb. 13, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350555; Richard C. Gilbert, *Mobility Barriers and the Value of Incumbency*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 475 (Richard Schmalensee & Robert D. Willig eds., 1989) (discussing strategic entry deterrence, which includes the concept of sunk costs).

¹⁴⁹ See Elhauge, *supra* note 18, at 8-12; Lemley, *supra* note 18.

¹⁵⁰ ASA, *supra* note 8, § 3.2 (d)(v) & Attachment E; Attachment A, Article IV..

¹⁵¹ *Id.* §§ 6.1 (a), 6.2 (b)(i).

¹⁵² See *id.* §§ 2.1 (a), 4.5 (a) (paying to rightsholders 63 percent of revenues from all uses of copyrighted works).

power.¹⁵³ While there is no single definition of exclusionary conduct, the leading antitrust treatise defines it as conduct that tends to create or preserve monopoly power by impairing the opportunities of rivals and that a) either does not benefit consumers, or does so in an unnecessarily restrictive way, or produces harm disproportionate to the benefits.¹⁵⁴

Professor Lemley maintains that no exclusionary conduct is involved in the settlement agreement.¹⁵⁵ By that, he apparently means that the ASA does not authorize or facilitate conduct that affirmatively forecloses competition, raises entry barriers, or otherwise causes consumer harm. And he is correct that it does not. The ASA is very different from the controversial pay-for-delay pharmaceutical settlements that have split the circuit courts over whether they violate the antitrust laws.¹⁵⁶ The pay-for-delay reverse settlement cases typically involve brand name drug manufacturers suing generic drug manufacturers for infringement of patents that the generic drug maker (defendant) contends is invalid or is not infringed. To settle, the plaintiff pays the *defendant*, its competitor, and the competitor agrees to delay entering the market with its generic drug. Such settlements enable brand name drug makers, including those with weak patents that would likely be found invalid or not infringed by the defendant's generic product at trial, to essentially pay its potential rival—maker of the generic substitute--*not* to compete. To the extent that the settlement is really a payment by the plaintiff to the defendant to secure less competition than is warranted by the patent alone, the

¹⁵³ See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”); *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (defining illegal monopoly to require proof of monopoly power in a relevant market, and the “willful acquisition or maintenance of that power” through anticompetitive means); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (“Having a monopoly does not by itself violate § 2. A firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct.”).

¹⁵⁴ See Phillip E. Areeda & Herbert Hovenkamp, 3 *Antitrust Law* ¶ 651(a), at 96 (defining exclusionary conduct as acts 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.”).

¹⁵⁵ See Lemley, *supra* note 18 (section captioned “There is no anticompetitive conduct here”).

¹⁵⁶ For general analyses of the reverse settlement controversy, see, e.g., C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 109 COLUM. L. REV. 629 (2009); Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND J. ECON. 391 (2003); Herbert Hovenkamp, Mark D. Janis and Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719 (2003).

agreement could and should be found to violate the Sherman Act despite its settlement context,¹⁵⁷ as at least one circuit court has held.¹⁵⁸

The ASA does not resemble pay-for-delay reverse settlements in that it does not affirmatively block a competitor's entry into an existing business with adverse consequences for consumers. Nor does it involve a horizontal restraint that clearly violates the antitrust laws. Nonetheless, the pay-for-delay settlement cases demonstrate that proposed settlement agreements *can* be found to violate antitrust laws, and be rejected on that basis, under the right set of facts. In the Google books case, the ASA has provisions resulting in de facto exclusivity over a specific group of books for Google. Agreeing to such provisions arguably could constitute exclusionary conduct and be found objectionable on antitrust grounds if the effects are anticompetitive on balance, which leads us to an effects analysis.

**A. The “Foreclosure of Competition in Digital Distribution of Unclaimed Books”
Argument**

The debate over whether the ASA has anticompetitive effects mainly involves unclaimed books since, as earlier discussed, there are no restrictions on competition, legal or de facto, for other book categories. For in-print books, the ASA clearly would have no anticompetitive effects: Google would not even have a default non-exclusive right to display their content, sell digital copies, or include them in the institutional subscription,¹⁵⁹ but must obtain the digital rightholders' prior consent just like any of its rivals.¹⁶⁰ In fact, the ASA would be procompetitive with respect to these books: it would increase efficiencies and output by providing a process to clarify who owns the *digital* rights, which may be unclear for books published before digital books came on the scene,¹⁶¹ and by aiding in the commercial promotion of these books.¹⁶²

¹⁵⁷ See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (finding per se illegal an arrangement whereby a bar review course provider effectively paid a competing provider not to compete in particular states).

¹⁵⁸ See *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 908 (6th Cir. 2003) (finding that some reverse settlements are per se illegal). *But see* *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 110 (2d Cir. 2010) (per curiam) (declining, as a matter of law, to find antitrust violation even in cases where the reverse payment for delay of entry of the generic drug was quite large); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1341 (Fed. Cir. 2008) (same); *Schering-Plough Corp. v. Federal Trade Commission*, 402 F.3d 1056, 1076 (11th Cir. 2005) (showing great deference to the settlement and the patent but applying a different standard); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1304-06, 1312-13 (11th Cir. 2003) (same).

¹⁵⁹ See ASA, *supra* note 8, § 3.2 (b). However, Google may make non-display uses of these books without rightholders' consent. See *id.*, §§ 3.4 (a), 1.94.

¹⁶⁰ See *id.*, § 3.4 (b).

¹⁶¹ See *id.*, Attachment A, Articles V-VI.

For out-of-print books that are or would be *claimed*, the ASA is also unlikely to have anticompetitive effects because Google’s non-exclusive license would be truly non-exclusive.¹⁶³ Its potential rivals would face no constraints either from copyright laws or from the ASA, and can negotiate with the Registry (or with individual rightsholders) for rights to digitize, distribute or make other uses of books in this category. The ASA, in fact, is likely to be procompetitive because it promises new readership and profits for their rightsholders. Google would undoubtedly have a first-mover advantage; it could, for example, include these books in its institutional subscription service before potential rivals have an opportunity to do so. But antitrust law does not prohibit or punish someone for being the first mover, and first movers usually derive some competitive benefits over later entrants.

