WHY THE GOOGLE BOOK SEARCH SETTLEMENT SHOULD BE APPROVED: A RESPONSE TO ANTITRUST CONCERNS AND SUGGESTIONS FOR REGULATION

Yuan Ji[*]

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I. INTRODUCTION

Imagine the corpus of all human knowledge available in print form housed in an online bookstore, not at all constrained by shelf space limitation, damage, or physical deterioration of the books over time. Without ever having to leave the comfort of his or her own home, a user can perform a keyword search within the texts of all the books in this massive digital database. The search results are almost instantaneous. Those results in the public domain or out of copyright can be viewed in full and downloaded as PDF files for free. For works still under copyright, the results will limit the number of viewable pages and display only snippets of text that respective Rightsholders are willing to disclose to the viewer.[1] The user then has the option of purchasing an electronic copy of a book directly from the online bookstore, or clicking on links to other suppliers such as Amazon and Barnes & Noble.[2] This is exactly what the Google Book Search (GBS) service aspires to be and will be if, following the recent fairness hearing on February 18th, 2010, Judge Denny Chin of the Southern District Court of New York approves the class action settlement between Google and the Authors Guild and Association of American Publishers.[3]

Part I outlines the key components of the current Amended Settlement Agreement as well as the antitrust concerns raised against its approval. Part II explains why any proper antitrust analysis must take into account Google's status as a two-sided platform and responds to existing antitrust concerns. It concludes that the settlement, if approved, will not grant exclusive orphan book access to Google or anticompetitive pricing

[1] *See* Amended Settlement Agreement § 3.5(b)(i), Authors Guild, Inc., v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. Nov. 13, 2009), *available at* http://www.googlebooksettlement.com/r/view_settlement_agreement [hereinafter Amended Settlement Agreement] ("Any Rightsholder of a Book at any time may direct Google or the Registry to exclude his, her or its Book, or any portion thereof, from any one or more, or all, Display Uses . . . ."). A "Display Use[ ]" can mean any of the following: "Snippet Display, Front Matter Display, Access Uses, and Preview Uses." *Id.* § 1.52.

[2] *See What you'll see when you search on Google Books*, GOOGLE BOOKS, http://books.google.com/intl/en/googlebooks/screenshots.html (last visited Nov. 29, 2010); *About Google Books*, GOOGLE BOOKS, http://books.google.com/intl /en/googlebooks/about.html (last visited Nov. 29, 2010).

[3] *See* Order, Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. Feb. 5, 2010), *available at* http://thepublicindex.org/docs/ame nded_settlement/fairness_hearing_order.pdf; *See* Amended Settlement Agreement, *supra* 1, §§ 1.64, 1.65, 1.67.

power to the Rightsholders. Part III explores post-settlement regulatory alternatives and rejects compulsory licensing of orphan books as an option. Instead, it advocates the grant of licensing power to the Fiduciary and the Registry. Given GBS's natural monopoly traits, another regulatory option is the imposition of a consent decree similar to those under which ASCAP and BMI operate.

II. BACKGROUND

A. *Timeline of Events*

What GBS has accomplished is no small feat. As of October 2009, it has scanned and placed into the online database more than 10 million books, and the number continues to grow.[4] To outline the sequence of events leading up to the present-day proposed Amended Settlement Agreement (ASA), first rewind backward to October 2004 when Google Print, the precursor to GBS, was launched at the Frankfurt Book Fair in Germany.[5] The Google Print Program initially consisted of fifteen publishers that agreed to make their products available for search within the database, and two months later in December 2004, the Google Library Project's first cohort of five prominent libraries signed on and agreed to make digital scans of their collections available worldwide.[6] The Library Project led to two lawsuits in

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[4] Sergey Brin, *A tale of 10,000,000 books*, THE OFFICIAL GOOGLE BLOG (Oct. 9, 2009, 9:30 AM), http://googleblog.blogspot.com/2009/10/tale-of-10000000-books.html.

[5] *History of Google Books*, GOOGLE BOOKS, http://books.google.com/googlebooks/ history.html (last visited Nov. 29, 2010).

[6] *See id.* (listing the five libraries as Harvard, Stanford, the University of Michigan, the University of Oxford, and the New York Public Library); *see also Google Checks Out Library Books*, GOOGLE PRESS CENTER, http://www.google.com/press/pressrel/print_library.html (last visited Nov. 29, 2010). While the University of Michigan, Harvard, and Stanford agreed to make their entire collections searchable, the University of Oxford and the New York Public Library agreed to scan works only from their collections that are no longer under copyright. Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, N.Y. TIMES, Sept. 21, 2005, *available at* http://www.nytimes.com/2005/09/21/technology/21book.html?_r=1. The Library Project continued to expand in membership as other libraries, both domestic and foreign, joined in 2006 and 2007. *See, e.g.*, Press Release, Keio University, Keio University to Partner with Google, Inc. for Digitalization and Release of Its Library Collection to the World for "Formation of Knowledge of the Digital Era" (July 6, 2007), www.keio.ac.jp/english/press_release/070706e.pdf. (stating that, as of July 2007, the Japanese university had decided to partner with GBS with plans to initiate digitization in 2008, and stating it was the first partner

the following year, each alleging copyright infringement against Google – the first from the Authors Guild and the second from five high-profile publishers – since many of the books scanned by Google are still under copyright protection.[7] In response, Google claimed that its digitization of books and display of snippets are permitted as "fair use" under U.S. copyright law.[8]

B. Key Elements of the Settlement Agreement[9]

In October 2008, a class action Settlement Agreement (SA) was reached between GBS and the Authors Guild and Association of American Publishers after two years of negotiations.[10] Under the SA, Google was to pay $125 million in exchange for the right to scan, display, and sell electronic access to books online.[11] The settlement is non-exclusive in that it does not preclude consumers and Google's future competitors in the book digitization market from contracting with the Rightsholders independently, even if such contracts grant authorizations

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outside of the U.S. and Europe to do so).

[7] *See* Class Action Complaint at 2, Author's Guild v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. Sept. 20, 2005), http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/googles-answer-to-authors-guild/Google%27s%20Answer%20to%20Authors%20Guild%2011302005.pdf; Complaint at 2,4, McGraw-Hill Co. v. Google Inc., No. 05 Civ. 8881 (S.D.N.Y. Oct. 19, 2005), http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/mcgraw-hill/McGraw-Hill%20v.%20Google%2010192005.pdf.

[8] *See* Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc. at 3, McGraw-Hill Co. v. Google Inc., No. 05 Civ. 8881 (S.D.N.Y. Nov. 8, 2005),http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/googles-answer-to-publishers/Google%27s%20Answer%20to%20Publishers%2011082005.pdf; Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc. at 7, Author's Guild v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. Nov. 30, 2005), http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/14/0.pdf.

[9] This Article will refer to both the original Settlement Agreement and the current Amended Settlement Agreement with the understanding that they are proposed, but not approved, versions of the same settlement. Any description made in the present tense regarding either version means it is valid for the current Amended Settlement Agreement.

[10] Press Release, Google, Authors, Publishers, and Google Reach Landmark Settlement, (Oct. 28, 2008), *available at* http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html.

[11] *See id.*; Settlement Agreement §§ 3.1(a), 3.3(a)–(c), 3.4, Authors Guild, Inc., v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. Oct. 28, 2008), http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/settlement/Settlement%20Agreement.pdf [hereinafter Settlement Agreement].

identical to those given to Google under the settlement.[12] A minimum of $45 million of the settlement fund, backed by additional funds if necessary, is allocated to the compensation of authors and publishers whose copyrighted works have been digitized prior to the opt-out deadline for the settlement.[13] Another $34.5 million goes toward the creation of a Book Rights Registry (Registry), a non-profit entity that represents the Rightsholders' interests with respect to both the settlement and "potential licensing deals with other entities;"[14] a stipulation that will soon become relevant in the discussion of antitrust concerns in Section I.C and Part II.

Under the revenue-sharing agreement in the settlement, Google is to pay the Rightsholders through the Registry 70% of future revenues from consumer purchases and advertisements less 10% for operating costs, which results in a final split of 63% for Rightsholders and 37% for Google.[15] Besides distribution of the 63% share among Rightsholders, the Registry is also responsible for the creation of a Rightsholder identification database.[16] The database not only maintains the contact information for active Rightsholders, but will also be improved over time by the Registry's "commercially reasonable efforts" to locate the absent owners of orphan works: in-copyright but out-of-print works whose copyright holders cannot be found or identified.[17]

Rightsholders who do not agree with the terms of the settlement and want to retain the right to sue Google for copyright infringement may do so by opting out of the settlement.[18] If they wish that specific works of theirs not be digitized or displayed by GBS and if they specify the works on

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[12] Settlement Agreement, *supra* note 11, § 2.4.

[13] Settlement Agreement, *supra* note 11, § 2.1(b); Miguel Helft & Motoko Rich, *Google Settles Suit Over Book-Scanning*, N.Y. TIMES, Oct. 28, 2008, *available at* http://www.nytimes.com/2008/10/29/technology/internet/29google.html.

[14] *FAQs*, GOOGLE BOOK SETTLEMENT, http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704 (last visited Nov. 29, 2010) [hereinafter Google Book Settlement FAQs]; Settlement Agreement, *supra* note 11, § 2.1(c).

[15] Settlement Agreement, *supra* note 11, §§ 2.1(a), 4.5(a).

[16] Settlement Agreement, *supra* note 11, § 13.4; Google Book Settlement FAQs, *supra* note 14.

[17] Google Book Settlement FAQs, *supra* note 14; *Orphan Works*, PUBLIC KNOWLEDGE, http://www.publicknowledge.org/issues/ow (last visited Nov. 29, 2010).

[18] Google Book Settlement FAQs, *supra* note 14.

their opt-out forms, Google will honor such requests even though it is under no obligation to do so under the settlement.[19] This means that orphan books are included in the settlement by default, since by definition their copyright owners are not available to opt out. Although revised later in the Amended Settlement Agreement, the original SA's provision on unclaimed funds stipulates that revenues from orphan books which remain unclaimed for more than five years will be redistributed to active Rightsholders after paying some of the Registry's operational expenses.[20]

One important feature of the settlement is its pricing of online book purchases that consumers can make directly through GBS. Rightsholders have two options: specify their own prices, or allow Google to design a pricing algorithm that determines each book's optimal price to "maximize revenue for each Rightsholder."[21] The pricing algorithm will initially distribute books into twelve pricing bins ranging from $1.99 to $29.99.[22] Google will then take into account aggregate data on "substitute" books that are similar to a given book, and may adjust the price of this particular book over time "in response to sales data and in order to collect additional data to establish the optimal price."[23] This capacity for experimentation to determine the elasticity of demand is a tremendous advantage that Rightsholders do not have if they set prices on their own. As will be clarified later in the Amended Settlement Agreement, the algorithm is meant to emulate a competitive market by striving for the profit-maximizing price for each individual Rightsholder.

Last, but not least, the settlement covers only copyrighted books published by January 5, 2009.[24] This means that for books

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[19] *Id.*

> [T]he author or publisher can request that the Settlement Administrator ask Google not to digitize (or, if already digitized, not to display any contents from) the books or Inserts identified in the opt out form,[sic] Although Google has no obligation . . . to comply . . . it is Google's current policy to voluntarily honor such requests, if the Books or Inserts are individually specified, are in copyright, and the author or publisher has a valid and unchallenged copyright interest in their Books and Inserts.

Id.

[20] Settlement Agreement, *supra* note 11, § 6.3(a), Attachment. C § 1.1(e).

[21] *Id.* § 4.2(b)(i).

[22] *Id.* § 4.2(c)(i).

[23] *Id.* § 4.2(c)(ii).

[24] *Id.* § 1.16, Attachment. I para 5 (stating that books covered under the Settlement Agreement, include works that, "as defined in 17 U.S.C. § 101,

published after January 5, 2009, Google must contract with their copyright owners separately if it wishes to add them to the GBS database.[25] Given Google's mission "to organize the world's information and make it universally accessible and useful,"[26] it will likely want to make such additional contracts going forward so that the GBS database is comprehensive. The SA provides for such future needs by allowing Google to contract with copyright holders "other than by operation of this Settlement Agreement" to include their works in the GBS database.[27] Because all existing orphan books were published before the January 5 deadline and have no copyright owners to opt out, they will be included in the settlement.[28]

C. Antitrust Concerns

The terms of the settlement have been revised since it was first filed in October 2008. The current version of the settlement is the Amended Settlement Agreement (ASA),[29] which was filed in November 2009 partially in response to the concerns in a Statement of Interest that the Department of Justice (DOJ) filed in September 2009 regarding the proposed settlement.[30] Before highlighting the ASA's key revisions, to evaluate how effectively the ASA has addressed antitrust concerns, it is helpful to summarize these concerns about the original SA.

