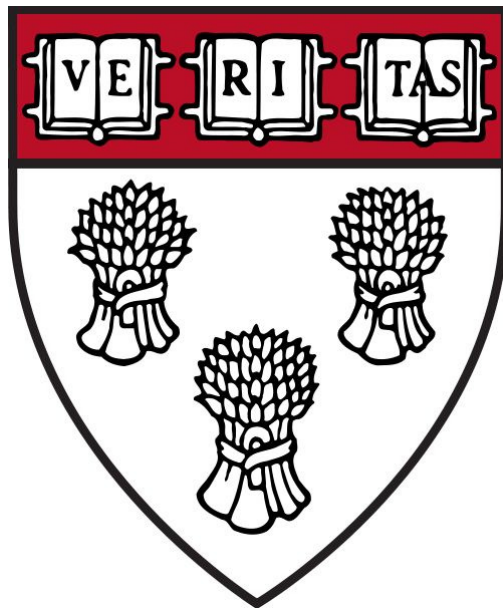


HARVARD JOURNAL OF LAW & TECHNOLOGY

*Harvard Journal of Law & Technology Occasional Paper Series — July 2013**

A PERSPECTIVE ON THE MERITS OF THE ANTITRUST OBJECTIONS TO THE FAILED GOOGLE BOOKS SETTLEMENT

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*Pamela Samuelson**

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. JUDGE CHIN’S EFFORT TO INFLUENCE A REVISED SETTLEMENT AGREEMENT.....	4
III. JUDGE CHIN ORDERED DOJ TO PROFFER AN ANTITRUST ANALYSIS BEFORE THE FAIRNESS HEARING.....	8
IV. SOME ANTITRUST OBJECTIONS TO THE ASA HAD MERIT	15
A. <i>The ASA’s Algorithmic Pricing Mechanism for Unclaimed Books Was Anti-Competitive</i>	16
B. <i>The ASA Would Have Erected Insurmountable Entry Barriers to Development of a Comprehensive Digital Books Database</i>	19
V. CONCLUSION.....	22

I. INTRODUCTION

Antitrust concerns were not the main reason why Judge Chin in March 2011 rejected the proposed Google Books Settlement, that is, the Amended Settlement Agreement (ASA)¹ of the *Authors Guild v. Google* class action lawsuit.² But he seemed to take seriously several antitrust concerns raised by the Department of Justice (DOJ), various competitors (chiefly Yahoo!, Microsoft, and Amazon.com), and some

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1. *Authors Guild v. Google Inc.*, Civ. No. 05-CV-8136-DC, Amended Settlement Agreement, [hereinafter ASA], available at <http://thepublicindex.org/docs/settlement/settlement.pdf>. For a detailed account and analysis of the original Settlement Agreement and the Amended Settlement Agreement, see generally Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 27 JOHN MARSHALL REV. INTELL. PROP. L. 227 (2009).

2. *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). The main reasons that the ASA was rejected are discussed in Part II.

nonprofit groups.³ Indeed, Judge Chin identified antitrust concerns as among the six categories of meritorious objections⁴ that persuaded him to reject the ASA after a hearing on whether it was “fair, reasonable, and adequate” to the class on whose behalf it had been negotiated (it was not)⁵ and otherwise comported with the strictures of Rule 23 of the Federal Rules of Civil Procedure (it did not).⁶

3. Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC) [hereinafter *DOJ Statement of Interest I*], 2009 WL 3045979; Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC) [hereinafter *DOJ Statement of Interest II*], 2010 WL 979111; Objection of Yahoo! Inc. to Final Approval of the Proposed Class Action Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 2980749 [hereinafter *Yahoo! Objection*]; Objections of Microsoft Corporation to Proposed Amended Settlement and Certification of Proposed Settlement Class and Sub-Classes, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), available at http://thepublicindex.org/docs/amended_settlement/Microsoft_Objection.pdf [hereinafter *Microsoft Objection*]; Objection of Amazon.com, Inc., to Proposed Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 4888799; Objection of Amazon.com, Inc., to Proposed Amended Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2010 WL 451143; Brief of *Amicus Curiae* Public Knowledge in Opposition to the Proposed Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 3169951; Brief of *Amicus Curiae* Public Knowledge in Opposition to the Amended Proposed Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2010 WL 377666; Brief *Amicus Curiae* of Consumer Watchdog in Opposition to the Proposed Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 2980734, 2009 WL 2980757; Second Brief of Consumer Watchdog, *Amicus Curiae*, in Opposition to the Proposed Amended Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2010 WL 451145; Memorandum of *Amicus Curiae* Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc., *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 2980747 [hereinafter *Open Book Alliance Brief I*]; Supplemental Memorandum of *Amicus Curiae* Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc., *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2010 WL 451144 [hereinafter *Open Book Alliance Brief II*]. *But see* *Amicus* Brief of Antitrust Law and Economics Professors in Support of the Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), 2009 WL 2980740.