The more difficult effects question involves unclaimed books. The DOJ and others argue that the ASA would foreclose Google’s potential rivals from effective competition with Google in the sale of subscription products because they lack access to unclaimed books.¹⁶⁴ As a preliminary matter, the premise that unclaimed books are so unique and valuable that they must be included in any subscription product for effective competition is questionable, as previously discussed. Many institutions may find licenses to narrower, or targeted, digital collections at lower prices to be good substitutes for (or more attractive than) Google’s blanket license, especially when colleges and libraries are already entitled to at least one free terminal with a free license to Google’s comprehensive database.

But even assuming that subscription products *must* include unclaimed books to be economically viable, Professor Elhauge has persuasively argued that the ASA is still not anticompetitive, and indeed is procompetitive, based on a comparison with the “but-for alternative” in a world without the ASA.¹⁶⁵ In an amicus brief signed by a number of antitrust law professors and economists, Elhauge wrote:

“Even if the settlement did allow monopoly pricing over unclaimable books, the settlement would still be procompetitive because one market option is better

¹⁶² See *id.*, §§ 3.1 (a), 3.2 (b), 3.4 (a), 1.94 (allowing Google to digitize in-print books and provide at least indexing information about those books that contain the search term entered by a user; Google also includes links to vendors from whom the book can be purchased).

¹⁶³ *Id.*, §§ 2.4, 3.1 (a).

¹⁶⁴ See, e.g., DOJ First Statement of Interest, *supra* note 10, at 24 (“The seller of an incomplete database—i.e., one that does not include the millions of orphan works—cannot compete effectively with the seller of a comprehensive product.”).

¹⁶⁵ See Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement. Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV-8136-DC).

than none and monopoly pricing is better for consumer welfare than no market at all. The but-for alternative for unclaimable books is no licensing at all, which produces the anticompetitive output of zero. . . . Even monopoly pricing would necessarily increase output and lower effective prices and royalty rates from that but-for baseline.”¹⁶⁶

This argument has generated some debate as to what the “but-for” baseline should be. It is certainly true, as critic Professor Randal Picker has noted, that antitrust law does not shield an otherwise anticompetitive provision of a joint venture agreement simply because the joint venture as a whole produces net benefits.¹⁶⁷ But the but-for argument is not based on the netting out of the ASA’s effects on different book segments, with competitive harms in unclaimed books supposedly outweighed by benefits in other book segments. Rather, the argument is that *each* market segment, including the unclaimed, benefits from the ASA as measured by output based on a but-for analysis.¹⁶⁸ Absent the ASA, there is *no* output for unclaimed books; with the ASA, there would be output, albeit by a single provider.

But that should not end antitrust inquiry.¹⁶⁹ Courts have rejected procompetitive justifications for a restraint if a less restrictive alternative exists.¹⁷⁰ In this case, the “restraint” in

¹⁶⁶ *Id.*, at 18. For purposes of disclosure, I am among the antitrust professors who signed this amicus brief.

¹⁶⁷ See Picker, *Framing Baselines*, *supra* note 39, at 5-7. The ASA essentially embodies a joint venture agreement between rightsholders and Google.

¹⁶⁸ See Elhauge, *supra* note 18, at 21-22 (clarifying his argument that the ASA provisions relating to different book subgroups, “viewed separately, have clear procompetitive effects”).

¹⁶⁹ Professor Elhauge deems it unnecessary to consider less restrictive alternatives because he argues that there is no restraint to begin with and, therefore, no need to consider an alternative. See Elhauge, *supra* note 18, at 25 n.36. But agreeing to terms that result in de facto exclusivity can be considered a “restraint” and, therefore, I believe that inquiring into less restrictive alternatives is necessary.

¹⁷⁰ See, e.g., *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) (stating that “a restraint that is unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based on those benefits.”); *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 347-49 (2003) (emphasizing that if an antitrust defendant demonstrates a “specific link between the challenged restraint and the purported justification,” the plaintiff would have to show that “proffered procompetitive effects could be achieved through means less restrictive of competition” to prevail); *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993) (“To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative.”); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1261 (2d Cir. 1982) (stating that even where a restraint has procompetitive benefits, the defendant is “required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means”); see also U.S. Dep’t of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 3.36(b)(2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (stating that liability is appropriate where “similar efficiencies” are achievable through “practical, significantly less restrictive means”). There is, however,

question would be the ASA provisions that effectively bestow de facto exclusivity over the digital distribution of unclaimed books on Google, and the procompetitive objective or effect is the revitalization of out-of-print books, of which the truly unclaimed books are a subset. This means that if out-of-print books can feasibly be revived without the unintended consequence of giving Google de facto exclusivity over unclaimed works, the portion of the ASA that effectively gives such exclusivity to Google should arguably be excised.

Unfortunately, there seems to be no such feasible alternative. The DOJ has suggested that the ASA “could be amended to provide some mechanism by which Google’s competitors could gain comparable access to orphan works.”¹⁷¹ But the parties have *already* done all that is possible given the current state of the copyright laws: the ASA empowers the Fiduciary to license unclaimed works to third parties to the extent permitted by law.¹⁷² Thus, should Congress pass legislation to appropriately address the unclaimed works problem, the Fiduciary may license these works to third parties. However, absent such legislation, the Fiduciary has no power to do so because no one other than rightsholders has the right to authorize exploitation of their works. And, the Rule 23 class action mechanism probably cannot be used to bind class members in conferring a license to use their works on those who are not parties to the litigation being settled.

It has been suggested the ASA should “unbundle” the claimed and unclaimed books and presumably cover only the claimed ones.¹⁷³ But much of the ASA’s beneficial effects comes from the business plan as a whole. To create and make available a comprehensive digital library, Google has to be able to include the out-of-print books, many of which are unclaimed at the outset for the reasons discussed earlier. It is the potential of the project to develop new audiences and new revenue streams for out-of-print books, along with the Registry’s efforts, that is expected to induce their rightsholders to emerge to claim their works (and their profits),

also disagreement and criticism of the “less restrictive alternative inquiry.” See, e.g., *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249-50 (3d Cir. 1975) (expressing concern that an inquiry into less restrictive alternatives would overly burden businesses and put courts “in the position of second-guessing business judgments as to what arrangements would or would not provide ‘adequate’ protection for legitimate commercial interests”); Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561 (2009) (providing a critical analysis of the “less restrictive alternative” inquiry adopted in rule of reason cases).

¹⁷¹ DOJ First Statement of Interest, *supra* note 10, at 25.