1. Monopoly Power over Orphan Books

First, the DOJ is concerned that the SA grants Google "de facto exclusive rights for the digital distribution of orphan works,"[31] and several commentators have voiced the same concern.[32] The

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ha[ve] been registered with the United States Copyright Office as of the Notice Commencement Date [January 5, 2009].").

[25] Google Book Settlement FAQs, *supra* note 14.

[26] *Company Overview*, GOOGLE CORPORATE INFORMATION, http://www.google.com/corporate (last visited Nov. 29, 2010).

[27] *See* Settlement Agreement, *supra* note 11, § 1.62.

[28] Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383, 393 (2009).

[29] Amended Settlement Agreement, *supra* note 1.

[30] Statement of Interest of the United States of America Regarding Proposed Class Settlement at 1–2, Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y.Sept.18,2009), http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/doj/DOJ%20Brief.pdf [hereinafter Sept.'09 DOJ Statement].

[31] *Id.* at 23.

[32] *See, e.g.*, Picker, *supra* note 28, at 385–86 (arguing that the Settlement

Registry does not have explicit legal power to license digitized access to books without the permission of copyright owners, and in the case of orphan books, owners are unavailable to give consent.[33] Critics such as Professor Picker fear that even if the Registry has such power, active Rightsholders have little incentive to license orphan books to Google's competitors if they can enjoy monopoly pricing through GBS instead.[34] If the SA were approved, Google's monopoly power over orphan books could foreclose competition in the book digitization market since no competitor would be able to create a book database as comprehensive as GBS.[35]

The offense of monopoly under Section 2 of the Sherman Act[36] has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[37] One can argue that if the SA were approved, the monopoly power Google would gain over orphan books is not the result of a superior product but an unfair advantage gained from willful copyright violation. On the other hand, it is equally plausible to argue that Google had the business acumen to be the first to undertake book digitization on a massive scale and believed in good faith that this project constituted a fair use exception to copyright infringements.

But consider the following argument: a competitor like Yahoo!

Agreement may give Google a monopoly over orphan works); Miguel Helft, *Google's Plan for Out-of-Print Books Is Challenged*, N.Y. TIMES, Apr. 3, 2009, http://www.nytimes.com/2009/04/04/technology/internet/04books.html (stating that critics are concerned the agreement will give Google "virtually exclusive rights" and "too much power over orphan works"); James Grimmelmann, *How to Improve the Google Book Search Settlement*, J. INTERNET L., April 2009, at 14–15 (explaining that Google's rush to scan orphan works may create a monopoly); Robert Darnton, *Google & the Future of Books*, N.Y. REV. OF BOOKS, Feb. 12, 2009, *available at* http://www.nybooks.com/articles/22281 (arguing that the agreement will make Google "invulnerable to competition" and create a monopoly by default).

[33] *See* Sept. '09 DOJ Statement, *supra* note 30, at 23.

[34] *See* Picker, *supra* note 28, at 402–03 (explaining that licensing to additional providers will decrease returns to rightsholders).

[35] Sept. '09 DOJ Statement, *supra* note 30, at 24.

[36] Sherman Antitrust Act, 15 U.S.C. § 2 (2010) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . . shall be deemed guilty of a felony . . . .").

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

can gain access to orphan books by claiming fair use and, if necessary, triggering its own class action lawsuit as Google has done with the hope of reaching a similar settlement.[38] The SA is non-exclusive after all, and nothing in it prevents Rightsholders from contracting independently with "direct competitors of Google," such as Yahoo!.[39] In response, Professor Grimmelmann points out that even if Yahoo! mimics Google's path and is sued after large-scale scanning without permission, there is no assurance that this time the plaintiffs would be willing to settle on terms as favorable as those now offered to Google.[40] To eliminate lawsuits from future potential plaintiffs and sidestep the unavailability of orphan book owners, Yahoo! would need a class action settlement like Google's, but there is no guarantee that the plaintiffs will form a class at all if they are already getting a good deal from Google.[41] Even if history can repeat itself perfectly, such repetition should not be encouraged for two reasons. One, it is wasteful policy to promote copyright violations and duplicative litigation expenses when the negotiation of a legal licensing agreement between the Registry and competitor(s) is possible.[42] Two, even if a legal licensing agreement is not possible, the point of ensuring that Google's competitors have comparable access to orphan books is to encourage product innovation and price competition.[43] Duplicative litigation expenses can conceivably dwarf whatever additional welfare consumers extract from faster product innovation and lower prices, thereby resulting in a net deficit of social welfare. Encouraging Google's competitor(s) to gain access to orphan books through a similar class action lawsuit, in short, has no guarantee of success to begin with and makes bad public

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[38] *See* Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMPETITION L. & ECON. 411, 422–23 (2009) ("It bears emphasis that other companies can also embark on Google's road of scanning orphan works and providing access to them through fair use."); Einer Elhauge, *Why the Google Books Settlement is Procompetitive*, 2 J. LEGAL ANALYSIS1,13(2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1459 028 ("[T]he settlement would . . . lower rival entry barriers by providing a roadmap by which rivals could . . . . engage in copying efforts similar to Google, inviting a class action lawsuit that they would know (if this settlement were approved) they can settle on similar terms . . . .").

[39] *See* Settlement Agreement, *supra* note 11, § 2.4.

[40] Grimmelmann, *supra* note 32, at 14.

[41] *Id.*

[42] *See* Sept.'09 DOJ Statement, *supra* note 30, at 24.

[43] *See id.* at 22, 24 ("The seller of an incomplete database . . . cannot compete effectively with the seller of a comprehensive product.").

policy

A related concern about Google's monopoly power is its ability to charge high prices for institutional subscriptions, many of which are held by libraries and therefore subject to fairly inelastic demand. An institutional subscription is "any service of a limited duration provided by Google to an institution for a fee that allows Online access to and viewing of the full contents" of the GBS database.[44] Professor Robert Darnton, director of the Harvard University Library, has voiced the concern that Google is in a position "first [to] entice subscribers with low initial rates, and then, once they are hooked, ratchet up the rates as high as the traffic will bear."[45] Other commentators echo his unease.[46]

2. Horizontal Pricing Agreements Among Rightsholders Restrain Competition

The proposed SA also raises red flags under Section 1 of the Sherman Act, which declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal.[47] Some restraints are so "'manifestly anticompetitive"' and lacking in "'any redeeming virtue"' that they are deemed *per se* illegal;[48] otherwise "[t]he rule of reason" is the prevailing standard used to determine whether a restraint is

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[44] Settlement Agreement, *supra* note 11, § 1.74. Pricing for institutional subscriptions can vary across the categories of corporate, higher education, K-12 school, government, public, and "[a]dditional categories, as agreed between Google and the Registry." *Id.* § 4.1(a)(iv).

[45] *Librarian Opposes Google's Library Fees* (NPR radio broadcast Feb. 21, 2009), *available at* http://www.npr.org/templates/story/story.php?storyI d=100969810; Darnton, *supra* note 32. *Contra* Stephen Yenser et al., *Google & Books: An Exchange*, N.Y. REV. OF BOOKS , Mar. 26, 2009, *available at* http://www.nybooks.com/articles/22496 (responding to Darnton and explaining why Google is unable to use "rapacious pricing strategies" to target academic libraries).

[46] *See, e.g.*, Picker, *supra* note 28 at 397 ("[I]t is clear that many fear that Google will ultimately charge monopoly prices for these institutional subscriptions."); Christopher Suarez, *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values, Protecting Competition*, 55 N.Y.L. SCH. L. REV. (forthcoming 2010/2011) (manuscript at 27–33), *available at* http://ssrn.com/abstract=1409824 (arguing that institutional subscriptions could be subject to predatory pricing in violation of the Sherman Antitrust Act).

[47] Sherman Antitrust Act, 15 U.S.C. § 1 (2010).

[48] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (quoting Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 50 (1977); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985)).

a Section 1 violation.[49] The rule of reason takes into account factors such as "information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[50] While the market power of the business at stake is often a consideration under the rule of reason, a strong "procompetitive justification" for restraints on price or output is required to avoid a Section 1 violation regardless of whether or not the business enjoys substantial market power.[51]

Concerned with the similarities between the SA and horizontal agreements that the Supreme Court has deemed to be *per se* Section 1 violations, the DOJ lists three ways in which the collective negotiation in the SA can reduce price competition among Rightsholders. First, horizontal agreement among Rightsholders on how the pricing algorithm should price online purchases of their books will effectively serve to limit competition.[52] Traditionally, publishers compete with each other on the wholesale prices that they offer to distributors, and if the settlement is approved, Google will become a distributor through GBS.[53] A collectively negotiated revenue-sharing plan essentially fixes the wholesale revenue at 63% of total revenues earned by Google, thereby eliminating the need for publishers to compete with each other on the percentage returns they offer to Google.[54]

Under normal circumstances, this would not prevent a publisher from competing in the wholesale price by agreeing to a lower list price for the direct online purchase of a book through GBS. The publisher does have this pricing option, but the pricing algorithm sets the default list price of an online book purchase unless the publisher specifies otherwise.[55] If, as Google claims, the pricing algorithm can take into account the wealth of historical price data on substitutable books and maximize a

[49] *Leegin Creative Leather Prods.*, 551 U.S. at 885.

[50] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343).

[51] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 111 n.42 (1984); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (stating that some combinations are judged under the rule of reason with "an inquiry into market power and market structure designed to assess the combination's actual effect").

[52] Sept. '09 DOJ Statement, *supra* note 30, at 19–20.

[53] *Id.*; Settlement Agreement, *supra* note 11, § 2.1(a).

[54] Sept. '09 DOJ Statement, *supra* note 30, at 19–20; Settlement Agreement, *supra* note 11, § 2.1(a).

[55] Settlement Agreement, *supra* note 11, § 4.2(b).

Rightsholder's revenues from a particular book then that Rightsholder has little incentive to specify a lower list price instead.[56] Consequently, the collectively negotiated 63% revenue-sharing plan gives Rightsholders little incentive to compete with each other's wholesale prices.[57] It also sets the expectation of a percentage return floor for Rightsholders who choose to opt out of the settlement and negotiate independent revenue-sharing plans with Google, since they know that they can get at least 63% by simply doing nothing.

Second, Google's pricing algorithm, which sets the default list prices of online book purchases unless the Rightsholder specifies otherwise, is a potential restriction on retail price competition. The DOJ is concerned with Section 4.5(b)(ii) of the SA, which forbids Google from discounting the price of an individual online book purchase without the approval of both the book's active Rightsholder and the Registry.[58] Section 4.5(b)(i) allows temporary discounts from list prices of books at Google's discretion, but it does not specify what duration qualifies as "temporary" as distinguished from the discounts available under section 4.5(b)(ii).[59] Furthermore, the 63%/37% revenue split for temporarily discounted books under 4.5(b)(i) will still be based on the undiscounted list prices.[60] This, in combination with the uncertainty about what qualifies as "temporary," can discourage

[56] *See* Amended Settlement Agreement, *supra* note 1, § 4.2(b)(i)(2) (revising Section 4.2(b)(i)(2) in the original SA to clarify that the pricing algorithm is designed to maximize a Rightsholder's revenues from an individual book "without regard to changes to the price of any other Book," provided that "Google may use historical price data of other Books in designing the Pricing Algorithm"). This is the same as what a Rightsholder would price an individual book in a competitive Nash-Bertrand market. *See* Jerry Hausman et. al., *Competitive Analysis with Differenciated Products*, 34 ANNALES D'ÉCONOMIE ET DE STATISTIQUE 159, 162, 178 (1994), *available at* http://www.jstor.org/stable/20075951 (discussing the Nash-Bertrand price model in a competitive industry).

[57] Sept. '09 DOJ Statement, *supra* note 30, at 19–20.

[58] *Id.* at 21.

[59] *See* Settlement Agreement, *supra* note 11, § 4.5(b)(i)–(ii); Sept.'09 DOJ Statement, *supra* note 30, at 21& n.9.