4. Judge Chin grouped the objections as follows: 1) Adequacy of Class Notice; 2) Adequacy of Class Representation; 3) Scope of Relief Under Rule 23; 4) Copyright Concerns; 5) Antitrust Concerns; 6) Privacy Concerns; 7) International Law Concerns. *Authors Guild*, 770 F. Supp. 2d at 673–74. While he did not find merit in the first category, he found merit in the other six. *Id.*

5. Rule 23 of the Federal Rules of Civil Procedure (FRCP), which governs the class action procedure, requires approval of a class action settlement following a hearing to determine whether the settlement agreement is “fair, reasonable, and adequate” to the class. FED. R. CIV. P. 23(e)(2). Following a fairness hearing in February 2010, Judge Chin rejected the ASA on March 22, 2011. *Authors Guild*, 770 F. Supp. 2d at 671, 686.

6. Judge Chin considered adequacy of class notice and of class representation in the ASA in addition to the scope of relief under Rule 23. The FRCP requires a court to “direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal.” FED. R. CIV. P. 23(e)(1). The FRCP also requires adequacy of class representation, as to both the representative parties and class counsel. FED. R. CIV. P. 23(a)(4), 23(g). Judge Chin found class notice to be adequate. *Authors Guild*, 770 F. Supp. 2d at 676. He also found class counsel to be fully qualified; however, the Author Subclass attorneys had, in his

The rejection of the ASA has not entirely ended academic debate about the antitrust implications of this agreement.⁷ This Article responds to critics of the antitrust objections to the ASA by making three main points. Part II explains that Judge Chin's incomplete and unpersuasive analysis of the antitrust objections to the proposed settlement agreement is best understood as an effort to encourage the settling parties to adopt more competitive terms in any revised settlement agreement. Part III points out that the DOJ did not reach definitive conclusions on antitrust issues posed by the ASA. The DOJ was, however, obliged to submit an interim analysis because Judge Chin wanted the government's input before he ruled on whether the settlement should be approved and the DOJ did a creditable job under the circumstances. Part IV contends that there was more merit to the DOJ's antitrust concerns about the proposed settlement than some commentators have recognized. A close examination of certain details of the ASA demonstrates that it posed significant anticompetitive risks in relation to price fixing and foreclosure of competitive entry.

view, inadequately represented the interests of academic authors, foreign rights holders, and owners of rights in orphan works. *Id.* See also *infra* notes 10–13 and accompanying text.

7. For example, a recent article analyzing the antitrust aspect of the GBS settlement is Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 ANTITRUST LAW JOURNAL 397 (2012) (criticizing the antitrust-based objections to the settlement). Most of the criticism of the antitrust objections was published prior to Judge Chin's rejection of the Google Book settlement. See, e.g., Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010) [hereinafter Elhauge, *Why GBS Is Procompetitive*]; Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, GCP: THE ANTITRUST CHRON., Oct. 2009 (2) [hereinafter Elhauge, *Framing the Antitrust Issues*]; Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, AMI: TUDSCHRIFT VOOR AUTEURSMEDIA- & INFORMATIERECHT, no. 2 (2010); Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMPETITION L. & ECON. 411 (2009). Among the pre-rejection commentaries receptive to the antitrust objections are James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, CPI ANTITRUST J., Jan. 2010 (2); James Grimmelmann, *How to Fix the Google Book Search Settlement*, J. INTERNET L., Apr. 2009, at 1; Randall C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009) [hereinafter Picker, *Orphan Works Monopoly?*]; Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, GCP: THE ANTITRUST CHRON., Oct. 2009 (Release 2) [hereinafter Picker, *Antitrust and Innovation*]; Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* (Univ. of Chicago John M. Olin Law & Econ. Working Paper No. 499, 2009), available at <http://ssrn.com/abstract=1507172> [hereinafter Picker, *Assessing Competition Issues*]; Christopher A. Suarez, Note, *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition*, 55 N.Y.L. SCH. L. REV. 175 (2010/11). While I objected to the proposed settlement mainly on other grounds, I supported antitrust scrutiny of its provisions. See, e.g., Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Book Search Settlement*, COMM. ACM, July 2009, at 28; Pamela Samuelson, *Why Is the Antitrust Division Investigating the Google Book Search Settlement?*, HUFFINGTON POST (Aug. 19, 2009, 05:16 PM), http://www.huffingtonpost.com/pamela-samuelson/why-is-the-antitrust-divi_b_258997.html.

