ANTITRUST LAW — MONOPOLIZATION — SOUTHERN DISTRICT OF NEW YORK REJECTS PROPOSED GOOGLE BOOKS SETTLEMENT AGREEMENT. — *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

The digitization of books, periodicals, and other scholarly material is a growing trend. Modern society has demanded that any and all information be made available online, and the market has responded to this demand in a variety of ways, not the least of which includes the provision of greater digital access to scholarship. In 2004, Google gained access to several major libraries across the globe and sought to digitize their collections.[1] Google's attempts to provide public access to these extensive collections ultimately led to litigation, brought by a number of authors and publishers. Recently, in *Authors Guild v. Google Inc.*,[2] the United States District Court for the Southern District of New York, citing a variety of concerns ranging from copyright to antitrust, rejected an Amended Settlement Agreement (ASA) designed to end the litigation and permit Google to take the most significant step in history toward developing a universal digital library.[3] Unfortunately, in the antitrust portion of its ruling, the court undervalued the significant long-term benefits of the ASA and overestimated the short-term anticompetitive costs.

In 2004, Google announced a new partnership with the New York Public Library and the libraries at Harvard University, Stanford University, the University of Michigan, and the University of Oxford to digitize these libraries' collections,[4] a project that eventually gave birth to the Google Books program. Since entering into this partnership, Google has scanned more than twelve million books from these collections.[5] In exchange, Google provides each partner library with digital copies of that library's books.[6] Google's primary goal, however, was to create a searchable electronic database of books.[7]

In 2005, a series of plaintiffs — the Association of American Publishers, individual authors, and numerous publishing companies[8] — sued Google for unauthorized digitization of books still under copy-

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1 Press Release, Google Inc., Google Checks Out Library Books (Dec. 14, 2004), *available at* http://www.google.com/press/pressrel/print_library.html.

2 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

3 *See id.* at 669–70.

4 *See* Press Release, Google Inc., *supra* note 1.

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

6 *Id.*

7 *See id.*

8 Second Amended Class Action Complaint at 2, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-JES).

right.[9] In bringing this action, the plaintiffs sought to represent a class of "all persons or entities that have a United States copyright interest in one or more Books."[10] Claiming that Google had engaged in "massive copyright infringement," the plaintiffs sought damages as well as injunctive and declaratory relief against Google's present infringement and sought declaratory and injunctive relief against Google's future digitization of library collections.[11]

On November 13, 2009, Google and the plaintiffs agreed upon and filed the ASA.[12] While substantially similar to an earlier proposed settlement,[13] this settlement included major changes in response to criticism from class members.[14] The ASA was designed as an agreement between Google and "all Persons that, as of January 5, 2009, have a Copyright Interest in one or more Books or Inserts."[15] The ASA would permit Google to continue digitizing books, to advertise on electronic book pages, to sell subscriptions to an electronic database housing the digitized books, and to sell online access to individual books.[16] However, Google's access would be nonexclusive, allowing rightsholders to license use of their books to Google's competitors.[17] Moreover, rightsholders would maintain the authority to prevent Google from digitizing their books and to demand that Google remove their books from the electronic database.[18] Those rightsholders who chose to keep their works in Google Books would provide their rights information to

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[9] *See Authors Guild*, 770 F. Supp. 2d at 670.

[10] Second Amended Class Action Complaint, *supra* note 8, at 11.

[11] *Id.* at 3. In response, Google argued primarily that, under the Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2006), its conduct constituted fair use. *Authors Guild*, 770 F. Supp. 2d at 670–71; *see also* Copyright Act of 1976 § 107.

[12] *Authors Guild*, 770 F. Supp. 2d at 671.

[13] *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Settlement Approval, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-JES). The parties filed the initial proposed settlement on October 28, 2008, and Judge Sprizzo of the Southern District of New York preliminarily approved it on November 17, 2008. However, given the strong negative reactions from many sources, the parties returned to negotiations. *Authors Guild*, 770 F. Supp. 2d at 671.