[60] Google and the Registry, however, can agree to base the 63%/37% revenue split on a revenue figure other than the undiscounted list price. *See* Settlement Agreement, *supra* note 11, § 2.1(a) (establishing a 63% revenue split); *see also id.* § 4.5(b)(i) ("Google may provide temporary discounts off the List Prices from time to time at its sole discretion. If Google elects to provide such discounts, the Standard Revenue Split for Purchases paid to the Registry for the benefit of the Rightsholders will be based on the List Prices, unless otherwise set forth in this Section 4.5(b) (Discounting and Subsidies) or unless otherwise agreed by Google and the Registry.").

Google from funding discounts with any significant impact on consumer prices.[61]

The DOJ's Statement of Interest of September 2009 relies on *United States v. Socony-Vacuum Oil Co.*, in which the Supreme Court held that the agreement among competing oil companies to artificially raise and fix gasoline prices by manipulatively buying up gasoline in the spot market is "one species of price-fixing" that violates the Sherman Act.[62] The oil companies' use of a pricing formula for gasoline contracts, although not the agreement at stake in *Socony*, was illegal because it was based on an artificially high spot price benchmark that, through a well-organized buying program of the oil companies, served as a pricing floor under the gasoline market.[63] The analogy between *Socony* and GBS is the following: the lack of transparency in the pricing algorithm's design and its potential for artificially maintaining high prices may violate the Sherman Act, even if the collective agreement among Rightsholders on a default pricing algorithm does not. Horizontal agreement among competitors not to offer discounts to consumers is also considered *per se* illegal price-fixing.[64] In conclusion, Google's pricing algorithm bears enough resemblance to past instances of illegal horizontal agreements to warrant closer inspection under Section 1 of the Sherman Act.

Third, the pricing algorithm allows active Rightsholders to choose the prices at which competing orphan books are sold.[65] Since the orphan book owners are unavailable to specify otherwise, the DOJ is concerned that the active Rightsholders would price orphan books so that they do not effectively compete

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[61] *See* Sept.'09 DOJ Statement, *supra* note 30, at 21 & n.9.

[62] 310 U.S. 150, 165–67, 222–24, 228 (1940).

[63] *Id.* at 198, 216.

[64] *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647–48 (1980) ("[E]xtending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per-se* rule against price fixing."); Freeman v. San Diego Ass'n of Realtors, No. 01-56199, No. 01-56231, 2003 U.S. App. LEXIS 7731, at *22–23, 38 (9th Cir. Mar. 10, 2003) (holding that the defendant's horizontal agreement to fix prices and not offer discounts is *per se* illegal); *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682, 705 (E.D. Mich. 2000) (explaining that horizontal market allocation agreements are *per se* illegal).

[65] *See* Sept. '09 DOJ Statement, *supra* note 30 at 22.

with their own books.[66] Absent empirical evidence of orphan books' substitutability in relation to the active Rightsholders' books, it is difficult to assess the merit of this claim.

D. Key Revisions in the Amended Settlement Agreement

In its September 2009 statement, the DOJ made it clear that unless the terms of the settlement were revised in response to the above concerns, it would likely find the settlement to be in violation of the antitrust laws.[67] The ASA, incorporating some important revisions, was filed in November 2009 to address these concerns.[68]

First, the ASA eliminated the Most Favored Nation (MFN) clause in the proposed SA, which required the Registry to offer Google terms that are equal or better than any offered to third parties within ten years of the settlement's effective date.[69] Second, to address the problem of reduced wholesale price competition due to Rightsholders' horizontal agreement on a uniform revenue-sharing plan, the ASA has a new provision that gives Google the power to enter bilateral negotiations on the revenue split with an individual Rightsholder.[70] However, if an agreement cannot be reached, then Google reserves the right to exclude the particular book at issue from the GBS database.[71] Third, conditional on court approval and a supermajority vote of the Registry's Board of Directors, an independent Unclaimed Works Fiduciary (Fiduciary) is established to oversee the commercial use of orphan books and to protect the interests of their copyright owners.[72] Fourth, instead of distributing to the Registry and active Rightsholders all funds that remain unclaimed for five years, as originally proposed in the SA the ASA now allocates, subject to the Fiduciary's approval, up to 25% of funds that have remained unclaimed for at least five years to locate the owners of orphan books.[73]

[66] *Id.*
[67] *Id.* at 19.
[68] Amended Settlement Agreement, *supra* note 1, § 2.1, Attachment. M.
[69] *Id.* Attachment. N; Settlement Agreement *supra* note 11, § 3.8(a).
[70] Amended Settlement Agreement, *supra* note 1, § 4.5(a)(iii).
[71] *Id.*
[72] *Id.* § 6.2(b)(iii). The Fiduciary is an entity independent of the Registry and not comprised of currently active Rightsholders. *See id.*
[73] *Id.* § 6.3(a)(i)(2). The remaining 75% of unclaimed funds will be held by the Registry for the benefit of orphan book owners until they register and claim their books. *See id.* § 6.3(a)(i)(1)-(2). Funds that remain unclaimed for ten

Last, but not least, clarifications on the pricing algorithm's design are added. Agreements between Google and the Registry to add or change pricing bins for orphan books must be approved by the Fiduciary.[74] The pricing algorithm will be designed by Google "with no involvement of or control by the Registry or any Rightsholder" and based on historical data regarding substitutable books.[75] The algorithm seeks to maximize an individual book's revenues while holding the prices of other books equal, as a Rightsholder would in a competitive Nash-Bertrand market.[76] In its second Statement of Interest filed on February 4, 2010, the DOJ continues to raise antitrust concerns and contends, in particular, that the ASA does nothing to address Google's *de facto* monopoly power over orphan books and consequential foreclosure of competitors who want to obtain comparable rights.[77]

III. RESPONSE TO ANTITRUST CONCERNS

This Part will address the antitrust concerns enumerated in Section I.C. To foreshadow the result of the analysis, I conclude that the GBS settlement benefits all parties involved and should be approved. The point of antitrust regulation is not to extinguish all outcomes except the optimal one, but rather to ensure that the settlement increases aggregate social wealth and consumer welfare.[78] It is difficult to dispute that the GBS service advances both. In the age of the Internet, the elimination of physical shelf space constraints means big opportunities for

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years or longer will be distributed proportionally to the United States, Canada, the United Kingdom, and Australia. *Id.* § 6.3(a)(i)(3). Subject to the Fiduciary's approval, the Registry can then recommend to the court how the unclaimed funds should be distributed to literacy-based charities in the respective four countries. *Id.*

[74] *Id.* § 4.2(c)(i).

[75] *Id.* § 4.2(c)(ii)(2).

[76] *Id.* See also Jerry Hausman et. al., *supra* note 56.

[77] Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 21, Authors Guild, Inc. v. Google, Inc. No. 05 Civ. 8136 (S.D.N.Y. Feb. 04, 2010), http://www.justice.gov/atr/cases/f255000/255012.pdf [hereinafter Feb. '10 DOJ Statement].

[78] *See* Hausman & Sidak, *supra* note 38, at 419; Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1023 (1987) ("[T]he economic goal of antitrust policy is to increase the material welfare of society through the instrument of interfirm rivalry. The end result is the enhancement of aggregate social wealth (economic efficiency) subject to the constraint that consumers shall receive an appropriate share of such wealth . . . .").

online retailers—companies such as Netflix and iTunes, now no longer bound by traditional retail's need to stock the most popular items for a local audience, are able to tap into previously unprofitable niche markets and cater to the off-the-beaten-path tastes of all consumers.[79] GBS is not about the elimination of physical shelf space constraints *per se*, but by unlocking millions of out-of-print volumes that were previously available only on the shelves of a few libraries and adding them to the digitized corps of human knowledge, it achieves the same dramatic increase in product variety.

Wired Magazine's Editor-in-Chief Chris Anderson has coined a term for online retailing's ability to cater profitably to the nuanced tastes of more consumers: "The Long Tail."[80] If products are graphed against their individual popularity rankings, the head of the graph comprised of a few bestselling hits falls rapidly into the long tail of niche products, each of which may result in a few sales but which collectively make up a significant portion of total sales.[81]

In-copyright but out-of-print orphan books, which make up a substantial portion of the library books that Google has scanned thus far, are the niche products that make up the digitized book market's long tail.[82] Presumably they are out of print because there has not been enough popular demand to make printing profitable, but many, if not all, just might be the perfect match for a customer's obscure interests. And, GBS's search and snippet-display functions are the filtering devices that help

[79] *See* CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 16 (2006).
[80] *See id*. at 10, 274.
[81] *See, e.g.*, *id.* at 25 (showing an example of such a graph for the online music industry).
[82] *See* Hausman & Sidak, *supra* note 38, at 420 (estimating that nine percent of the books Google has copied are orphan works).

customers find what they are looking for by revealing the niche products down the curve.[83]

Authors and publishers are not the only ones who will gain from the long tail of orphan books if the settlement is approved. GBS offers the convenience of browsing without setting foot in a bookstore or library, greater product variety, the ability to find the right product for free, and a sampling of snippets or pages (subject to how much of each individual book its Rightsholder is willing to display online).[84] Researchers have shown that in electronic markets such as online bookstores, increased product variety as a result of eliminating physical shelf space constraints brings significantly more consumer surplus than any efficiency gains from increased competition and lower prices.[85] "[T]he number of book titles [offered by] Amazon.com is more than 23 times larger than the [physical inventory] of a typical Barnes & Noble superstore, and 57 times greater than [that of] a typical large independent bookstore."[86] Product variety increases when an online retailer like Amazon.com can catalog its massive inventory with the ability to "recommend" additional products to a consumer of known tastes, and because of this, online bookstores have been shown to increase consumer welfare "between 7 and 10 times [more than] the consumer welfare gain from increased competition and lower prices in this market."[87]

Furthermore, antitrust intervention and opposition from potential competitors cause delays in the introduction of new goods and hurts consumer welfare as a result.[88] Professors Hausman and Sidak illustrate the analogous costs of regulatory delay by using the example of voice-messaging services offered by the Bell operating companies.[89] These services were initially presented in the 1970s but due to regulatory delays did not begin operation until more than a decade later.[90] Hausman estimated

[83] *See* ANDERSON, *supra* note 79, at 15–16 (explaining how an online bookseller's software helped customers find additional products by displaying reader reviews).

[84] *See What you'll see when you search on Google Books*, *supra* note 2.

[85] *See* Erik Brynjolfsson, Yu (Jeffrey) Hu, & Michael D. Smith, *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, 49 MGMT. SCI. 1580, 1580 (2003), *available at* http://digital.mit.edu/research/papers/176_ErikB_OnlineBooksellers2.pdf.

[86] *Id.*

[87] *Id.*

[88] Hausman & Sidak, *supra* note 38, at 418.

[89] *Id.* at 411, 417–18.

[90] *Id.* at 417–18.

the resulting cost to consumers, from this ten-year regulatory delay, to be many billions of dollars, and close to $100 billion for the delayed introduction of cell phone services.[91]

A. Evaluating the Google Book Search as a Two-Sided Platform

Existing commentary on GBS has paid little, if any, attention to Google's role as a two-sided platform that serves consumers on the one side and Rightsholders on the other. Before responding to the antitrust concerns outlined in Section I.C, all of which evaluate only a single side of this two-way relationship, consider the implications that Google's two-sided role has for the antitrust analysis of the pending settlement. In a 2003 article, Jean-Charles Rochet and Jean Tirole defined a two-sided platform as a business that caters to two interdependent groups of customers.[92] Later in their 2006 paper, Rochet and Tirole characterized a two-sided platform as a platform that "can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board."[93] In contrast to a one-sided business in which transactions can be negotiated in accordance with the Coase Theorem, a two-sided platform tends to form when the service it offers is unlikely to become available through direct negotiations between the two groups of customers: the transaction costs for a customer from group A to negotiate with customers from group B and for one of the latter to bargain with group A customers are simply too high.[94]

The proper antitrust analysis of a two-sided platform should not focus solely on a single side because the pricing decisions on side A will affect those on side B, which will in turn affect side A

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[91] *Id.* at 418.

[92] *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 990 (2003), *available at* http://www.jstor.org/stable/40005175 (stating that many markets "are characterized by . . . two distinct sides whose ultimate benefit stems from interacting through a common platform).

[93] Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report,* 37 RAND J. ECON. 645, 664–65 (2006), *available at* http://www.jstor.org/stable/25046265.