II. JUDGE CHIN'S ANTITRUST ASSESSMENT SOUGHT TO INFLUENCE A REVISED SETTLEMENT AGREEMENT

In the process of deciding whether to approve the ASA, Judge Chin had to contend with a veritable mountain of documents filed by interested parties concerning the ASA. In addition to briefs submitted by the settling parties and two DOJ Statements of Interest, there were hundreds of written objections to the ASA filed by class members, numerous amicus curiae briefs, and dozens of letters submitted by individuals and organizations about the ASA.⁸ The submissions raised a wide range of issues, and more than 90 percent of the submissions were critical of the settlement.⁹

The main ground on which Judge Chin disapproved the ASA, however, arose from what the DOJ called “the bridge too far” problem.¹⁰ Here is the key paragraph from Judge Chin’s opinion:

The ASA can be divided into two distinct parts. The first is a settlement of past conduct and would release Google from liability for past copyright infringement. The second would transfer to Google certain rights in exchange for future and ongoing arrangements, including the sharing of future proceeds, and it would release Google (and others) from liability for certain *future* acts I conclude that this second part of the ASA contemplates an arrangement that exceeds what the Court may permit under Rule 23. As articulated by the United States, the ASA “is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.”¹¹

Judge Chin recognized that “Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of

8. See, e.g., Brandon Butler, Association of Research Libraries, *The Google Books Settlement: Who Is Filing and What Are They Saying?* (2009), available at <http://wo.ala.org/gbs/wp-content/uploads/2009/10/The-Google-Books-Settlement-Who-Is-Filing-And-What-Are-They-Saying.pdf>; The Public-Interest Book Search Initiative, New York Law School, *Objections and Responses to the Google Books Settlement: A Report, Version 2.0* (2010), available at <http://thepublicindex.org/docs/commentary/objections-responses-2.pdf>.

9. Butler, *supra* note 8, at 3.

10. DOJ Statement of Interest II, *supra* note 3, at 3.

11. *Authors Guild*, 770 F. Supp. 2d at 676–77 (quoting DOJ Statement of Interest II at 2; emphasis in the original).

absent class members in close view.”¹² The Rules Enabling Act constrains what courts can do, for the Act states that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”¹³ The forward-looking business operations contemplated by the ASA, which would have enabled Google to commercialize all out-of-print books unless rights holders specifically opted out of the scheme, would have modified substantive rights of class members under copyright law.¹⁴

Had Judge Chin chosen to rest his rejection of the ASA on that ground alone, he could have issued an opinion disapproving the ASA within a matter of weeks after the fairness hearing. Instead, he took more than thirteen months to mull over the myriad objections to the ASA and to think through whether, with certain kinds of changes, a revised settlement might be approvable. The most plausible way to read Judge Chin’s opinion is not as a complete analysis of the merits of the issues discussed therein, but as a set of suggestions about what he hoped the parties would address in future settlement negotiations.¹⁵

Judge Chin noted, for instance, that a substantial number of class members had taken the time to object to the ASA,¹⁶ particularly with regard to the license the ASA would have given Google to commercialize their books without their permission.¹⁷ Judge Chin noted that “many of the concerns raised in the objections would be ameliorated if the ASA were converted from an ‘opt-out’ settlement to an ‘opt-in’ settlement,”¹⁸ that is, if members of the class were given the opportunity to opt in to Google’s plan to commercialize out-of-print books rather than, as the ASA proposed, having class members opt out of the commercialization operations if they did not want Google to sell ac-

12. *Authors Guild*, 770 F. Supp. 2d at 677 (quoting *Amchem v. Windsor*, 521 U.S. 591 at 629).