¹⁷² ASA, *supra* note 8, § 6.2 (b)(i).

¹⁷³ See Picker, *The Google Book Search Settlement*, *supra* note 39, at 383, 409.

which would then diminish the number, and importance, of unclaimed books.¹⁷⁴ If the ASA jettisons unclaimed books at the outset, the procompetitive effect of bringing new life to potentially millions of *out-of-print* books is unlikely to materialize. Thus, narrowing the ASA to cover only claimed books would not achieve an important procompetitive purpose of the ASA, or secure their consumer benefits.

De facto exclusivity over unclaimed books may not be the perfect outcome from an antitrust perspective. Unfortunately, in this instance, there seems to be no less restrictive alternative for achieving the hoped-for benefits. Another way of viewing this issue is through the lens of the ancillary restraint doctrine.¹⁷⁵ To the extent that provisions resulting in de facto exclusivity for Google with respect to unclaimed books constitute a restraint, this restraint would probably be considered reasonable as it is ancillary to a main lawful purpose of the settlement agreement and is reasonably necessary (and no more restrictive than necessary) for the achievement of that lawful purpose.

B. The “Entrenchment of Market Power in Online Search” Argument

In the DOJ’s second Statement of Interest, the government also very briefly (in a single paragraph) argued that “Google’s exclusive access to millions and millions of books may well benefit Google’s existing online search business.”¹⁷⁶ In its opinion rejecting the ASA, the court included an approving reference to this claim, stating that the ASA “would arguably give Google control over the search market.”¹⁷⁷ The basic theory is that since content from unclaimed books is available only through use of Google’s search engine, competing search engines might be viewed as less attractive by users thereby allowing Google to maintain or enhance its dominance in general online search.¹⁷⁸

¹⁷⁴ See *supra* notes 105-106 and accompanying text.

¹⁷⁵ See *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (articulating the ancillary restraint doctrine); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (applying the rule of reason and upholding a restraint that was ancillary to an efficient joint venture); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985) (using the rule of reason analysis and upholding a restraint that facilitated a joint venture).

¹⁷⁶ See DOJ second Statement of Interest, *supra* note 10 at 26. This was mainly an antitrust objection from Google’s competitors such as Microsoft and Yahoo!. See Microsoft’s Objections, *supra* note 9, at 15-25; Yahoo!’s Objections, *supra* note 9, at 25.

¹⁷⁷ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011).

¹⁷⁸ DOJ Second Statement of Interest, *supra* note 10, at 26 (“Google already holds a relatively dominant market share in [the online search] market. That dominance may be further entrenched by its exclusive access to content through the ASA. Content that can be discovered by only one search engine offers that search engine at least some protection from competition.”)

This is a dubious, though ambitious, Section 2 claim. Absent evidence of direct anticompetitive effects, such as Google’s ability to charge inflated prices for search advertisements as a result of its control of unclaimed books, defining the relevant market (encompassing search) alleged to be affected is critical to establishing this claim.¹⁷⁹ Google is indeed the dominant general search engine in this country, or perhaps even globally, in the sense that a large percentage of user searches conducted on general search engines is performed on Google.¹⁸⁰ Yahoo! and Microsoft’s Bing come in a distant second and third.¹⁸¹ But this data alone does not define the market. If Google’s search and search advertising business faces existing and potential competition from sources other than other general search engines, the relevant market would not consist only of general search engines.

While it is outside the scope of this Article to explore in depth this complicated market definition issue, general business news about trends in internet and cell phone usage suggest that the market encompassing search is extremely fluid and rapidly changing.¹⁸² Social media, such as Facebook and Twitter, clearly pose a competitive threat to Google for online advertising dollars.¹⁸³ Already immensely popular with significant segments of the population, as Facebook continues to evolve to add more features, many of its users could gradually bypass Google and go directly to Facebook for content, attracting advertising dollars. The amount of information that Facebook users provide about themselves, including what they do, buy, and endorse, allow advertisers to better target their advertisements making Facebook potentially more attractive to advertisers than Google. A recent commentary that has received substantial coverage, for example, predicts that Facebook will surpass Google in advertising revenues because of the power of “social advertising.”¹⁸⁴ Google’s recent introduction of Google+ may, in fact, reflect some recognition of this threat from Facebook and other social media products.

¹⁷⁹ See *supra* notes 126-130 and accompanying text (discussing the need for market definition).

¹⁸⁰ A July 2011 ranking of U.S. search engine rankings released by comScore, Inc., shows Google with 65.5 percent search share. See *comScore Releases July 2011 U.S. Search Engine Rankings*, PR NEWSWIRE (Aug. 10, 2011), <http://www.prnewswire.com/news-releases/comscore-releases-july-2011-us-search-engine-rankings-127476563.html>.

¹⁸¹ See *id.* (showing Yahoo! with 15.9 percent search share, and Microsoft’s Bing with 14.4 percent share).

¹⁸² See, e.g., Hussein Fazal, *Prediction: Facebook Will Surpass Google In Advertising Revenues*, TECHCRUNCH.COM (June 5, 2011), <http://techcrunch.com/2011/06/05/facebook-will-surpass-google>; *Google Survey Shows Smartphones Used for Local Search*, RJMNETWORK (May 2, 2011), <http://www.rjmconsultinggroup.com/google-survey-shows-smartphones-used-for-local-search/264/>.

¹⁸³ See *id.* (showing that Facebook’s advertising revenues increased from \$2 billion in 2010 to over \$4 billion in 2011 and is expected to increase more significantly in the future).

¹⁸⁴ *Id.*

Specialized search engines that focus on specific content (such as Tripadvisor.com or Travelocity for travel) or reputable e-commerce sites offering sophisticated search functions and a wealth of information (such as Amazon.com) probably also compete for users and search advertising dollars. To the extent that consumers looking to buy digital cameras, for example, bypass Google to begin search on Amazon.com, Amazon.com offers an alternative platform that may prove more valuable to advertisers since they would be able to better target those who are more ready to buy.

The growing popularity of smartphones, which users apparently increasingly use to perform local searches,¹⁸⁵ suggest that more advertising dollars may migrate to smartphones in the foreseeable future, especially as technologies develop further to allow advertisers to better target advertisements to specific users.¹⁸⁶ My point here is not to attempt to define the relevant market encompassing online search and search advertising but to suggest that it is far too unstable for anyone to assume that it consists only of general search engines, without some supporting data showing cross-elasticities of demand and supply. At the very least, Google's current dominance in the search and online advertising business may be quite fragile.