[94] *See* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151, 154 & n.7 (2007) (explaining that two-sided platforms generally "aris[e] in situations in which there are externalities and in which transactions costs . . . prevent the two sides from solving this externality directly").

again.[95] Because a two-sided platform such as Google needs to bring a critical mass on board from each set of customers, it may undertake pricing strategies that would look odd in a one-sided business with no such interdependent sets of customers.[96] Optimal pricing on one side of the market does not necessarily track marginal cost on the same side, and two-sided platform businesses will often charge one side a price well below marginal cost.[97] The platform business makes significant investments in cultivating one set of customers, as eBay does in developing buyer communities, even though most of the revenue is generated from the other set.[98] For this reason when assessing a two-sided business with significant fixed costs, such as Google's investment in scanning technology and settlement-related legal expenses, we should not be too hasty in drawing anti-competitive inferences just because price is well above marginal cost on a single side: if eBay wants to stay in business, it has to charge sellers more than the marginal cost of serving them. It is worthwhile to keep this in mind especially when evaluating claims that the settlement, if approved, will enable Google to charge monopoly prices for institutional subscriptions. The next two Sections will respond to the antitrust concerns summarized in Section I.C.

B. Google's Access to Orphan Books Is Not Exclusive

> The mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.[99]

Google's alleged *de facto* monopoly power over orphan books is

[95] *See* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 325 (2003) (explaining that all sides must be considered in analyzing competitive effects for multi-sided platform markets).
[96] *See id*. at 355–56 ("[O]ne cannot talk about the individual prices in isolation. Any change in demand or cost on one side of the market will necessarily affect the level and relationship of prices on all sides.").
[97] *See id*. at 325.
[98] *See id*. at 328–29, 360.
[99] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

the primary antitrust concern among the settlement's critics.[100] But from the beginning, the settlement has remained non-exclusive by allowing Google's competitors to contract with Rightsholders—either through the Registry or independently—for terms identical to those offered to Google.[101] The Most Favored Nation (MFN) clause in the SA could have reduced future competition if potential competitors knew that they could not gain a competitive advantage over Google and hence had less incentive to enter the market as a result.[102] Now that the ASA has eliminated the MFN clause, it is even harder to accuse Google of possessing monopoly power. The ASA, if anything, provides a neat solution to the orphan works problem that Congress has repeatedly tried to address since 2005.[103] Cognizant of the large number of orphan works and the prohibitively high fines faced by potential users should absent copyright owners resurface later to claim infringement, Congress has proposed legislation that would impose significant limitations on judicial remedies as long as users of orphan works have performed a "reasonably diligent search" for their owners beforehand.[104] Different versions of the bill—the Shawn Bentley Orphan Works Act and the Orphan Works Act—were introduced in the Senate and the House respectively in 2008.[105] Although the bill passed the Senate, neither version became law.[106] The ASA, if approved, not only reserves unclaimed funds for the benefit of orphan book owners who may resurface later, but also

[100] *See* Hausman & Sidak *supra* note 38, at 413–14, 419, 421–23.

[101] Settlement Agreement, *supra* note 11, § 2.4; Amended Settlement Agreement, *supra* note 1, § 2.4.

[102] Picker, *supra* note 28, at 386, 401.

[103] *See* Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFFICE (Sept. 25, 2008), http://www.copyright.gov/orphan/ (stating that the Copyright Office conducted studies and discussions under the leadership of congressional representatives and senators in 2005, and the findings were submitted to the Senate Judiciary Committee in January 2006).

[104] Ryan Andrews, Note, *Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves As a Private Solution to the Orphan Works Problem and Why It Should Matter to Policy Makers*, 19 S. CAL. INTERDISC. L.J. 97, 110–13 (2009).

[105] *Id.* at 111.

[106] *Id.*; *S. 2193: Shawn Bentley Orphan Works Act of 2008*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s110-2913 (last visited Nov. 29, 2009) (noting that the Senate bill passed by unanimous consent but never became law). The full text and status of the Senate bill, Shawn Bentley Orphan Works Act of 2008 can be found at http://www.govtrack.us/congress/bill.xpd?bill=s110-2913. The House bill, Orphan Works Act, can be found at http://www.govtrack.us/congress/bill.xpd?bill=h110-5889.

allocates money to the search for such absent Rightsholders.[107] In short, it can accomplish what Congress has failed to legislate. If parties to the ASA indeed do not have the legal right to give licensing powers to the Fiduciary, explicitly granting this right to the ASA seems to be a much easier task for Congress than starting another round of proposed legislation.[108]

1. Judicial Grant of Licensing Power to the Registry and the Fiduciary is Appropriate

Section 6.2(b)(i) of the ASA explicitly grants the Registry, "to the extent permitted by law, [the power to] license Rightsholders' U.S. copyrights to third parties."[109] It also grants the Fiduciary identical licensing power regarding orphan books.[110] What possible objections to Section 6.2(b)(i) can critics raise? If the fear is that the settlement simply allows, but does not have the legal right to authorize the Fiduciary to license orphan books then it is not the settlement, but the law that is responsible for whatever monopoly power that may result.[111] In the event that the ASA is distributing licensing powers to the Fiduciary despite its having no legal right to do so, Congress can always statutorily halt all licensing by pointing out that it is not allowed, that it goes beyond "'the extent permitted by law."'[112]

Critics of Section 6.2(b)(i) might also challenge whether it is an appropriate judicial role for Judge Chin to approve the settlement. It is troubling that if approved, the settlement will allow parties to take absent copyright owners' properties, without permission nor profit for the absent owners from that taking.[113] The response is that yes, it is an appropriate judicial role.

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[107] *See* Amended Settlement Agreement, *supra* note 1, § 6.3.

[108] *See* Andrews, *supra* note 104, at 125–27 (discussing the drawbacks in the proposed Orphan Works Act of 2008 and advocating for the Registry as a superior private market solution to the orphan books problem). *But see* James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, CPI ANTITRUST J., January 2010, at 2, 4, http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=james_grimmelmann (demonstrating much more faith than Andrews in Congress' ability to rise from past inaction and "create [legislation] from scratch").

[109] Amended Settlement Agreement, *supra* note 1, § 6.2(b)(i).

[110] *Id.*

[111] *See* Elhauge, *supra* note 38, at 12–13.

[112] *See id.* at 12–13, 28.

[113] *See* Amended Settlement Agreement *supra* note 1, at §§ 6.2(b), 6.3 (providing that the "Unclaimed Works Fiduciary" will have the "power to act with respect to the exploitation of unclaimed [b]ooks").

Innovation, economic development, and social progress should not be unconditionally held back and penalized because of restrictions in copyright law.[114] The orphan books problem would be nonexistent or at least drastically diminished if it were not for the Copyright Act of 1976, which eliminated the requirement that owners must register with the copyright office before gaining copyright protection for their works.[115] The Copyright Act also increased the duration of protection from twenty-eight years with the option to renew to the life of the author plus fifty years.[116] In 1998, the Sonny Bono Copyright Term Extension Act again lengthened the duration, this time to the author's life plus seventy years.[117] Works created before 1978 did not qualify for such extensions originally and still required renewal after the first twenty-eight years under the 1976 Copyright Act. However, the Copyright Renewal Act of 1992 eliminated this requirement and made renewal automatic for pre-1978 works.[118]

The Takings Clause of the Fifth Amendment allows the government's taking of private property for public use if just compensation is paid.[119] In this context, the Supreme Court has found "economic development" to be a legitimate public purpose, the pursuit of which "will often benefit individual private parties."[120] It is true that the government is not a party to the GBS settlement, but "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government . . . ."[121] It is hard to imagine a public

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114 See Andrews, *supra* note 104, at 108–11 (summarizing the changes in copyright law in relation to the orphan works problem).

115 *Id.* at 108; *see also* 17 U.S.C. § 102(a) (2010) (listing the mediu ms of expression that are protected by copyrights).

116 Andrews, *supra* note 104, at 108; *see also* Copyright Act of 1976, Pub. L. 94–553, §§ 302(a), 304(a), 90 Stat. 2572, 2573 (1976).

117 Pub. L. No. 105–298, § 101, 12 Stat. 2827 (1998) (current version at 17 U.S.C. § 302 (1998)).

118 Copyright Renewal Act of 1992, Pub. L. No. 102-307, §§ 101, 102 (c) & (g)(2), 106 Stat. 264, 264, 266–67 (1992) (amending 17 U.S.C. § 304 by providing for automatic renewal of works copyrighted between January 1, 1964, and December 31, 1977).

119 U.S. CONST. amend. V.

120 Kelo v. City of New London, 545 U.S. 469, 484–85 (2005). The *Kelo* decision was highly controversial, and most states had enacted post-*Kelo* reform legislation curtailing the government's power to invoke eminent domain in the name of economic development. *See* Edward J. Lopez, R. Todd Jewell & Noel D. Campbell, *Pass a Law, Any Law, Fast!: State Legislative Responses to the Kelo Backlash*, 5 REV. OF LAW & ECON. 101, 102 (2009).

121 Berman v. Parker, 348 U.S. 26, 33–34 (1954) (discussing the constitutionality of the District of Columbia Redevelopment Act of 1945).

interest more legitimate than the dissemination of knowledge, or to argue that the compensation provided for orphan book owners by the ASA is not fair.

What other objections can critics raise to Section 6.2(b)(i) of the ASA? If the fear is that to the extent permitted by law, the Registry might "lack the power and ability to license copyrighted [orphan] books . . . [since] consent cannot be obtained from the owners, ..."[122] remember that the Fiduciary has such licensing power under the ASA.[123] If the fear is that the Fiduciary's independence from the Registry is questionable, or that the Fiduciary will not adequately protect the interests of absent Rightsholders,[124] then Judge Chin can request the parties to revise the settlement so that the Fiduciary is independent and adequately powerful. Under any of these three interpretations, the allegation that the settlement grants Google *de facto* monopoly power over orphan books cannot be maintained.

2. The Registry and the Fiduciary Have Adequate Incentive to Contract with Google's Competitors

One can argue that even if the Registry's active Rightsholders and the Fiduciary have the right to contract with Google's competitors, there will be little incentive to do so when they can enjoy monopoly pricing through GBS instead. Several commentators have addressed this issue by pointing out that if a competitor, such as Amazon, offers Rightsholders more than 63% of the revenue the Rightsholders will have perfectly good incentives to contract even if, to compete with Google, Amazon charges consumers lower prices for both institutional

[122] Sept. '09 DOJ Statement, *supra* note 30, at 23.

[123] *See* Amended Settlement Agreement, *supra* note 1, at § 6.2(b)(i) ("[T]he Unclaimed Works Fiduciary may license to third parties the Copyright Interests of Rightsholders of unclaimed Books and Inserts to the extent permitted by law").

[124] *See* Feb. '10 DOJ Statement, *supra* note 77, at 20 ("[T]he independence of a Fiduciary serving under the Registry's board remains unclear, particularly as the Registry's charter and organizational documents were not included as part of the ASA (and have not otherwise been disclosed). In addition, the parties withheld from the Fiduciary many powers that may be necessary to protect the interests of absent rightsholders, such as the ability to renegotiate the 63:37 revenue split, § 4.5(a)(iii), the ability to set prices for works, § 4.2(b)(i)(1), and the ability to turn off the display of a work, § 3.2(e)(i) – all powers granted only to registered rightsholders. *Id.* Without so empowering the Fiduciary, the defaults set and controlled by the Registry largely dictate those terms for unclaimed works." *Id.*

subscriptions and individual books sales.[125] Amazon's offer of more than 63% of the revenue generated by lower prices can result in two possible outcomes in absolute rather than percentage terms: (1) Rightsholders receive less revenue per sale from Amazon than they would from contracting exclusively with Google, or (2) they receive an amount that is equal to or greater than exclusively contracting with Google.[126]

Under the first outcome, the high demand for Amazon's cheaper service can offset the lost profit per individual sale, thereby making it worthwhile for the Rightsholder to contract with Amazon. With sufficiently elastic demand, this can hold true even if Amazon's offer is less than 63% of total revenue. Under the second scenario, contracting with Amazon seems to be a no-brainer for Rightsholders. If Amazon is willing to make an offer that is just as good as (if not better than) Google's, and is happy to attract customers at a cheaper price, why not accept it? Professor Elhauge reinforces this point by pointing out that the interests of wholesale manufacturers and consumers are aligned when it comes to the minimization of upstream suppliers' distribution markups.[127]

3. Constraints on Google's Ability to Obtain Exclusive Rights to Orphan Books

There are two more constraints on Google's exclusive rights to orphan books if the settlement is approved. First, over time, some orphan books will be claimed by or matched with their rightful owners, thereby reducing the pool of unclaimed books.[128] The ASA provides, subject to the Fiduciary's approval, for using up to 25% of funds that remain unclaimed for five years to search for orphan book authors.[129] Revenues generated by orphan books also create economic incentives for their copyright owners to come forward to claim their shares of the revenue. Second, Google's digitized access to orphan books cannot achieve monopoly status because it has to compete with the physical

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[125] *See* Hausman & Sidak, *supra* note 38, at 431–32; Elhauge, *supra* note 38, at 12 ("[I]f a Google rival would undercut the distribution markup that Google charges or be a more efficient distributor in any other way, then both the Registry and individual rightsholders would have incentives to license that rival.").