13. 28 U.S.C. § 2072(b).

14. *Authors Guild*, 770 F. Supp. 2d at 676–77. For an in-depth discussion of the reasons why Judge Chin was right that such a forward-looking commercial enterprise posed serious Rule 23 problems, see James Grimmelmann, *Future Conduct and the Limits of Class Action Settlements*, 91 N. C. L. Rev. 387 (2013).

15. Judge Chin would likely have written the opinion quite differently if he had expected the settling parties to appeal his decision rejecting the settlement. The fact that no such appeal took place is telling.

16. *Authors Guild*, 770 F. Supp. 2d at 673 (noting approximately 500 submissions, the “vast majority” of which objected to the settlement, as well as 6,800 class members who opted out of the action).

17. For example, discussing Google’s potential commercialization activities, Judge Chin’s opinion specifically cited to, among others, Objections of Arlo Guthrie et al. to Proposed Class Action Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC); Letter from Pamela Samuelson to Judge Denny Chin re: Supplemental Academic Author Objections to the Google Book Search Settlement (Jan. 27, 2010), *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC) [hereinafter Samuelson Letter].

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

cess to their books. Judge Chin “urge[d] the parties to consider revising the ASA accordingly.”¹⁹

If the settling parties were willing to adopt an opt-in approach to a revised settlement, this would, Judge Chin believed, take care of one major Rule 23 impediment to approval of a Google Books settlement, for such an agreement would not modify substantive rights class members enjoyed under copyright law.²⁰ This would have also allayed most of the copyright concerns that Judge Chin regarded as having some merit.²¹ A core default rule of copyright law is that anyone who wishes to exploit commercially in-copyright works must get permission of rights holders *before* doing so rather than going ahead with a commercialization project and waiting for rights holders to show up to ask for compensation or cessation of the project.²²

Judge Chin’s discussion of the antitrust objections to the ASA unquestionably lacked the rigor one might have expected, especially given how much attention the Google Books settlement had garnered.²³ The judge did not define markets or assess market power, he was quite unspecific about the anticompetitive conduct the ASA would enable or the anticompetitive effects he anticipated if the ASA

19. *Id.*

20. The copyright issues were discussed, *id.* at 680–82. Judge Chin did not, however, consider Google’s fair use defense to the underlying claim, so his copyright analysis, like the antitrust analysis, was incomplete.

21. *Id.* While it is surely true that Google could not claim fair use as a justification for commercializing out-of-print books, Google had a plausible fair use defense for scanning books to index contents and display snippets. See, e.g., Band, *supra* note 1, at 237–60; Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 23 (2010); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91–94 (2006). Google’s research library partners have recently won a fair use ruling in a similar case. See *Authors Guild Inc. v. HathiTrust*, No. 11 CV 6351(HB), 2012 WL 4808939 (S.D.N.Y. Oct. 12, 2012). The Guild is appealing this decision.

22. *Authors Guild*, 770 F.Supp.2d at 681 (citing 17 U.S.C. § 106(1), (3):

[T]he owner of copyright under this title has the *exclusive* rights to do and to authorize any of the following: . . . reproduce the copyrighted work . . . [and] distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership. (emphasis added).

See also *id.* at 682 (“[I]t is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.”) Of course, there are often commercial uses of in-copyright works that do not require advance permission, such as uses privileged by fair use or other limiting doctrines of copyright law. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (thumbnail-size images of photographs made by search engine were fair use, not infringement).

23. See, e.g., Lao, *supra* note 7, at 409 (noting the brevity of Judge Chin’s discussion of the antitrust issues). See also James Grimmelman, *Inside Judge Chin’s Opinion*, THE LABORATORIUM (Mar. 22, 2011, 11:56 PM), http://laboratorium.net/archive/2011/03/22/inside_judge_chins_opinion (describing the opinion’s antitrust section as “thin and a bit odd”); Randal C. Picker, *After Google Book Search: Rebooting the Digital Library* 7 (John M. Olin Law & Economics Working Paper No. 559 (2d series), 2011) (describing the antitrust discussion as short and lacking a full analysis).

was approved, and he mentioned but did not discuss price-fixing allegations to which DOJ had given considerable attention.²⁴ Possible pro-competitive benefits of the ASA discussed in an antitrust professor's amicus curiae brief²⁵ were entirely ignored.