[14] *See* SUPPLEMENTAL NOTICE TO AUTHORS, PUBLISHERS AND OTHER BOOK RIGHTSHOLDERS ABOUT THE GOOGLE BOOK SETTLEMENT 1–4, *available at* http://www.googlebooksettlement.com/Supplemental-Notice.pdf (outlining twenty different changes). The major changes included the addition of a fiduciary to the Book Rights Registry "who will have the responsibility for representing the interests of Rightsholders with respect to the exploitation of unclaimed Books," *id.* at 2; a requirement that the Registry "use settlement funds to attempt to locate Rightsholders," *id.*; a right of individual rightsholders to negotiate individual revenue-sharing agreements with Google, *id.* at 3; and deletion of the so-called "most favored nations" clause, which would have prevented Google's competitors from getting beneficial deals with respect to unclaimed books, *id.*

[15] Amended Settlement Agreement § 1.13, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-DC).

[16] *Id.* §§ 3.1, 3.14, 4.1, 4.2.

[17] *Id.* §§ 2.4, 3.1(a).

[18] *Id.* § 3.5(a)(i).

a newly formed Book Rights Registry and receive payments in accordance with the ASA's revenue-allocation scheme,[19] under which rightsholders would be paid sixty-three percent of all revenues received from Google's use of their books.[20] Furthermore, Google would commit at least $45 million to a settlement fund to pay those rightsholders whose books had already been digitized.[21] Google would also have the authority to digitize and display so-called "orphan books," or books without identified rightsholders.[22] Google, however, would be obligated to undertake "commercially reasonable efforts" to identify the rightsholders of orphan books.[23] Once identified, these rightsholders would be entitled to the same compensation, competition, and control over their involvement as all other rightsholders would be.[24]

Judge Chin of the Second Circuit, sitting by designation on the Southern District of New York, denied the Rule 23(e)[25] motion for final approval of the ASA.[26] Judge Chin found a number of objections persuasive,[27] citing the choice of an "opt-out" system, rather than an "opt-in" system, as the fatal flaw in the ASA.[28] Judge Chin noted that a court may approve a settlement "only if it determines that the settlement is 'fair, adequate, and reasonable, and not a product of collusion.'"[29] In making such a determination, he explained that there is a "presumption of fairness, adequacy, and reasonableness"[30] and that "[p]ublic policy, of course, favors settlement."[31] Nevertheless, Judge Chin chose to reject the settlement.[32]

Commentators had raised seven principal objections to the ASA, of which Judge Chin found five to be grounds for invalidating the settlement.[33] First, he found that a substantial question existed about

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19 *Id.* § 6.1(b), (d).

20 *Authors Guild*, 770 F. Supp. 2d at 671; Amended Settlement Agreement, *supra* note 15, § 2.1(a).

21 Amended Settlement Agreement, *supra* note 15, § 2.1(b). The ASA required Google to pay more if the $45 million did not cover all required rewards to rightsholders. *Id.*

22 *Authors Guild*, 770 F. Supp. 2d at 672, 678–79.

23 *Id.* at 672 (internal quotation marks omitted).

24 *See id.* at 671–72.

25 FED. R. CIV. P. 23(e).

26 *Authors Guild*, 770 F. Supp. 2d at 686.

27 *Id.* at 676–86. While the court's disposition of the settlement was pending, the court received 500 responses, the majority of which were hostile to the ASA, and approximately 6800 class members opted out of the settlement altogether. *Id.* at 673.

28 *See id.* at 686 (internal quotation marks omitted).

29 *Id.* at 674 (quoting Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000)).

30 *Id.* (quoting Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005)) (internal quotation mark omitted).

31 *Id.* (citing *Wal-Mart Stores*, 396 F.3d at 116–17).

32 *See id.* at 676, 686.