[126] *See* Hausman & Sidak, *supra* note 38, at 432.

[127] *See* Elhauge, *supra* note 38, at 12.

[128] *See* Amended Settlement Agreement, *supra* note 1, § 6.3(a)(i)(2).

[129] *Id.*

copies of these books available in libraries, used bookstores, or online retailers such as Amazon and Half.com.[130]

The analysis above is a counter to the related concern that Google's exclusive access to orphan books will enable it to charge high prices for institutional subscriptions. Hausman and Sidak believe that Google will not be able to capture all of the additional consumer welfare created by GBS's database of orphan books, since doing so would require perfect first-degree price discrimination that charges each institutional subscriber the maximum price it is willing to pay to search in this database.[131] However, they do acknowledge the possibility that Google might attempt third-degree price discrimination, which places customers into categories and charges each category its inferred maximum willingness to pay.[132] Section 4.1(a)(iv) of the ASA does divide institutional subscribers into groups like "corporate" and "higher education" with the implication that different prices will be charged to different groups.[133] However, as Professor Grimmelmann points out, such a pricing structure for institutional subscriptions can still be fair.[134] Group-specific pricing such as student discount tickets or early-bird specials catering to seniors is allowed in other sections of the economy.

To foreshadow Section III.C, which proposes that GBS is a natural monopoly, keep in mind that the mere possibility of Google's practicing third-degree price discrimination for institutional subscriptions is not reason enough to bar the settlement.[135] In a natural monopoly market where one seller can adequately meet all demand, an increase in output from price discrimination presumptively increases total consumer welfare because it implies greater surplus from meeting the demands of new customers.[136] Of course, as a result of third-degree price discrimination, some customers can face a price so much higher than that of the single-price monopolist's that their resulting decrease in consumer surplus offsets the greater

[130] *See* Hausman & Sidak, *supra* note 38, at 423.
[131] *Id.*
[132] *Id.* at 423–24.
[133] Amended Settlement Agreement, *supra* note 1, § 4.1 (a)(iv).
[134] *See* Grimmelmann, *supra* note 32, at 16 ("The pricing structure for the Institutional Subscription will be largely fair [if Google sets prices] with different pricing buckets for different categories of institutions.").
[135] *See* Hausman & Sidak, *supra* note 38, at 424.
[136] *See generally* W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 401 (4th ed. 2005).

surplus enjoyed by new customers.[137] This possibility should certainly not be discounted in GBS's case, but there is value in making an innovative product accessible to more customers even if the net consumer surplus does not increase as a result.

C. Under the Rule of Reason Horizontal Agreements among Rightsholders Do Not Restrict Competition

The competitive pricing of institutional subscriptions to GBS does not immunize anticompetitive aspects of the ASA such as cartelized single-book sales to individual customers.[138] However, it is not as easy for Rightsholders to form a cartel against either Google or individual customers as Professor Picker seems to believe. This Section will explain why.

The horizontal pricing agreement among Rightsholders does not violate Section 1 of the Sherman Act once the analysis acknowledges the GBS settlement's resemblance to the blanket license at issue in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*.[139] In *BMI* the Supreme Court held that the issuance and pricing of blanket licenses by performing rights organizations ASCAP (American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.) are not *per se* illegal price-fixing and should be evaluated under the rule of reason.[140] ASCAP was formed in 1914 to serve copyright owners and users as a "clearing-house" for authorized uses of copyrighted music.[141] Prior to its formation, the frequent for-profit public performance of copyrighted songs by so many users made it practically impossible for individual copyright owners to negotiate licensing agreements with each user, let alone to monitor unauthorized copyright uses.[142]

ASCAP's members are composers, songwriters, lyricists, and music publishers who give ASCAP nonexclusive rights to issue blanket licenses of their works to paying licensees like radio and television stations.[143] In return, ASCAP distributes royalties

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[137] *See generally id.*

[138] *See generally* Amended Settlement Agreement, *supra* note 1, §§ 3.7(a), 4.1-4.2.

[139] 441 U.S. 1 (1979).

[140] *Id.* at 23–24.

[141] *Id.* at 4–5.

[142] *Id.* at 5. For a recap of ASCAP's history and development see Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1329–35 (1996).

[143] *See Broad. Music Inc.*, 441 U.S. at 5.

from the license revenues to the copyright owners, and monitors as well as enforces against infringement activities.[144] Like an institutional subscription to GBS, a blanket license allows the licensee unlimited access to perform any of the songs in ASCAP's database for a fixed duration.[145] Rival BMI was formed in 1939 and operates in the same way as ASCAP, albeit with a smaller music repertory.[146] At the time *BMI* was decided, the combined repertories of the two organizations covered almost all domestic copyrighted compositions.[147] ASCAP and BMI have been operating under a consent decree since 1941 after the DOJ alleged the blanket license was an anticompetitive restraint on trade.[148] The consent decree, later amended in 1950, imposes restrictions on the operations of the two performing rights organizations.[149]

The procompetitive justifications for analyzing the GBS settlement under the rule of reason are very similar to the ones that the Supreme Court applied to the blanket license in *BMI*.[150] First and foremost, GBS's aggregation of the world's knowledge is a new and better product that is on the whole "truly greater than the sum of its parts,"[151] and easily the precursor of the library systems of the future. Second, GBS is efficient: the ASA significantly reduces the duplicative transaction costs that users like institutional subscribers would face in their negotiations with numerous Rightsholders and obviates the costs of tracking down orphan book owners.[152] Like the blanket license for copyrighted music, Google's services allow users immediate access to the database without the delay of prior negotiations with individual Rightsholders and a great selection in the choice of material.[153] The GBS settlement, if approved, creates a new market in which individual Rightsholders and orphan book owners alike are inherently incapable of competing but can all

144 *See* Merges, *supra* note142, at 1329.

145 *Id.*

146 *Tradition*, BMI, http://www.bmi.com/about/entry/533105 (last visited Nov. 29, 2010).

147 *Broad. Music Inc.*, 441 U.S. at 5.

148 United States v. Am. Soc'y of Composers, Authors, & Publishers, [1941] Trade Cas. (CCH) ¶ 56,104. (S.D.N.Y Mar. 14, 1941).

149 United States v. Am. Soc'y of Composers, Authors, & Publishers, [1950] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y Mar. 14, 1950).

150 *See Broad. Music Inc.*, 441 U.S. at 7–8.

151 *See id.* at 21–22.

152 *See* Amended Settlement Agreement, *supra* note 1, § 3.8.

153 *See id.* § 3.1(a).

benefit from through the ASA.

1. Wholesale Price Competition

In response to the criticism that the SA restricted wholesale price competition, Section 4.5(a)(iii) was added to the ASA, and it allows Google to renegotiate with individual Rightsholders revenue-sharing plans different from the standard 63%/37% split.[154] Google has the power to exclude a book from GBS if such bilateral renegotiation does not result in an alternative revenue-sharing agreement.[155] In its February 2010 statement, the DOJ continues to be concerned about the settlement's restriction on wholesale price competition and points out two limitations to Google's power to renegotiate wholesale prices under Section 4.5(a)(iii).[156] First, Google's renegotiation power under the provision is limited to "Commercially Available" works, which in its current definition is a narrow category that does not include most of the books covered under the settlement.[157] Second, the DOJ is concerned that Google's renegotiation power is limited to the price of books alone and does not control for their quality. That is, Rightsholders can still collectively agree not to compete against each other in quality, since Section 4.5(a)(iii) does not give Google renegotiation power on anything besides the wholesale price.[158]

[154] *See id.* § 4.5(a)(i).

[155] *See id.* § 4.5(a)(iii).

[156] Feb. '10 DOJ Statement, *supra* note 77, at 19.

[157] *Id.* at 17 & n.14. "Commercially Available" works are defined as books with new copies available for sale "from sellers anywhere in the world, through one or more then-customary channels of trade to purchasers within the United States, Canada, the United Kingdom or Australia." Amended Settlement Agreement, *supra* note 1, § 1.31.

[158] Feb. '10 DOJ Statement, *supra* note 77, at 19. The DOJ's concern that the ASA allows Rightsholders collectively to agree not to compete in quality is a strange one. A book's quality presumably will be taken into account by the pricing algorithm (which sets its default online list price on GBS) rather than by the revenue split. When the Registry distributes its 63% cut of total revenues among Rightsholders, works of inferior quality generate less revenue and therefore get smaller cuts of the pie. In revenue-sharing renegotiations, Google also has the option of excluding for "non-editorial reasons" a book of inferior quality if its owner is bold enough to insist on a more favorable deal than the default 63%. *See* Amended Settlement Agreement, *supra* note 1, § 3.7(e). Of course, it is possible that the quality at issue here is the quality of the presentation in, for example, format and font, not the quality of the written text itself. This is an equally strange concern, given that the average GBS user probably expects the same quality of presentation as that of most PDF documents. It seems highly unlikely that products of a lower quality will be

Part of DOJ's unease over the narrowness of the "Commercially Available" category is that the GBS database is mostly composed of books, such as orphan books, that are not commercially available.[159] What is more, Section 4.5(a)(iii) of the ASA vests not only Google but also the *Rightsholders,* who own rights to commercially available works with the power to renegotiate revenue splits.[160] Publishers with commercially available books would take advantage of this power to get a better deal from Google, leaving commercially unavailable works as the main ones subject to the default 63%/37% revenue-sharing plan; consequently not alleviating the restriction on wholesale competition.[161]

However, the DOJ's fear of opportunistic publishers seems excessive, as Google ultimately has the upper hand in the unlikely event that revenue-sharing renegotiation over a commercially available book escalates into a showdown between Google and the publisher. Both have the final trump card of excluding the book from inclusion in GBS, but the question is which party would doing this hurt the most?[162] It seems that the average publisher has much more to lose than Google, for whom the deprivation of a few books would hardly make a dent to its massive book database numbering in the millions. Of course, a major publishing house would has more leverage against Google than the average publisher, and the DOJ's fear of opportunistic publishers would be more justified if one or several major publishers decide to enter revenue-sharing renegotiations with Google.

Vesting Google with renegotiation power over non-commercially available works risks putting vulnerable Rightsholders like authors and small publishers at Google's mercy in revenue-sharing renegotiations. The DOJ acknowledges this possibility, but nonetheless insists that giving Google the power to renegotiate individually with all

acceptable, let alone profitable.

[159] *See* Feb. '10 DOJ Statement, *supra* note 77, at 17.

[160] *See* Amended Settlement Agreement, *supra* note 1, § 4.5(a)(iii).

[161] *See* Feb. '10 DOJ Statement, *supra* note 77, at 17.

[162] *See* Amended Settlement Agreement, *supra* note 1, § 4.5(a)(iii) ("Google may choose not to make such Books available through such Revenue Model(s) as permitted under Section 3.7(e) (Google's Exclusion of Books)) and the Rightsholder may choose to exclude its Book(s) from such Revenue Model(s) pursuant to Section 3.5(b) (Right to Exclude from Display Uses and Revenue Models).").

Rightsholders is more important than the ASA's protection of commercially vulnerable class members.[163] If approval of the settlement hinges on this issue, Google probably will be happy enough to expand the scope of renegotiation power to cover non-commercially available books. Such expansion is much more likely to hurt "small" Rightsholders, who will not be in a position to make much of a fuss when Google strong-arms lower wholesale prices from them.

Furthermore, the DOJ does not address how Google would renegotiate revenue splits with respect to orphan books, which make up most of the commercially unavailable works. The Fiduciary is the natural representative of orphan books owners should such renegotiations with Google take place, but would giving it this authority be a good idea? The Fiduciary acting in this capacity has tremendous power, especially if it has the trump card of excluding all orphan books from GBS if it is unsatisfied with Google's best offer during renegotiation.