But even if the market is limited to general search engines, it is doubtful that being the only search engine with the capability of revealing content to unclaimed books would substantially enhance the value of Google's search engine and help preserve its dominance over Bing and Yahoo!. Unclaimed books are usually unclaimed for a reason. Thus, the court's suggestion that Google could control the entire "search market" based on a "de facto monopoly over unclaimed works"¹⁸⁷ seems somewhat improbable.

It might be more realistic to argue, instead, that having the entire body of scanned works on Google's digital database and integrated with its search engine might enhance the value of Google's search engine to its users. But if that is the source of advantage to Google's search engine, that advantage would be primarily due to Google being the first mover (and innovator) in the massive scanning of books, and not from its exclusive access to those books

¹⁸⁵ See *Google Survey Shows Smartphones Used for Local Search*, *supra* note 182 (concluding, in a survey, that 95% of smartphone users use their phones for local searches, and 90% take direct action, such as visit a store or make a purchase, within 24 hours).

¹⁸⁶ See *id.* (reporting that 82% of respondents said they noticed mobile advertising, and half of those who noticed the advertisements made a purchase or took some form of action, suggesting that mobile advertising is quite effective).

¹⁸⁷ Authors Guild, 770 F. Supp. 2d 666, 682 (S.D.N.Y. 2011).

with the least consumer demand (the unclaimed).¹⁸⁸ And, antitrust policy generally encourages innovation and initiative, which puts one into first-mover status, and allows even dominant firms to reap some of the benefits inherent to being a first-mover.

Yahoo! has also contended that Google’s “monopoly” in unclaimed books would enhance its dominance in search by helping it refine its search technologies.¹⁸⁹ The theory is that, the more data is available for search engines to work with, the easier it is to improve search technologies. Since the book project adds large volumes of additional content for Google’s search engine to process, the quality of its searches would improve relative to that of other general search engines.¹⁹⁰

Assuming the validity of this theory, it is still only the de facto exclusive license to unclaimed books that is relevant to the consideration of this argument. The addition of *other* books into Google’s digital database would be the result of a truly non-exclusive license, as well as its initial book scanning project, neither of which can reasonably be objectionable on antitrust grounds so long as Google does not act to block other search engines from taking comparable action or otherwise competing on the merits. To the extent that the de facto exclusive license over unclaimed books is the only aspect of the ASA that could legitimately be considered in analyzing this claim, it is hard to see how adding a body of unclaimed works can so improve Google’s search technologies that it can substantially hinder competition in the search engine business.

C. Competitive Advantage Due to “Superior Product” and “Business Acumen”?

Some critics of the ASA object that the proposed settlement would allow Google to gain an unearned advantage in book digitization or the unclaimed books business—an advantage that is derived, not from offering a “superior product” or from “business acumen,” but “from the stroke of a District Judge’s pen.”¹⁹¹ This assessment, however, greatly understates Google’s efforts, its business acuity and skill, and the role that played in its current lead in book

¹⁸⁸ Stanford University Computer Science Dept. Professors, Letter to Judge Chin Supporting Approval of Amended Settlement Agreement, *supra* note 66 (expressing surprise at “the audacity of the challenge that Google set itself to achieve”)

¹⁸⁹ Yahoo!’s Objections, Inc., *supra* note 9, at 25.

¹⁹⁰ *Id.*

¹⁹¹ Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, *supra* note 39, at 3 (citing U.S. v. Grinnell Corp., 384 U.S. 563, 571 (1966)). See also Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement, Authors’ Guild, Inc. v. Google Inc., 77 F. Supp. 2d 666 (S.D.N.Y. Sept. 8, 2009) (No. 05-CV-8136-DC) (making a similar argument that Google’s market position in digitization was not a result of its strong business acumen or innovation).

digitization and even in achieving exclusivity over unclaimed books had the ASA been approved.¹⁹²

Much of Google’s first-mover status in digitization came from its vision in imagining the original book search project, and the steps (and risks) it took to realize that vision.¹⁹³ It negotiated agreements with major research libraries to scan their entire collections, made a calculated decision that it had a sufficiently strong “fair use” defense to display snippets, and then proceeded to digitize the millions of books it received. These initiatives reflected “business acumen,” as did its willingness to commit enormous resources to the task (including for the development of new technologies to automate scanning and handle technical difficulties)¹⁹⁴ despite legal uncertainties about the fair use doctrine. As even a critic of the ASA acknowledged, “ex ante Google was on the same playing field as potential competitors,”¹⁹⁵ but it was apparently willing to take more risks. Microsoft, for example, chose to withdraw from book scanning in 2008 because of high costs, explaining that it lacked “an underlying sustainable business model.”¹⁹⁶

Even the crafting of an ingenious settlement agreement that would create a comprehensive digital library no one had contemplated is, in itself, an exercise of superior skill and business acumen. No matter what one thinks of the propriety of using a class-action settlement to solve thorny copyright issues in the face of Congressional inaction, the claim that Google has not demonstrated skill or business acumen seems inaccurate. And the suggestion that Google’s first-mover status would be attributable mainly to the happenstance of a favorable settlement, had the ASA been approved, seems at best vastly overstated.

V. “The Perfect Is the Enemy of the Good”

Many who object to the ASA on antitrust and other grounds acknowledge its substantial benefits but seem to oppose it because they prefer an alternative option (or alternative terms)

¹⁹² Even an ASA critic acknowledges this. See Fraser, *supra* note 73, at 81–82 (“In my opinion, Google no doubt exhibited ‘superior skill, foresight, and industry’ in designing the ambitious scanning project. . . . Google also exhibited skill and foresight during this litigation. . . .”).

¹⁹³ See Stanford University Computer Science Dept. Professors, Letter to Judge Chin Supporting Approval of Amended Settlement Agreement, *supra* note 66 (praising the “amazing revolution” affecting the future of books that Google has produced, Google’s audacity and entrepreneurial spirit in the challenge it set for itself, and its success “in the face of a technically difficult problem”).

¹⁹⁴ See John Harrington, *Book Scanning Technology*, PHOTO BUSINESS NEWS & FORUM (May 4, 2009), <http://photobusinessforum.blogspot.com/2009/05/book-scanning-technology.html>.