33 Judge Chin rejected claims that the class had not received adequate notice, *id.* at 676, and that Google Books did not provide adequate privacy protections to users, *id.* at 683–84.

whether the named plaintiffs' interests adequately represented the class.[34] Second, he explained that Congress would be the appropriate actor to deal with the question of orphan books.[35] Third, he concluded that the settlement "would release claims well beyond those contemplated by the pleadings."[36] Fourth, he claimed that copyright law is designed to protect authors automatically, and the opt-out system proposed by the ASA would "place the onus on copyright owners to come forward to protect their rights."[37]

Fifth and finally, the court contended that there were serious antitrust concerns that justified rejection of the settlement. Judge Chin claimed that the "ASA would give Google a de facto monopoly" over orphan books, as only Google had begun copying these books on a large scale.[38] Judge Chin noted that Google's position as the first actor in this market would mean that only Google would be able to offer a comprehensive digital library.[39] He also argued that Google's monopoly in orphan books would prevent entry from competitors, as Google would be the only firm with access to the orphan books and could deny them to its competitors.[40] Moreover, he contended that Google's orphan-books monopoly would "further entrench Google's market power in the online search market."[41]

The antitrust portion of the court's ruling miscalculated the policy implications in this case and missed a critical opportunity to expand access to books considerably and gain other benefits without causing significant anticompetitive harms. The Google Books settlement would provide substantial long-term benefits to the public, Google's competitors, and rightsholders. The public would benefit from increased access to digitized books.[42] Google's competitors would benefit from increased access and clarified titles. Finally, rightsholders would benefit from the significant competition between Google and other participants in the new digitized books market. Moreover, the concern that Google would gain a de facto monopoly in orphan books is overstated. While the Google Books innovation might initially give Google a monopoly in orphan books, its market power would likely diminish greatly and could ultimately be eliminated over time. The ASA would contribute to the de-orphaning of books,[43] and Google

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[34] *See id.* at 676.
[35] *Id.* at 677–78.
[36] *Id.* at 678.
[37] *Id.* at 682.
[38] *Id.*
[39] *Id.*
[40] *See id.* at 683.
[41] *Id.*
[42] *Id.* at 670.
[43] *See* Amended Settlement Agreement, *supra* note 15, §§ 6.1(c), 6.3(a)(i)(2).

would likely have to provide competitors access to those texts that remained orphaned. Finally, even if the ASA did facilitate the creation of a monopoly, public policy justifies approving the settlement, since antitrust laws can remedy any anticompetitive conduct as it occurs.

There are significant procompetitive and public benefits to the ASA. First, Google Books would substantially benefit the public by dramatically increasing access to books.[44] Beyond these obvious benefits, the district court also noted the benefits of expanding access to books for the visually impaired, by aiding the conversion of books to audio recordings or Braille translations.[45] The program would also give the public new opportunities to read out-of-print and orphan books, "many of which are falling apart buried in library stacks."[46]

Google's competitors would also benefit from the ASA, as the settlement helps identify rightsholders and provide access to books. Currently, locating the rightsholders to unclaimed books presents a daunting task for Google's competitors. The ASA, however, would establish a Book Rights Registry, which would make available to everyone, including Google's competitors, the names of books that have been claimed and their authors.[47] Without the Registry, many publishers would not invest the resources necessary to grapple with the complex chain of rights; but with the aid of the Registry the solution would be just a click away.[48] This easy access to rights information would reduce transaction costs for publishers and help increase competition.[49] Moreover, following Google's tremendous investment of time and resources in scanning millions of books, Google's competitors would have opportunities to compete in this market at significantly lower entry costs.[50] Market entrants would have the option of purchasing electronic access to these works from libraries or Google itself.[51]

Finally, the ASA would benefit rightsholders by preserving and stimulating competition in the digital library market. Under the ASA,

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[44] *Authors Guild*, 770 F. Supp. 2d at 670; *see also, e.g.*, Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 ANTITRUST L.J. (forthcoming 2012) (manuscript at 18, 39) (on file with the Harvard Law School Library). Professor Marina Lao notes that increased access "level[s] the playing field for those who are not fortunate enough to attend or be employed at an elite university or to otherwise have access to elite libraries." *Id.* (manuscript at 39).

[45] *Authors Guild*, 770 F. Supp. 2d at 670; *see also* Lao, *supra* note 44 (manuscript at 39).