2. Retail Price Competition

The DOJ continues to worry that the horizontal agreement among Rightsholders to let the pricing algorithm determine default prices for their books is a restriction of retail price competition.[164] At the heart of this concern appears to be distrust of the pricing algorithm's integrity in carrying out its purported simulation of a perfectly competitive market: to find the optimal price for each book that will maximize its revenues "assuming no change in the price of any other Book."[165] Google's unilateral development of the algorithm will not be controlled by or involve the Registry or any Rightsholder, and the ASA allows the Registry to validate the algorithm's reasonableness through third-party experts.[166] The Registry, however, is likely happy to "validate" anticompetitive prices as long as they maximize total revenues. Here, maximization of total revenues is as good as the maximization of total profit from online book sales through GBS, since the marginal cost of providing an extra digitized copy is essentially zero. The DOJ's concern is valid to the extent that the ASA does not provide any third-party oversight *independent* of the Registry to monitor the pricing algorithm's reasonableness. Judge Chin could condition his approval of the settlement on the

163 *See* Feb. '10 DOJ Statement, *supra* note 77, at 17–18.
164 *Id*. at 19.
165 *See* Amended Settlement Agreement, *supra* note 1, § 4.2(c)(ii)(2).
166 *Id*. § 4.2(c)(ii)(2)-(3).

addition of a provision for independent third-party validation of the pricing algorithm's adherence to truly competitive pricing.

The fear of a Rightsholders' collusive pricing agreement that would enable them to behave like a monopoly and charge supracompetitive prices should not be a source of distress. First, books published after January 5, 2009 are not covered by the ASA.[167] If Google wants to include these books in GBS, it must contract with the copyright owners individually.[168] The competition between "past" and "future" books, or between GBS and a potential competitor who gains dominance in the "future" books market over time, is the first constraint on supracompetitive pricing.[169]

Second, collusion is unlikely to result for individual book sales on GBS, which has to compete not only with brick-and-mortar bookstores like Barnes & Noble, but also with multiple online outlets like Amazon.[170] A horizontal agreement to charge monopolistic prices through the pricing algorithm would be difficult to sustain, since each Rightsholder has a financial incentive and the ability to undercut the algorithm's monopoly price slightly by specifying its own price instead.[171]

It is possible, but very unlikely that supracompetitive prices will result in this scenario because GBS lacks the classic characteristics of an ordinary cartel. Successful collusion requires much more than agreement on price.[172] A sustainable cartel must have the ability to detect and effectively punish cheaters. Collusion among sellers is harder to achieve when there is significant product heterogeneity, or when a contract with a large buyer is sufficiently long in duration to make individual deviation worthwhile.[173] Granted, the latter point is more relevant for scenarios in which the large buyer meets all of its needs from one supplier, but the number of players involved in GBS and the staggering product heterogeneity of books numbering in the millions are still too great to sustain cartel-like

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[167] *See* Amended Settlement Agreement, *supra* note 1, § 1.19.

[168] *See* Hausman & Sidak, *supra* note 38, at 434.

[169] *Id.* at 422–23, 433.

[170] See *id.* at 432–34.

[171] *Id.* at 434.

[172] *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44 (1964).

[173] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *HORIZONTAL MERGER GUIDELINES* §§ 2.1, 2.11–2.12 (Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/21.html.

behavior.[174] Defection by specifying a lower list price is easy enough, and no effective mechanism for punishing cheaters is apparent inside or outside the ASA.

IV. POST-SETTLEMENT REGULATORY ALTERNATIVES

Subsection II.B(ii) demonstrated that the ASA does not eliminate current Rightsholders' incentive to contract with Google's competitors. If the arguments made in Section II.C are sound, then antitrust regulation, if appropriate at all, should focus on orphan books—the primary source of antitrust concern among the settlement's critics. One regulatory alternative raised by several commentators is compulsory licensing under an antitrust decree, which would require the Fiduciary (or Google) to license orphan-book access at a pre-determined fee to any competitor who wants it.[175] The argument for compulsory licensing of orphan books is that the Fiduciary's profit-maximizing interests are not always aligned with the maximization of social welfare. The duopoly pricing that would result once Amazon, for example, enters the market could be so competitive that the Fiduciary would have little incentive to license orphan books to Amazon even if doing so would increase social welfare.[176]

Most commonly seen in intellectual property regimes outside the United States, compulsory licensing of patents tends to be employed when a serious public interest such as national security or public health is at stake.[177] In the context of antitrust remedies for GBS, the rationale is that competition in the

[174] To illustrate the rich product heterogeneity available in GBS, a quick query for books containing the exact phrase "intellectual property law," and written in the English language returned about 63,000 results on August 19, 2010. *Intellectual Property Law Book Search*, GOOGLE BOOKS, http://www.google.com/books (use advanced search tool to select books for content; then select "English" as the language; then enter "Intellectual Property Law" in the exact phrase box; then hit "Google Search" button).

[175] *See* Pamela Samuelson, OCLC/Kilgour Lecture at the Sch. of Info. & Library Sci. at UNC at Chapel Hill: Reflections on the Google Book Search Settlement, slide 20, (Apr. 14, 2009), *available at* http://www.slideshare.net/naypinya/reflections-on-the-google-book-search-settlement-by-pamela-samuelson; *cf.* Picker, *supra* note 328, at 403 (suggesting that because Rightsholders have little incentive to voluntarily license their works to third parties, the settlement should be altered to either "add additional licenses" or include "a mechanism for new licenses to be considered going forward").

[176] *See generally* Picker, *supra* note 28, at 403–05.

[177] HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 2–38 (Supp. 2004).

digitized book market—easily the precursor of library systems of the future—is very much in the public's interest. Compulsory licensing is necessary, the argument goes, because Google controls an "essential facility" that competitors must have to enter the market.

Despite lower courts' recognition of the "essential facilities" doctrine,[178] the Supreme Court has held that the doctrine is irrelevant if the competitor has access to the facilities at stake.[179] Furthermore, this doctrine applies only when the licensee's entrance into the market is "essential for competition" and the licensee has no other "duplication or practical alternatives" to compete effectively.[180] Compulsory licensing of orphan books fails both of these requirements. Section III.C will demonstrate that GBS has the characteristics of a natural monopoly, which would negate the argument that any competitor's entrance is "essential for competition." Section II.B showed that Google's competitors indeed have a practical alternative to compulsory licenses: the Fiduciary, as a collective rights organization (CRO) representing all orphan book owners, has both the power and the incentive to contract with a competitor regarding access to orphan books. This Part will explain why a contract negotiated between the Fiduciary (or the Registry) and interested buyers is a superior solution to compulsory licensing.

A. Why Compulsory Licensing of Orphan Books Is A Bad Idea

In his seminal study of the economic effects of compulsory patent licensing, Professor Scherer concluded that patent protection is much more important for a firm "contemplating

[178] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 847 (1990).

[179] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004). For sample criticisms of the "essential facilities" doctrine, see Hausman & Sidak, *supra* note 38, at 435–36.

[180] Areeda, *supra* note 1798, at 852; *see, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 285 (1985) (stating that a cooperative's expulsion of a members is not necessarily anticompetitive, "[u]nless it is shown that the cooperative possesses market power or exclusive access to an element essential to effective competition . . . ."); *see also* MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

entry through technical innovation into some new field without the benefit of brand reputation, existing distribution channels, and accumulated production know-how" than it is for a well-established firm.[181] Compulsory licensing is not the favored approach especially when imposed on a firm that has "exercised extraordinary creative initiative or accepted extraordinary technical and financial risks in its innovative effort."[182]

Compulsory licensing sets a price ceiling for competitors and consequently limits the innovator's expected profit from a risky project, which can be uncertain or low enough to discourage undertaking the project altogether.[183] It is true that Google has already undertaken the GBS project, but the imposition of compulsory licensing is likely to affect its incentives to continue the project and to make future innovations. Competitors would not have to make upfront investments like massive scanning, since they would enjoy the luxury of waiting at Google's expense to find out whether the market is lucrative. Google's development of the Registry also gives competitors the extra benefit of gauging from a safe distance the magnitude of the orphan books problem, which may or may not lead to future legal disputes as more absent owners step forward to reclaim their works. Competitors and customers, in essence, have the "free option" to access the innovation at a regulated price if GBS turns out to be successful, but simply to walk away if it does not.[184]

Judicial imposition of the duty to deal is inappropriate, because courts are not suited for the regulatory role of setting and supervising compulsory license fees.[185] Although some

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[181] F.M. SCHERER, THE ECONOMIC EFFECTS OF COMPULSORY PATENT LICENSING 84 (1977). Scherer's study, while excellent, was written more than thirty years ago. A more recent analysis of the experience with compulsory licensing would be ideal, but unfortunately I have not found any.

[182] *Id.* at 86.

[183] *See* Hausman & Sidak, *supra* note 38, at 430–31.

[184] *See id.* at 425. For another illustration of the "free option" concept in the telecommunications industry, see Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 458 (1999).

[185] *See* Pac. Bell Tel. Co. v. Linkline Commc'ns., Inc., 129 S.Ct. 1109, 1120–21 (2009). *See also* 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."); Areeda, *supra* note 17978, at 853 ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day

scholars have advocated compulsory licensing of patents as a way of reducing the deadweight loss created by the monopoly power inherent in patents, they do so relying on the assumption that regulators are able to set the optimal royalty rate or know the duration of the optimal patent life (which, in GBS's case, would be the time from inception until a compulsory license is activated).[186] On the contrary, compulsory patent licensing under antitrust decrees has been shown to decrease innovation as measured by patenting activity undertaken by firms diverse in size and decree severity.[187] If the goal is to discourage monopolistic market structures by encouraging new entry, compulsory licensing under antitrust decrees has shown *no* statistically significant impact in reducing market concentration.[188]

B. Contracting into Liability Rules—Why the Grant of Licensing Power to the Fiduciary and the Registry is A Superior Solution

Compulsory licensing is an example of a liability rule, a legal entitlement regime that gives any user the right to use the owner's property as long as the owner is compensated for it later at a price determined by a third party such as the government.[189] Under liability rules, users save on transaction costs by not having to bargain for permission with the owner before using the property.[190] In contrast, a property rule—the legal entitlement regime that protects what is generally viewed as private property—excludes a user from the property unless the owner has voluntarily given permission beforehand.[191] Under the latter, the owner sets the price that a user has to pay in exchange

controls characteristic of a regulatory agency.").

[186] *See, e.g.*, Pankaj Tandon, *Optimal Patents with Compulsory Licensing*, 90 J. POL. ECON. 470, 470–71 (1982) ("[P]ropos[ing] the notion of royalty rates that optimally trade off the negative incentive effects of licensing with the positive consumer price effects."); WILLIAM D. NORDHAUS, INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE 76 (1969) (proposing that the optimal patent life maximizes consumer surplus less R&D costs).

[187] *See* SCHERER, *supra* note 18181, at 66–67.

[188] *See id.* at 75–78.

[189] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

[190] *See id.*

[191] *Id.*

for the entitlement.[192] In a Coasean world of zero transaction costs, economic efficiency would be achieved regardless of who owns the initial entitlement to a property or how it is protected.[193] Through trading, that entitlement will inevitably end up with the party who derives the highest value from it.[194]

The fact that we do not live in such a world is one justification for sometimes favoring liability rules over property rules. This argument was made earlier by Coase and later set out in Calabresi and Melamed's foundational framework of legal entitlements theory. The transaction costs of negotiation under a property rule regime can be so exorbitant that a transfer of the entitlement will not happen even if it is beneficial for all parties concerned.[195] For example, when multiple sellers or multiple buyers are involved, hold-out or free-rider problems can arise and prevent an economically efficient transfer of an entitlement from taking place.[196] That is, each seller has the incentive to hold out for a price higher than the one at which he or she is actually willing to sell, if there is reason to suspect that a buyer is willing to pay the higher price.[197] Similarly, each buyer has an incentive to free-ride by stating a price lower than his or her actual willingness to pay, in the hope that other buyers will make up for the difference by contributing more money to the pool.[198] The advantage of a liability rule lies in its collective valuation of the appropriate compensation for seller(s) and of appropriate cost to be imposed on each individual buyer, thereby reducing the transaction costs of negotiation.

Professor Merges has subsequently contributed to the discourse by pointing out that compulsory licensing comes with its own downsides and is not a good policy for transactions concerning intellectual property such as digital media.[199] Unlike most real property, intellectual property tends to be non-rivalrous (capable of simultaneous consumption by more than

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[192] *Id.*

[193] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ.1, 2, 9–10(1960).