¹⁹⁵ See Fraser, *supra* note 73.

¹⁹⁶ See Miguel Helft, *Microsoft Will Shut Down Book Search Program*, NY TIMES, May 24, 2008.

that would potentially provide greater consumer benefits or more public good. For example, Professor Pamela Samuelson, a strong opponent of the ASA, characterizes Google’s massive digitization project as “[o]ne of the most significant developments in the history of books,”¹⁹⁷ and acknowledges that it was Google that had the “vision, technology, and financial resources” to undertake it.¹⁹⁸ She applauds the objective of creating a huge digital library, crediting Google for raising public awareness of its social desirability,¹⁹⁹ but apparently prefers that a project with so much public interest at stake be funded and run by a consortium of non-profit foundations and educational institutions.²⁰⁰

Harvard Librarian Robert Darnton, likewise, clearly approves of “the prospect of bringing virtually all of the books from America’s greatest research libraries within the reach of all Americans.”²⁰¹ In fact, he so appreciates its social value that he suggests nationalizing Google’s digital database by an act of Congress (compensating Google for the taking).²⁰² Another commentator raising antitrust concerns recognizes that the settlement “serves the public interest—and, indeed, can be construed as procompetitive,” but finds that the settlement could be “vastly improved to further promote competition.”²⁰³ He argues that the question should not be whether the settlement “may increase output relative to a pre-settlement world,” but whether we can “imagine a world with *even more output* if the Settlement were approved in a different form”.²⁰⁴

A. The Good

Professor Elhauge has written in depth about the procompetitive economic effects of the ASA—that it enhances consumer welfare by increasing output and reducing prices as compared to a “but-for” world without the ASA with respect to each category of books²⁰⁵--and I will only briefly summarize his analysis here. For all out-of-print books, including the unclaimed ones, the ASA enables them to be offered for individual sale whereas, in the absence of the ASA,

¹⁹⁷ Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1308.

¹⁹⁸ *Id.*, at 1314.

¹⁹⁹ *Id.*, at 1310.

²⁰⁰ *Id.*, at 1367.

²⁰¹ Darnton, *Google and the Future of Books*, *supra* note 14.

²⁰² Darnton, *Google and the New Digital Future*, *supra* note 14 (suggesting “transform[ing] Google’s digital database into a truly public library [through] an act of Congress . . . But it is not clear how Google would react to such a buyout.”).

²⁰³ Christopher A. Suarez, *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition*, 55 N.Y.L. SCH. L. REV. 175, 177 (2011).

²⁰⁴ *Id.*, at 216 (italics in original)

²⁰⁵ See Elhauge, *supra* note 18, at 29-57

there is no output because the costs of identifying and locating rightsholders are too great compared to the minimal potential financial benefit.²⁰⁶ For books that are unclaimed, while Google might indeed be the sole provider, one is better than none and the ASA does not increase entry barriers.²⁰⁷

For in-print books, the ASA potentially increases output by making it easier for readers to search for and purchase them (by including links to vendors in the search results), and by providing a process for Google to offer some of these books as well.²⁰⁸ It also increases efficiency through the creation of the Registry which may serve as a licensing agent for rightsholders.²⁰⁹

The ASA would also allow the creation of the “Institutional Subscription.”²¹⁰ This new product, unavailable but for the ASA, would grant institutional subscribers a blanket license to all out-of-print books (except those whose rightsholders specifically opted for exclusion) and all in-print books whose rightsholders elected to be included,²¹¹ and those affiliated with paid subscribers would be able to view the entire contents of any and all books within the database wherever they have internet access. For all book categories, the ASA is expected to also reduce transaction costs, increase efficiencies,²¹² and generally provide enhanced access to books.

In an ideal world, it would be preferable to have more than one provider of digital access to unclaimed books. But, from an economic perspective, having one is indeed better than none. And, even if unclaimed books constitute a relevant market, we would tolerate exclusivity if there are no less restrictive alternatives for achieving the procompetitive purpose of reviving the millions of out-of-print books that are now sitting unused in libraries. As earlier discussed, there does not seem to be any such less restrictive alternative.

As significant as the ASA’s benefits are from a microeconomic perspective, the agreement’s many social benefits are equally important. It is no accident that representatives of civil rights and disadvantaged groups, and the visually disabled communities are among the

²⁰⁶ See *id.*, at 41-42.

²⁰⁷ See *id.*, at 47, 51. See also Lemley, *supra* note 18.

²⁰⁸ See Elhauge, *supra* note 18, at 30-32.

²⁰⁹ See ASA, *supra* note 8, § 6.2 (b)(i).

²¹⁰ *Id.* § 4.1 (a)(v).

²¹¹ *Id.*

²¹² See Elhauge, *supra* note 18, at 8-12 (discussing how the ASA lowers digitization cost barriers, costs to valuing digital books, and identify out-of-copyright works).

strongest supporters of the settlement agreement.²¹³ Though modern antitrust analysis tends to dismiss non-economic benefits (or harms) as irrelevant, the fact that an agreement has substantial, tangible and undeniable social benefits should be worthy of consideration, at least when the ASA's alleged anticompetitive effects are somewhat speculative and the quirky consequence of the copyright laws rather than the terms of the ASA itself.

One of the most important social benefits of the ASA is that it goes a long way toward leveling the playing field for those who are not fortunate enough to attend or be employed at an elite university or to otherwise have access to elite libraries,²¹⁴ and those who are visually impaired. Had the ASA been approved, a student attending the humblest community college would effectively have digital access to the same books, through the free access terminal(s) that Google would provide each non-profit college, as a student at an Ivy League university. The same digital library would also be equally accessible to people living in rural or poor communities, through the free access terminal that Google would supply each public library. The blind and visually impaired would also have greatly benefited from the settlement agreement,²¹⁵ which promises to increase the number of books accessible to the print-disabled from today's mere 60,000 to ten million²¹⁶ through use of digitization and other new technologies.

The ASA's benefits to the general public, not only to disadvantaged groups, would have been immense as well. Under the ASA, all readers would be able to easily (and without charge) identify and preview books of interest to them, no matter how obscure the subject, wherever they have internet access. For most out-of-print books, anyone could further access the full contents at a free access terminal found in any library or college. Those affiliated with an institution or entity that is a paid subscriber to Google's digital library would even have the convenience of accessing the entire database wherever they have a computer with internet access.²¹⁷

That the ASA would enhance welfare both economically and socially is almost undeniable though, as with any agreement, there are probably alternative terms that could

²¹³ See *supra* notes 48-49.