[46] *Authors Guild*, 770 F. Supp. 2d at 670.

[47] *See* Amended Settlement Agreement, *supra* note 15, § 6.1(b).

[48] *See* Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1, 11 (2010).

[49] *See* Lao, *supra* note 44 (manuscript at 38).

[50] Elhauge, *supra* note 48, at 8–9.

[51] *See id.* at 8. The potential for licensing from Google or the libraries is no pipe dream — substantial agreements have already been entered into between the University of Michigan and Amazon.com and between Google and Sony and Barnes & Noble, respectively. *Id.*

rightsholders who make a book available through Google Books would retain the authority to license their works to any other party, either instead of or in addition to Google.[52] Accordingly, if Google's pledge of sixty-three percent of all revenues was not a fair price for the license, the rightsholder would have the option to withdraw completely from Google Books and to negotiate with Google's competitors. Alternatively, rightsholders would have the opportunity to stay out of the new digital market altogether, by withdrawing from Google Books and not licensing to a rival.[53] This strategy could even be used as a threat to negotiate a better revenue-sharing agreement with Google[54] or as a way to exploit the traditional print media market.[55]

In addition to undervaluing the benefits of the ASA, the court dramatically overestimated the potential anticompetitive impact of this arrangement. Notably, the district court and others have criticized the ASA for granting Google exclusive access to orphan books.[56] Admittedly, giving Google Books access to these works might establish a temporary monopoly. However, two principal facts suggest that the anticompetitive effects that would accompany an orphan-books monopoly are overstated. First, Google's monopoly power over these books would be short-lived. The vigorous efforts that Google must put forth to find rightsholders of orphan books make it significantly less likely the books will remain orphaned for as long as they would be without the ASA.[57] De-orphaning itself carries a number of benefits, as discussed above: Rightsholders would benefit, as they would reap financial rewards from Google Books's use of their works.[58] Competition would also be stimulated because rightsholders could negotiate with Google and its competitors for more revenue. The de-orphaning process ensures that any anticompetitive costs would be short-term.

Critics who condemn the ASA as potentially anticompetitive are also misguided because they fail to recognize that there may in fact be competition for orphan books. When a book remains orphaned, com-

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[52] Amended Settlement Agreement, *supra* note 15, § 2.4.

[53] *See id.* § 3.5(a)(i).

[54] *See id.* § 4.5(a)(iii).

[55] *Cf.* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–24 (1979) (approving of blanket licenses where competitors had the "real choice," *id.* at 24, to license individually).

[56] *See, e.g.*, *Authors Guild*, 770 F. Supp. 2d at 682.

[57] *See* Amended Settlement Agreement, *supra* note 15, § 6.1(c) ("[The Registry] will, from its inception, use commercially reasonable efforts to locate Rightsholders of Books and Inserts . . . ."); *id.* § 6.3(a)(i)(2) ("[T]he Registry may use up to [twenty-five percent] of Unclaimed Funds earned in any one year that have remained unclaimed for at least [five] years . . . for the purpose of attempting to locate the Rightsholders of unclaimed Books."); *see also* Lao, *supra* note 44 (manuscript at 17) (explaining that, due to the efforts of the Registry, "a good percentage of the presently unclaimed books would probably not remain unclaimed if the ASA were implemented").

[58] *See* Amended Settlement Agreement, *supra* note 15, § 4.5(a).

petitors may seek to license it directly from Google.[59] If Google refused to provide access or discriminated in price, competition laws would likely force Google to offer these orphan books at a reasonable price, perhaps through the traditional competitive duty to deal under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[60] Alternatively, under the antitrust "essential facilities" doctrine, courts have required monopolists to provide access to the essential components of market competition under certain circumstances.[61] In order for the essential facilities doctrine to apply in this case, the court would need to find that access to orphan books was essential to competition and that Google could feasibly provide access.[62] If, as claimed, Google held a de facto orphan-books monopoly and orphan books were essential for competition in the digital library market, a court would likely require Google to provide access to these books for a reasonable fee. Recognizing the concern that control of a nonduplicable, essential component of competition would have serious anticompetitive implications, "antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on *non-discriminatory* terms."[63] Accordingly, should a conflict arise, any anticompetitive concerns can readily be addressed by antitrust law.