[194] *See id.* at 5 (providing an example of reaching economic efficiency).

[195] *See id.* at 7(illustrating the premise that under a property rule regime the transfer of entitlement will not always occur due to transaction costs).

[196] Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade,* 104 Yale L.J. 1027, 1029 (1995).

[197] *Id.* at 1029–30.

[198] *See* Calabresi & Melamed, *supra* note 89, at 1106–07.

[199] *See* Merges, *supra* note 142, at 1300.

one user) and non-excludable (owners are unable to prevent access by users who have not paid).[200] Liability rules may very well encourage more transactions than property rule entitlements would for real property, but intellectual property is different in that more than one user can enjoy entitlement to the same right.[201] In contrast, if the value that Google places on exclusive access to orphan books is higher than the compulsory license fee, it cannot just "buy off" a competitor from entering the market since many more alleged "competitors" may emerge and need to be paid off in this manner in the future.[202]

Other scholars have argued that liability rules are better than property rules in situations where the injunctive relief that a rights owner is entitled to cannot be confined to the protection of the underlying right alone.[203] That is, if the property owner can use injunctive relief to restrain the use of someone else's property as well, then the availability of such relief in a property rule regime can give rise to hold-out problems; rights owners will strategically use the threat of litigation to negotiate fees far greater than the harm they suffer from infringing uses of their properties. Consequently, property rules will systematically leave rights owners overcompensated and users over-deterred, leading to a reduction of innovation and economic growth.[204] This concern does not apply to GBS. If the Fiduciary has agreed to license the use of orphan books to a third party, Rightsholders are not entitled to injunctive relief against such use. The same is true for the Fiduciary's power over non-orphan books if the Registry has agreed to license their use to third parties. Hold-out problems, therefore, will not occur because both the Fiduciary

[200] CHRISTINE GREENHALGH & PADRAIG DIXON, DEPARTMENT OF ECONOMICS DISCUSSION PAPER SERIES: THE ECONOMICS OF INTELLECTUAL PROPERTY: A REVIEW TO IDENTIFY THEMES FOR FUTURE RESEARCH (UNIVERSITY OF OXFORD), *available at* http://www.economics.ox.ac.uk/index.php/papers/details/the_economics_of_intellectual_property_a_review_to_identify_themes_for_futu/.

[201] *See* Merges, *supra* note 142, at 1304.

[202] *Id*. *But cf.* Ayres & Talley, *supra* note 196, at 1032–33 (arguing that in some situations liability rules are preferable to property rules because they "catalyze consensual trade" by forcing parties to reveal how much they value an entitlement in a way that property rules do not). This implies that a correct compulsory licensing fee is less essential, since the parties can bargain around it. In response, Merges points out that the Ayres & Talley theory assumes only two transaction parties who know each other, which is not appropriate in the context of intellectual property. Merges, *supra* note 142, at 1304–05.

[203] *See, e.g.*, Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 783–84 (2007).

[204] *Id*. at 784–785.

and the Registry have incentives to license the use of their respective books to Google's competitors.[205]

Compulsory licensing is not necessarily the most efficient way to reduce transaction costs. A court, the institution most commonly used to impose and monitor such a system, is ill suited for the regulatory role of setting and supervising the license rate. Assigning this role to Congress or an administrative agency comes with its own costs. A statutorily mandated fee schedule will invite lobbying efforts from rightsholders and buyers alike. There is no guarantee that Congress will set the fee correctly, and even if it does, the money spent on lobbying and educating Congress is still an extra expense. The fee schedule, which is most likely to be "locked in," will become out of date as market conditions change over time. Furthermore, any efforts on Congress's part to update the fee schedule will invite more rounds of lobbying.[206] A rate-setting administrative agency is prone to the same problems, sans lobbying expenses.

Once the fee schedule is set, it serves as a price ceiling and bargaining over license fees between right owners and users can only trend downward.[207] This is problematic if the fee is initially set too low, which neither adequately rewards the right owners, nor sends a reassuring message to would-be innovators in the future. In the case of GBS, rate-setting regulators also have to grapple with exactly what right(s) compulsory licensing grants to the licensee. Does it give Amazon the right to access Google's archive of scanned orphan books, or the mere right to scan orphan books at its own expense without the fear of copyright lawsuits? Different licensing fees are appropriate for different rights, which further compounds the difficulty of setting the correct fee schedule.

Merges points out that in a number of industries privately held collective rights organizations (CROs), such as ASCAP and BMI, outperform compulsory licensing in transaction cost reduction.[208] A CRO is an organization formed through private contracting that pools the rights of all members and licenses access to the pool at collectively determined prices.[209] It also handles administration through revenue distribution to members,

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[205] *See generally supra* Part II.B(ii).
[206] Merges, *supra* note 142, at 1299.
[207] *See id.* at 1305.
[208] *See id.* at 1296, 1298.
[209] *Id.* at 1298–99.

adjustment of licensing fees in response to changing market conditions, and dispute arbitrations.[210] CROs arise in property rule regimes with high transaction costs and repeated play between parties on the two sides of transactions.[211] This is why, contrary to traditional legal entitlement theory, it is better to start with a property rule regime instead of a liability rule of compulsory licensing in digitized media markets. The initial high transaction costs and repeat play in a property rule system catalyze the formation of CROs, which allow individual rightsholders rather than the legislature to set standard terms of exchange and will prove to be much more flexible in the creation of efficient entitlements.[212] Merges calls this process "contracting into liability rules."[213]

As illustrated by ASCAP, CROs are much more adroit than legislatively mandated compulsory licenses in making appropriate license fee adjustments for different categories of users over time. ASCAP's license fees are tailored to the value of music derived by users from a wide array of industries, ranging from radio stations to colleges and universities.[214] Whenever possible, license fees are negotiated with the corresponding trade associations that represent user industries such as the All-Industry Radio Music Licensing Committee sanctioned by the National Association of Broadcasters and the Higher Education Music Copyright Task Force, which represents organizations like the American Council on Education.[215] Furthermore, CROS are adept at monitoring infringements and developing sophisticated techniques for the fair distribution of royalty income among member right owners.[216]

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210 *Id*. at 1392.

211 *Id*.

212 *Id*. 1392–93.

213 *Id*. at 1392.

214 *Id*. at 1335 n.142 (stating that ASCAP devises industry-appropriate royalty rates for user groups like "television and radio networks and stations, cable television program services and systems, restaurants, taverns, nightclubs, hotels, retail businesses, trade show promoters and organizers, conventions and consumer shows, shopping centers and shopping malls, background music services, colleges and universities, symphony orchestras, and others."). *See Music Licensing Practices of Performing Rights Societies: Hearing Before the H Subcomm. on Intellectual Prop. & Judicial Admin.. On Judiciary*, 103d Cong., (1994) (LEXIS) [hereinafter Gould Statement] (statement of Morton Gould, President Emeritus, ASCAP).

215 *Id*.

216 For an example of ASCAP's monitoring and royalty distribution mechanisms for one song, see Merges, *supra* note142, at 1336–37.

The Registry and the Fiduciary have the perfect setup to serve as CROs for the digitized book market. Identifying and locating absent Rightsholders, in addition to negotiations with each active Rightsholder for the right to scan and search, present formidable transaction costs.[217] Rightsholders and Google interact in a repeated game in several capacities. Each party has the power to renegotiate revenue splits in the future, and Google will periodically propose to the Registry for approval pricing strategies for institutional subscriptions.[218] The initial pricing strategy is expected to last between two to three years, and each subsequent pricing strategy's duration will be jointly determined by Google and the Registry.[219] The periodic reassessment of the pricing of institutional subscriptions, along with the pricing algorithm's simulation of competitive market valuation of by-the-book sales, reiterate the Registry and the Fiduciary as examples of CROs that have contracted into liability rules from an initial property rule entitlement regime.[220]

This is the reason why, consistent with Merges' observation that CROs often emerge in repeated-play industries with high transaction costs, granting the Fiduciary the power to license orphan books to Google's competitors is superior to compulsory licensing. As discussed in Subsection I.C(i), the transaction costs for Google's competitor(s) to secure comparable rights to orphan books are high. Not only does the Fiduciary have adequate incentive to license to Google's competitors, but by virtue of its flexibility in the setting and adjustment of licensing fees over time it also promises to be much more efficient than compulsory licensing at transaction-cost reduction.[221] One possible critique is that licensing through the Fiduciary may reduce transaction

[217] *See* Andrews, *supra* note 104, at 117–18.

[218] *See* Amended Settlement Agreement, *supra* note 1, § 4.1(a)(vi).

[219] *See id*. § 4.1(a)(vi)(3).

[220] *See id*. Attachement. I para. (c). The Registry's capacity to serve as a CRO that represents the Rightsholders' interests with regard to third parties has been discussed by existing scholarship, which observes that "[t]he biggest potential limit on the Registry's ability to deal with other companies is the requirement [in Attachment I § 8(C) of the Amended Settlement Agreement] that it gain the express permission of [R]ightsholders for any such future deals . . . ." Andrews, *supra* note 104, at 121. The concern that the Registry will be unable to license orphan works to third parties because the owners of these books are not available to give express approval is no longer valid now that the ASA has established the Fiduciary to represent the interests of absent Rightsholders. *See id.*

[221] *See supra* Part I.C(1).

costs for the parties involved but is not necessarily aligned with the maximization of social welfare. It is far from clear, however, that compulsory licensing can do a much better job at social welfare enhancement than the Fiduciary can in its capacity as a CRO. Absent evidence that one option is much better than the other at the maximization of social welfare gross of transaction costs, licensing through the Fiduciary is the superior option because it has the highest potential for transaction cost reduction.

C. Thinking of the Fiduciary and the Registry as Natural Monopolies

GBS as well as the Registry and Fiduciary created by the proposed settlement have the classic characteristics of a natural monopoly. Google's alleged *de facto* monopoly power over orphan books is not nearly as troubling if GBS is indeed a natural monopoly. A natural monopoly exists if, as a result of economies of scale or economies of scope, service by a single firm minimizes the total cost of production for the market.[222] Often arising from the presence of large fixed costs, economies of scale exist when a proportional increase in all inputs results in a more than proportional increase in output.[223] Economies of scope arise when more than one good is produced, and it is cheaper for one firm to produce a given quantity of each of the goods than for the specified quantity of each good to be produced individually by different firms.[224] Markets for public utility services such as electricity, natural gas, telephone, waste disposal, and cable television are classic examples of natural monopoly, though some aspects of these industries are no longer considered to be natural monopolies.[225] Because upfront investments, like telephone networks and gas pipelines are expensive, competitors are unlikely to make the capital investments to enter such markets when the incumbent firm suffers no cost disadvantage and adequately meets all demand.[226]

GBS enjoys economies of scale because the fixed costs of

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[222] *See* VISCUSI, HARRINGTON & VERNON, *supra* note 136, at 401.

[223] *See* KENNETH E. TRAIN, OPTIMAL REGULATION: THE ECONOMIC THEORY OF NATURAL MONOPOLY 5–6 (1991).

[224] *See id.* at 8.

[225] *See* JACK P. FRIEDMAN, DICTIONARY OF BUSINESS TERMS 551 (3d ed. 2000).

[226] Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, 15 FCC Rcd. 3696, 3735 (1999).

scanning and settlement negotiations are high, but the marginal cost of providing its service to one more user will be virtually zero once the settlement is approved.[227] Economies of scope conceivably arise in three ways: (1) the combined supply of orphan books and non-orphan books, (2) the combined supply of books searchable by text and online by-the-book purchases, and (3) the combined customer base of individual users and institutional users.[228]

More pertinent to the focus of this Article, CROs such as the Registry and the Fiduciary can be thought of as natural monopolies, because the collective licensing, monitoring, and enforcing of copyrights through a single seller is much more efficient than similar administration by more than one entity.[229] This proposition is up for debate. Professor Katz questions whether in CROs such as ASCAP and BMI, the claimed benefits outweigh the costs enough to justify their status as natural monopolies.[230] Katz agrees that administration by individual rightsholders is inefficient, but points out that this does not explain why licensing through a single intermediary is more efficient than through several intermediaries, such as a natural duopoly or natural triopoly.[231] After all, ASCAP and BMI have coexisted since 1941, and their much smaller but successful rival SESAC has been in operation since 1931.[232]

Katz acknowledges the possibility that this market is indeed a natural monopoly, but observes that the efficient merger of the three CROs would never happen because of antitrust sanctions.[233] He points out, however, that in a genuine natural monopoly market, SESAC would have a significant disadvantage in comparison to its much bigger rivals: if efficiency is made possible by the collective administration of a CRO, then bigger size implies more efficiency for any output level that the market

[227] *See, e.g.,* Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICH. TELECOMM. & TECH. L. REV. 1, 55 (2006).