²¹⁴ See *supra* notes 46-47 and accompanying text.

²¹⁵ See *supra* note 48 and accompanying text.

²¹⁶ See Statement of President of the National Federation of the Blind, Transcript of Fairness Hearing, *supra* note 12, at 16.

²¹⁷ See *supra* notes 43-47 and accompanying text.

produce even greater consumer benefits. Many of the objections to the ASA are seemingly driven by the belief that antitrust law demands nothing less than the perfect outcome.

B. The “Perfect,” and Why Rejecting the Good for the Conjectural Perfect Is Bad

Many objectors seem to believe that there are alternatives to the ASA that would provide the same benefits but without the harm of having Google “monopoliz[e] access to our common cultural heritage.”²¹⁸ The desired alternatives tend to fall into four broad categories: 1) public control of the digital library envisioned by Google; 2) copyright reform to allow *free* exploitation of unclaimed books by all, as opposed to the ASA’s pay model; 3) litigation on the merits, which would (hopefully) result in Google prevailing on the fair use defense; or 4) some form of pricing or other governmental regulation as a condition for approval of the ASA.

Preliminarily, there is a fundamental problem with this general perspective: the antitrust law does not require perfection.²¹⁹ It does not, for example, condemn a non-anticompetitive (or procompetitive) joint venture agreement on the theory that an alternative term would further enhance consumer welfare. If it did, *any* joint venture agreement could probably be found to violate the antitrust laws because there is almost always an alternative term that could yield greater consumer benefits. Thus, the fact that a settlement agreement does not maximize consumer welfare, whereas an alternative might, does not provide antitrust grounds to reject the agreement. From a practical perspective, it is also particularly risky to reject the good for the “perfect” alternative when the perfect is, at best, conjectural and, at worst, not better at all.

Consider, first, the public control alternative favored by some ASA opponents. Professor Samuelson suggests that the future of public access to “the cultural heritage of humankind embodied in books” is so important that it should be publicly funded and run by a collaboration of nonprofit educational institutions, not by Google or other for-profit firms.²²⁰ She hopes that, inspired by Google’s dream, research communities would self-organize and encourage colleagues to contribute their out-of-print books to be digitized and made available for viewing on a free-access basis.²²¹

Harvard Librarian Darnton takes a similar position. Acknowledging that through “technological wizardry and sheer audacity, Google has shown how we can transform the

²¹⁸ Darnton, *A Digital Library Better Than Google’s*, *supra* note 14.

²¹⁹ *See supra* note 21.

²²⁰ Samuelson, *Google Book Search and the Future of Books in Cyberspace*, *supra* note 39, at 1367.

²²¹ Samuelson, *The Google Book Settlement as Copyright Reform*, *supra* note 39, at 561.

intellectual riches of our libraries, books lying inert and underused on shelves,”²²² Darnton nonetheless believes that a project of such social importance should be placed under public control, and not be left in the hands of a “monopolist.”²²³ There would then be a true public digital library providing free access to all books to everyone,²²⁴ as contrasted with the ASA which would charge institutions for subscriptions to Google’s comprehensive digital library. Darnton strongly advocated the rejection of the ASA and proposed, instead, to have the government take over Google’s database through an act of Congress, with Google compensated for its scanning.²²⁵ Should that be deemed too ambitious, he proposes “a minimal solution” of having a mass digitization effort funded by a combination of nonprofit foundations and the federal government, totaling approximately \$750 million, with the digitization done by nonprofit organizations.²²⁶ His proposals assume that Congress would have passed legislation removing copyright barriers to the use of out-of-print books whose rightsholders cannot be found.

In theory, having nonprofit institutions implement a free national digital library could produce greater consumer benefits than the ASA. All Americans would then have free access to the entire collection of tens of millions of out-of-print books wherever they can find a computer with internet access. The ASA, in contrast, would provide truly free access only at the limited number of free-access terminals that Google would make available at each public library and university. With nonprofit groups or the government at the helm offering free access, there would be no concerns regarding the possibility of supracompetitive prices in the future.

In practice, we may have to wait indefinitely for this perfect result. Even if a modern-day Carnegie emerges to provide the necessary funding (or Congress miraculously does), a digitization project of this scale is a substantial technical undertaking if it is to be done efficiently. Google is known to have invested heavily in technology for the project,²²⁷ and it is not clear how long it would take for a consortium of research libraries to perform the same

²²² Darnton, *A Digital Library Better Than Google’s*, *supra* note 14.

²²³ *See id.*; Darnton, *Google and the New Digital Future*, *supra* note 14; Darnton, *Google and the Future of Books*, *supra* note 14.

²²⁴ *See* Darnton, *A Digital Library Better Than Google’s*, *supra* note 14 (“But only a digital public library will provide readers with . . . a vast collection of resources that can be tapped, free of charge, by anyone, anywhere, at any time”).

²²⁵ *See* Darnton, *Google and the New Digital Future*, *supra* note 14.

²²⁶ *See id.*

²²⁷ *See* Grimmelmann, *The Google Book Search Settlement*, *supra* note 39, at 2 (describing how Google “uses custom-built machines to hold the books in place and then take-quality photographs of each page”; individual workers must also stand by to turn the pages); Harrington, *supra* note 194 (noting Google’s development of technologies to automate scanning and to handle page curvatures).

tasks. Furthermore, it is an open question whether Congress will pass the necessary unclaimed works legislation in the foreseeable future.

There are also no guarantees that a nonprofit or government initiative would produce better results. Though Darnton argues that “Google is not committed to maintaining its corpus,” and that “the job would be done right” in the hands of nonprofit groups,²²⁸ the bases of his assumptions are unclear. It is difficult to imagine why Google would lack commitment to the digitization project, had the court approved the ASA, after it has invested so much in sunk costs. Also, unlike Darnton, others are apparently quite impressed with the technical quality of Google’s work.²²⁹ In any event, the ASA has concrete terms that would almost certainly help bridge the divide between the privileged and the underprivileged with respect to access to knowledge, and there is no assurance that the government or nonprofit groups would do better in this regard. The settlement agreement is also procompetitive in the economic sense, which is the primary concern of antitrust law. To reject an agreement that even opponents admit is generally good for the conjectural perfect does not seem to make much sense.