Finally, even conceding that antitrust concerns exist, rejecting the settlement was more harmful than approving it. In this case, allowing

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[59] *See id.* art. IV.

[60] 472 U.S. 585 (1985); *see also id.* at 605 ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory [under § 2 of the Sherman Act]." (footnote omitted) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978))). The Court approvingly cited the *Aspen* duty to deal doctrine in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), where the Court explained that a critical consideration in *Aspen* was that refusing to sell to a competitor "*even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* at 409.

[61] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding that competitors may be required to provide access to facilities essential to competition). Commentators have criticized the essential facilities doctrine in the past. *See* Marina Lao, *Networks, Access, and "Essential Facilities": From* Terminal Railroad *to* Microsoft, 62 SMU L. REV. 557, 558 n.10 (2009) (collecting sources). *See generally* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990) (arguing that the essential facilities doctrine should be clarified and narrowed). Nevertheless, while the Supreme Court has "never recognized such a doctrine," when given the opportunity to reject it recently, the Court declined to do so. *Trinko*, 540 U.S. at 411. More importantly, lower courts have continued to apply the doctrine in *Trinko*'s wake. *See, e.g.*, MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128–30 (9th Cir. 2004); *see also* Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 443–44 (2002).

[62] Formally, the essential facilities doctrine applies a four-part test: there must be "control of the essential facility by a monopolist," inability by a competitor "to duplicate the essential facility," and denial of the essential facility to that competitor, and it must be feasible to provide access to the competitor. *E.g.*, Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990) (quoting MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983)).

[63] *MCI*, 708 F.2d at 1132 (emphasis added).

Google to position itself as a monopolist is preferable to creating a world in which out-of-print and orphan books may not be offered at all.[64] The district court ignored the traditional antitrust maxim that market power or monopoly status is not an evil in itself.[65] Indeed, a monopoly may be one of the strongest signs of a vibrant and innovative economy.[66] Thus, Judge Chin's declaration that Google would gain a de facto monopoly is not inherently troubling. As soon as Google exploits its monopoly position to exclude rivals or harm consumers, the law can and should intervene. That day has not arrived, and the district court should only address antitrust claims as they arise. The district court's per se condemnation of Google's potential monopoly may stifle innovation and develop a culture of entrepreneurial hermitism — a certain recipe for economic stagnation.

The Google Books ASA may be an imperfect proposal, but from the antitrust perspective the district court missed an opportunity to increase competition, increase consumer welfare, and reward innovation. Instead, the district court overestimated short-term costs and condemned a settlement with major public and competitive benefits. Waiting for Congress to take action on orphan books may mean waiting for years or decades.[67] The antitrust issues here were one component of the many concerns the court addressed, but the court's holding leaves Google and its competitors few opportunities to digitize orphan books and presents the danger of stifling future digitization efforts. It is unclear when a court will next address the Google Books issue, but when it does, it would be wise to make a careful assessment of the public and procompetitive benefits of Google Books. If it does, the public and rightsholders will reap substantial rewards.

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[64] *Cf. Trinko*, 540 U.S. at 415–16 (holding that a court may not require a monopolist to alter its actions simply because "some other approach might yield greater competition"). The Supreme Court has repeatedly acknowledged that traditionally anticompetitive conduct is often necessary for a new product to be offered. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) ("A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.").

[65] *See, e.g.*, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1118 (2009); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383, 389 (2009).

[66] *See, e.g.*, *Linkline*, 129 S. Ct. at 1118; *Trinko*, 540 U.S. at 407 ("[P]ossession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system.").

[67] *See Authors Guild*, 770 F. Supp. 2d at 678 (explaining Congress's failure to act on this issue in the past); Elhauge, *supra* note 48, at 28. Moreover, settlement approval does not preclude subsequent congressional action or regulation. *Id.*