[228] *Cf.* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 181 (1995).

[229] *See* Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION L. & ECON. 541, 543 (2005).

[230] *See id.*

[231] *See id.* at 553–56.

[232] *Id.* at 558.

[233] *Id.*

would demand.[234] The fact that SESAC has done quite well is not consistent with the natural monopoly theory of CROs.

Nonetheless, Katz does not completely reject the theory that collective rights organizations are natural monopolies but simply professes skepticism toward it. He acknowledges that the high costs of individual monitoring and enforcement (in comparison to collective administration) support the natural monopoly theory.[235] Assuming that the CRO markets for music licensing and digitized books are indeed natural monopolies, optimal regulation rather than an effort to encourage competition becomes the most pressing task.

D. Advocating for a Consent Decree in the Fashion of ASCAP and BMI

Ideal public policy would impose regulation on a natural monopoly market so that society can benefit from least-cost production and minimize the costs imposed by the policy itself without incurring the deadweight loss from monopoly pricing.[236] This Section will focus on the possibility of relying on a consent decree similar to those imposed on ASCAP and BMI. The analogy is particularly appropriate because these organizations, like the Fiduciary and Registry, are CROs with at least arguably natural monopoly characteristics.

ASCAP has been operating under a consent decree with the Department of Justice since 1941.[237] The consent decree was amended in 1950, 1960, and 2000.[238] ASCAP's licensing activities today are largely governed by the terms set out in the 1950 amended consent decree, which has three key provisions.[239] First, ASCAP must license to any user who is willing to pay a

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[234] *See id.*

[235] *See id.* at 556.

[236] For a more in-depth discussion of regulatory alternatives for natural monopolies, which is beyond the scope of this Note, see VISCUSI, HARRINGTON & VERNON, *supra* note 136, at 408–23.

[237] United States v. Am. Soc'y of Composers, Authors, & Publishers, [1941] Trade Cas. (CCH) ¶ 56,104. (S.D.N.Y Mar. 14, 1941).

[238] *See* United States v. Am. Soc'y of Composers, Authors, & Publishers, [1950] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y Mar. 14, 1950); United States v. Am. Soc'y of Composers, Authors, & Publishers, [1960] Trade Cas. (CCH) ¶ 69,612 (S.D.N.Y. Jan. 7, 1960); United States v. Am. Soc'y of Composers, Authors, & Publishers, 1960 Trade Cas, [2001-2] Trade Cas. (WCC) ¶73,474 (S.D.N.Y. June 11, 2001).

[239] *See* Gould Statement, *supra* note 214, at 28–29.

reasonable fee for a blanket license.[240] Second, ASCAP's licensing activities must be nondiscriminatory; similarly situated users (from the same industry, for example) are entitled to the same kind of license with the same fee schedule.[241] Third, and most significantly for this discussion, Section IX(A) of the 1950 consent decree retains the jurisdiction of the District Court in the Southern District of New York to serve as a rate-setting court and determine a reasonable fee in the event that ASCAP and the user cannot voluntarily agree upon one between themselves.[242] Under this retention-of-jurisdiction provision, ASCAP bears the burden of proof in demonstrating to the court that a requested fee schedule is reasonable.[243]

One way to think of the consent decree is as a compulsory license with unspecified terms, and in the event that the licensor and licensee cannot come to an agreement the guarantee of judicial rate-setting. It is rare for licensing disputes to resort to adjudication by rate-setting courts. Since its establishment in 1950, the "rate-setting court" mechanism of the ASCAP consent decree has been utilized only a handful of times.[244] In comparison, BMI's appearance in rate-setting courts is of relatively recent origin; the consent decree it operates under did not incorporate a rate-setting mechanism until it was amended

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[240] United States, [1950] Trade Cas. (CCH) ¶ 62,595 § VII(B).
[241] *Id*. § IV(C).
[242] *Id*. § IX(A).
[243] *Id*.
[244] *See* Daniel A. Crane, *Bargaining in the Shadow of Rate-setting Courts*, 76 ANTITRUST L.J. 307, 310 & nn.10–19 (2009) ("This count does not include cases where a party asked the court to set a rate but the court declined."). The licensees in these disputes include CBS in 1970, Buffalo Broadcasting in 1987, Showtime/The Movie Channel in 1989, Capital Cities in 1994, Fox in 1995, Salem Media/New England Continental Media in 1997, National Cable Television Association in 1999, Muzak and DMX in 2004, and AOL in 2008. *Id*. *See* Columbia Broad. Sys. v. Am. Soc'y of Composers, Authors & Publishers, 320 F. Supp. 389, 394–395 (S.D.N.Y. 1970) (granting a motion for preliminary injunction which requires CBS to pay BMI the same rate paid during the last year of their expired licensing agreement while litigation is pending); United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13-95, 1993 WL 60687, at *1, *12 (S.D.N.Y. Mar. 1,1993) (addressing ASCAP's request to impose an administrative fee on those stations that have utilized an interim per-program license, the fee for which was determined by a rate-setting court in a 1987 decision); United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13–95, 1989 WL 222654 (S.D.N.Y. Dec. 20, 1989), *aff'd*, 912 F.2d 563 (2d Cir. 1990); United States v. Am. Soc'y of Composers, Authors & Publishers, 157 F.R.D. 173 (S.D.N.Y. 1994); United States v. Am. Soc'y of Composers, Authors & Publishers, 870 F. Supp. 1211 (S.D.N.Y. 1995); United States v. Am. Soc'y of Composers, Authors & Publishers, 981 F. Supp. 199 (S.D.N.Y. 1997).

in 1994.[245] Given that ASCAP and BMI memberships number in the hundreds of thousands and the organizations engage in thousands of licensing transactions, these instances of rate-setting court utilization are rare occurrences.[246] Even so, ASCAP and BMI are still considered outliers in how often they are involved with rate-setting decisions. In a recent survey of fifty-two cases that operate under decrees with retention-of-jurisdiction provisions for the judicial determination of a reasonable fee, Professor Crane could identify only three cases (two of them being ASCAP and BMI) with "any evidence that a court was ever called upon to set a rate for intellectual property."[247]

This leads to the central point of this Section, which is that fashioning a consent decree for GBS similar to those imposed on ASCAP and BMI is a superior regulatory alternative to the compulsory licensing of orphan books. This claim is based on Crane's central thesis: actual adjudication by a rate-setting court is a rare event because the unsavory possibility of having a court set the rate induces efficient bargaining in "the shadow of the rate-setting court" and "eliminate[s] the [licensor's] ability to charge an unfettered monopoly price."[248] Markets, not courts, are in the best position to set appropriate rates and adjust them over time in response to changing conditions. Markets can do this in the GBS context when settlement approval is conditional on GBS's operation under a consent decree crafted in the fashion of ASCAP and BMI.

My claim is not that a consent decree with a rate-setting court provision is the perfect form of regulation, but only that it is a

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[245] Crane, *supra* note 242, at 311 & nn.20–22 (finding only two rate-setting decisions in 2005 and 2007 involving BMI since its consent decree was amended in 1994).

[246] *See id.* at 311;*Customer Licencees: About ASCAP Licensing*, ASCAP, http://www.ascap.com/licensing/about.html (last visited Nov. 29, 2010) (stating that ASCAP's membership is comprised of "more than 390,000 of America's and hundreds of thousands of the world's best songwriters, composers, lyricists and publishers"); *About BMI*, BMI, http://www.bmi.com/about/entry/538061 (last visited Nov. 29, 2010) (stating that BMI's membership is comprised of "more than 400,000 songwriters, composers and music publishers it represents and distributes those fees as royalties to members whose works have been publicly performed").

[247] *See* Crane, *supra* note 244, at 311–12, app at 327–28. Besides ASCAP and BMI, the only case in which the court was called upon to set a rate for intellectual property was United States v. Am. Optical Co., 95 F. Supp. 771, 771 (S.D.N.Y. 1950).

[248] Crane, *supra* note 244, at 312.

more efficient form of liability than compulsory licensing. Relying on a consent decree is more efficient because it minimizes judicial involvement in rate-setting, even though it does not eliminate the possibility altogether. In the event that parties do invoke the judicial rate-setting provision in the decree, the task of setting a reasonable fee remains for the court, but is outside of this Article's focus. For examples of how might a court determine the reasonable fee to be paid to GBS by a licensee, past patent infringement cases in which the court calculated reasonable royalties offer some guidance. A reasonable royalty can be calculated on the basis of an annual rate, a single flat fee, a percentage of the infringer's (or the licensee's) sales or profits, or a rate per unit of item sold or used.[249]

Crane points out that courts often use the fifteen factors set out in *Georgia-Pacific Corp. v. U.S. Plywood Corp*. to determine appropriate royalty rates in patent infringement cases, but that these factors are more relevant to solving hold-out problems than to reducing the licensor's monopoly power. [250] Looking to external benchmarks in the market is a better solution, but it is by no means perfect, because such benchmarks "may already be the products of the defendant's monopoly power," and because there is no external benchmark for a court to refer to when setting rate for the first of Google's competitors.[251]

It should not make a great difference that the consent decrees for ASCAP and BMI govern their relationships with customers, but the Fiduciary's licensees can be Google's competitors as well. The intuit concern is that Google, much less willing to license to a competitor than to a pure customer, might set the license rate unreasonably high. In the absence of evidence suggesting the

[249] *See, e.g.*, Trio Process Corp. v. L. Goldstein's Sons, Inc., 612 F.2d 1353, 1361 (3d Cir. 1980) (holding that the annual license rate negotiated between the licensor and licensee prior to infringement constitutes reasonable royalty, and that "the possibility that [the licensor], had it chosen to do so, might have obtained a higher license rate than that actually charged, is irrelevant"); Elrick Rim Co. v. Cheek, 195 F. Supp. 496, 502 (S.D. Cal. 1961) (stating that the determination of a reasonable royalty should not be based on a mathematic formula, but rather on the facts and circumstances particular to each case, and finding a flat fee measure of damages for the infringement of a process patent); Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc., 446 F.2d 295, 302 (2d Cir. 1971) (awarding the owner of a patent on plywood wall paneling a reasonable royalty of a specified amount per thousand square feet of the infringer's total sales).

[250] Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); Crane, supra note 244, at 315.

[251] Crane, *supra* note 244, at 315.

contrary, whether a licensee is a university library or Amazon should not make a significant difference. The prospect of going to a rate-setting court and uncertainty about the court's competence in determining a reasonable fee are not any more pleasant for Google when the licensee happens to be a competitor. Furthermore, Google always has the burden of proof in demonstrating to the court that a proposed rate is reasonable under the consent decree.[252] If anything, this burden is probably higher when dealing with a licensee who is a competitor. This is especially the case when the licensee is the first competitor trying to enter the market since there would be few, if any, external benchmarks to which the rate-setting judge could refer.

V. CONCLUSION

The Google Book Search settlement should be approved because it is beneficial for consumers, Rightsholders, and Google, and because it provides a solution to the orphan works problem that Congress has repeatedly tried but failed to address through legislation. Antitrust analysis of the settlement should be mindful of Google's role as a two-sided platform catering to both consumers and Rightsholders, with the implication that traditional antitrust scrutiny focusing on any single side alone is inappropriate. Even so, the Amended Settlement Agreement does not grant Google monopoly access to orphan books and does not enable Rightsholders to collusively restrict price competition.

Nevertheless, the following concern is valid: the settlement does not provide third-party oversight of the pricing algorithm that is *independent* of the Registry. Before approving the settlement, Judge Chin should stipulate such a provision to ensure the pricing algorithm's adherence to truly competitive pricing. Post-settlement regulation should steer away from compulsory licensing of orphan books. Instead, it is more efficient to let the Registry and the Fiduciary act as collective rights organizations, and explicitly grant them licensing power if the legality of such power is in dispute. The imposition of a consent decree modeled after ASCAP and BMI should be considered. It is superior to compulsory licensing because it encourages efficient bargaining for an appropriate licensing fee "in the shadow" of a rate-setting court.

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[252] United States v. Am. Soc'y of Composers, Authors, & Publishers, [1950] Trade Cas. (CCH) ¶ 62,595 § IX (S.D.N.Y Mar. 14, 1950).