There are those who oppose the ASA because they believe a Congressional solution to the unclaimed works problem would produce a better result.²³⁰ Most, if not all, who object to Google’s gaining a “monopoly” over unclaimed books seem to recognize that the ASA does overcome the existing impediments to creating a comprehensive digital library as well as a marketplace for out-of-print books. But they prefer bills that Congress has considered but failed to pass.²³¹ These bills, had they passed, would have made out-of-print books *freely* available to all if their rightsholders cannot be located after diligent search.²³² Needless to say, that would open up access to these books to all, and Google would not have de facto exclusivity over the unclaimed subset. The bill’s free-access model would also provide greater benefits to the public

²²⁸ Darnton, *Google and the New Digital Future*, *supra* note 14.

²²⁹ See, e.g., Stanford University Computer Science Dept. Professors, Letter to Judge Chin Supporting Approval of Amended Settlement Agreement, *supra* note 66 (“In our role as technologists, we are very impressed by the technical quality of what has been achieved: audacity in the face of a technically difficult problem. But amazingly, the Google project works”).

²³⁰ See, e.g., Samuelson, *Academic Author Objections to the Google Book Search Settlement*, 8 J. ON TELECOMM. & HIGH TECH. L. 491, 506-08 (2010); Grimmelmann Amicus Brief, *supra* note 104, at 18-19.

²³¹ See, e.g., Samuelson, *Academic Author Objections*, *supra* note 230, at 506-08 (concluding that treating unclaimed books as public domain works freely usable by all, as provided in the bills that Congress considered but did not pass, would be more consistent with U.S. copyright law, and that the ASA’s escrow model with unclaimed funds distributed to charity after ten years would be “objectionable”).

²³² See, e.g., Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Public Domain Enhancement Act, H.R. 2408, 109th Cong. (2005).

(though not to rightsholders) than the ASA, which is a pay-model with payments due rightsholders of unclaimed books escrowed until they are claimed.

Virtually everyone agrees that there should be a mechanism for making use of unclaimed works, which are currently producing *no* benefits for anyone.²³³ As a general policy matter, it does seem more appropriate to have copyright issues of national importance resolved by Congress than by private parties via a class action settlement.²³⁴ From a utilitarian standpoint, however, setting aside a good solution, albeit one crafted by private parties in a class-action settlement, for the “perfect” legislation that may or may not be passed is to let the perfect be the enemy of the good.

There is also little reason to do so since the ASA does nothing to impede or discourage the hoped-for legislation. If Congress happily surprises us by passing legislation in the form that was under consideration after approval of the ASA, and others decide to also digitize unclaimed books, Google would face direct competition in unclaimed books then and make any necessary pricing adjustments. But, until that happens, having one avenue of access to unclaimed books is better than none. Rejecting this, along with all the other social benefits previously discussed, in favor of waiting for the uncertain passage of legislation that might be slightly more beneficial to consumers is a bit perplexing.

Also driving some objections to the ASA is the belief that Google has a strong fair use defense for its initial book search project—scanning, indexing and displaying snippets—and that the public interest would be better served if Google does not settle, proceeds to trial and prevails on the merits.²³⁵ That would then set a precedent for others wishing to engage in

²³³ See, e.g., DOJ First Statement of Interest, *supra* note 10, at 3

First, one goal of the settlement—making large numbers of copyrighted works available to the public in electronic form while providing compensation to authors and publishers—is a public benefit that, to date, has not come to pass due to certain realities of the copyright system The United States believes that, through the actions of private entities and Congress (if necessary), steps should be taken to advance these objectives.

²³⁴ Interestingly, the EC recently brokered a voluntary agreement among authors, publishers, libraries, and copyright collection management societies that would establish a system for digitizing out-of-print books and journals. As for “orphan” or unclaimed works, the EC has made a legislative proposal that would establish a mechanism for libraries to determine the “orphan” status of copyrighted works and be able to use them absent copyright permission, without the risk of copyright infringement. See Memorandum of Understanding, Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf.

²³⁵ See, e.g., Darnton, *A Digital Library Better Than Google’s*, *supra* note 14 (“Google could have defended its actions as fair use, but the company chose instead to negotiate a deal.”); Grimmelmann, *How to Fix the*

similar activities and also provide “a powerful, portable fair use principle that could do a lot of other good in this digital age.”²³⁶ A settlement would, of course, leave undecided the issue of whether book search is fair use or constitutes copyright infringement. The objectors presumably find the consumer benefits of having a favorable fair use principle and a book search business environment that is risk-free for all entrants to be greater than those that would be generated through the ASA, including access to the full contents of out-of-print books through Google (and the possibility of other providers whose only limitation would be the inability to include unclaimed books).

Setting aside the obvious fact that no party is required to risk liability by forging ahead in litigation without settling in order to achieve a perceived greater public good, it is by no means certain that Google will prevail on the fair use issue though most copyright scholars support Google’s position. If Google loses, the public would lose almost *all* of the benefits under the existing book search project; no snippets may be displayed from any copyrighted book except with the permission of the rightsholders. With the exception of those mostly in-print books that Google has digitized with the rightsholders’ permission, the rest of Google’s digital library would be unusable.

Even if Google prevails on fair use, all Google would have won is the right to continue with its initial (current) project: scan and index any book and display snippets in response to search queries without seeking copyright clearance. There would be no digital library from Google or anyone else because displaying the entire contents of a book without permission would clearly not fall within any conceivable definition of fair use. If Professor Samuelson’s idea of collaboration among the major research libraries takes hold, we may eventually have a digital library of a smaller scale but it would almost certainly not be in the near future. From an antitrust policy perspective, it is very strange to oppose a settlement that would, at worst, give us a “monopolist” of a new product that would not exist but for the settlement, in the hope that Google would prevail on fair use and that a truly public, nonprofit, digital library would someday emerge.

Google Book Search Settlement, *supra* note 39, at 12 (describing the reasons for some objectors’ opposition to the ASA).

²³⁶ Grimmelmann, *How to Fix the Google Book Search Settlement*, *supra* note 39, at 12.

Others have also proposed requiring judicial or other government oversight of prices on the theory that Google’s digital database is an essential facility,²³⁷ or compelling Google to grant licenses to its books database to a number of competitors, upon request, under the supervision of the DOJ.²³⁸ Neither is generally accepted as a desirable antitrust approach. As the Supreme Court has recently noted, judges in antitrust cases (and the DOJ) are not regulatory agencies with the expertise to review prices.²³⁹ It is also difficult to characterize Google’s digital library as an essential facility for which price regulation could be required.²⁴⁰ And, compulsory licensing is rarely appropriate except in unusual circumstances because it places the entire risk of a business venture on the firm that invested in the infrastructure; yet the firm would be compelled to license use to its competitors at regulated prices should the venture prove successful.²⁴¹ In other words, if demand for Google’s digital library service turns out to be low so that the digitization project proves unprofitable, logically none of Google’s competitors would seek a license for its library and Google alone would suffer the loss of its huge investment. But if the project is successful, its rivals would be permitted to license its use at regulated prices. This discourages investments and innovation and, therefore, is not something that the court lightly orders.

Finally, as to objections that seem to suggest that, to pass muster under antitrust law, the settlement provisions must produce the most competitive outcome and must maximize consumer welfare,²⁴² that is not what the antitrust law requires. Even opponents of the ASA

²³⁷ See American Library Association Comments on the Proposed Settlement, at 19, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV-8136-DC) (recommending that, because of the “essential facility” nature of Google’s digital library, the court should review the pricing of the institutional subscription upon the request of any library or other institutional subscriber).

²³⁸ See Picker, *A New Orphan-Works Monopoly?*, *supra* note 39, at 408-09; Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Association of American Publishers, Inc., et al. and Google Inc., at 29, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV-8136-DC).

²³⁹ See *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.”).

²⁴⁰ See generally Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

²⁴¹ See Hausman and Sidak, *supra* note 18, at 424-27 (explaining the economics of compulsory licensing).

²⁴² Some critics, for example, complain that Google was “stingy” or insufficiently generous in the number of free-access terminals it agreed to provide libraries and colleges. Some also object that readers using the free-access terminals would be required to pay for printing pages at the free terminals under the ASA. Still others wish to have completely free access to out-of-print books. See, e.g., Grimmelmann, *How to Fix the Google Book Search Settlement*, *supra* note 39, at 15; Samuelson, *Google Book Search and the Future*

generally acknowledge that its features are mostly procompetitive, in the public interest, and relatively fair to all.²⁴³ While any agreement could probably be revised to provide greater benefits to various segments of the public, even dominant firms are generally not required to give up all extra value that accrues to their initiative, efforts and willingness to invest in a risky endeavor, or to assist rivals who did not undertake the same risks.²⁴⁴

VI. Possible Solution and Conclusion

In rejecting the ASA, the court suggested that an “opt-in” as opposed to an “opt-out” settlement agreement would be potentially acceptable.²⁴⁵ However, a settlement requiring opt-in at the outset may fail to bring in the minimum number of out-of-print books that are necessary to make a comprehensive digital library viable. I will leave it to copyright and class-action scholars to explore whether there is a principled basis for a more “adventurous” approach to these issues than the court has taken. From an antitrust perspective at least, the ASA’s terms do not appear anticompetitive and, in fact, are quite procompetitive, and the court’s rejection of the settlement agreement is not a positive development for consumers or, indeed, for many rightsholders.

Perhaps if the ASA were amended to provide for a hybrid opt-out/opt-in compromise, a relatively large digital library (though not as comprehensive as under the ASA) might still be feasible and, at the same time, the copyright problem that particularly troubled the court would be minimized. In general terms, under this compromise, the further revised ASA would first operate under the regular class action opt-out mechanism for a limited period of time, for example, ten years. This would give Google a period of time to digitize out-of-print books, include them in its institutional subscription and make other permitted uses of them, unless a rightsholder opts out. It is expected that, within this time, many unclaimed books would become claimed as rightsholders are encouraged by the revenues brought in through use of their books to come forward to register their works in order to collect their share of revenues. The Registry would also be working to locate these rightsholders during this time. At the end of

of Books in Cyberspace, *supra* note 39, at 1340; Suarez, *supra* note 203, at 182; Darnton, *Google & the Future of Books*, *supra* note 14.

²⁴³ See, e.g., Samuelson, *The Google Book Settlement As Copyright Reform*, *supra* note 39, at 539-40 (acknowledging, even as an opponent, that the settlement seems relatively fair to all, though not optimal in every respect).

²⁴⁴ See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408-10 (2004) (severely limiting the duty to assist rivals).

²⁴⁵ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011).

the ten-year (or any limited) period, however, there would be an effective conversion to an opt-*in* process: any out-of-print books that remain unclaimed at that time would be removed from the institutional subscription database and would not be available for individual purchase thereafter.

This compromise presumes that most authors would be delighted to have their ideas disseminated and to earn money in the process, especially if their works, being out-of-print, have been largely unread for years. Therefore, many out-of-print books would be claimed in time, as rightsholders realize that there might still be interest in their works. Technically, there would still be an infringement of their copyrights since there would be a period of unauthorized use, but the infringement is minimal since the rightsholders subsequently ratified the use by registering with the Registry (opting in) and receiving benefits for the previously unauthorized use.

As for the rightsholders whose works remain unclaimed after the specified period of time, the infringement of their copyrights would be slightly greater but still relatively minor as it is limited in time—use of their works would be prohibited upon the expiration of the stated initial term. Given the public interest that would be served by this settlement agreement, approving such a mild abridgement of their rights would hardly be against public policy. After all, the Supreme Court has stated that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘To promote the Progress of Science and useful Arts.’”²⁴⁶

Assuming that most out-of-print books with some commercial value would be claimed over time if the general terms of the ASA were allowed to work for a limited period under an opt-out model, the creation of a fairly sizable digital library could be possible under this revised plan. Of course, I do not know if such a compromise would make business sense for Google.

It would truly be a missed opportunity to come so close to making most books ever published available to all (and, at the same, give many rightsholders a chance to profit from their works) and yet not realize the dream because of hypothetical concerns that Google might charge monopoly prices for institutional subscriptions in the future, or that there might be some minimal abridgement of the rights of a small number of rightsholders who apparently do not have sufficient interest in their copyrights to claim them.

²⁴⁶ Feist Publ’ns, Inc. v. Rural Tel. Servc. Co., 499 U.S. 340, 349 (1991) (quoting U.S. Const. art. I, § 8, cl. 8).