Indeed, the antitrust section of Judge Chin's opinion is simply a litany of allegations rather than an analysis of their merits:

The ASA would give Google a de facto monopoly over unclaimed works "This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database — *i.e.*, one that does not include the millions of orphan works — cannot compete effectively with the seller of a comprehensive product."²⁶

The ASA would arguably give Google control over the search market.²⁷

The ASA would permit third parties to display snippets from books scanned by Google, but only if they "have entered into agreements with Google."²⁸

[T]he ASA would permit third parties to "index and search" scanned books only if they are non-commercial entities or they otherwise have Google's prior written consent.²⁹

The ASA would broadly bar "direct, for profit, commercial use of information extracted from Books

24. *Authors Guild*, 770 F.Supp.2d at 673 (mentioning pricing mechanisms as an issue raised by objectors).

25. Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement, *supra* note 2, at 2–3.

26. *Authors Guild*, 770 F. Supp. 2d at 682 (quoting from DOJ Statement of Interest I, *supra* note 2, at 24).

27. *Id.* (citing Supplemental Memorandum of *Amicus Curiae* Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc., *supra* note 3, at 14–19).

28. *Id.* at 682–83 (quoting ASA, *supra* note 1, § 3.9).

29. *Id.* at 683 (quoting ASA, *supra* note 1, §§ 1.123, 1.93(e), 7.2(b)).

in the Research Corpus" except with the express permission of the Registry *and* Google.³⁰

Google's ability to deny competitors the ability to search orphan books would further entrench Google's market power in the online search market.³¹

Why did Judge Chin limit himself to a recitation of these concerns without a deeper analysis? The tenor of his opinion suggests that he may have intended for the opinion to influence what the settling parties might address in a revised settlement. He may also have thought it appropriate to leave the job of engaging in a deeper analysis of the antitrust implications of any proposed settlement to the DOJ.

The quoted statements suggest that Judge Chin hoped that the settling parties would find some way for a revised settlement (1) to give Google authorization to license other firms to provide access to orphan works, (2) to grant a license allowing competitors such as Yahoo! and Microsoft to make use of the Google Books corpus to refine their search algorithms, thereby lessening Google's dominance in the search market, and (3) to modify settlement provisions affecting snippet display, indexing, and commercial use to allow more room for competitive activities.

It is fair to infer that Judge Chin would have looked with greater favor on any revision to a settlement agreement for the Google Books lawsuits that addressed concerns that he implied had some merit by reciting them.³²

III. JUDGE CHIN ORDERED DOJ TO PROFFER AN ANTITRUST ANALYSIS BEFORE THE FAIRNESS HEARING

The settlement of the Google Books class-action litigation was announced in October 2008.³³ Public statements of concern about

30. *Id.* (quoting ASA, *supra* note 1, § 7.2(d)(viii)).

31. *Id.* (citing *United States v. Griffith*, 334 U.S. 100, 109 (1948) (holding that owners of movie theaters with monopoly power in certain towns violated § 2 of Sherman Act by obtaining exclusive licensing agreements for first-run films, allowing them to foreclose competition and establish monopolies in more towns)).

32. Professor Lao has suggested that Judge Chin's failure to discuss price-setting concerns identified by DOJ indicates that he was not persuaded by these allegations. Lao, *supra* note 7, at 409. I disagree. Judge Chin, in my view, was taking a broad-brush view of the antitrust issues, leaving to DOJ to nudge the parties to fine-tune price-setting provisions of the ASA that were more its bailiwick than his.

33. *See* Press Release, News from Google, Authors, Publishers, and Google Reach Landmark Settlement (Oct. 28, 2008), http://googlepress.blogspot.com/2008/10/authors-publishers-and-google-reach_28.html. The court granted preliminary approval to the settlement in November for purpose of authorizing the settling parties to send notices to class

antitrust implications of the proposed settlement began to appear almost immediately after the deal was announced and continued through the first few months of 2009.³⁴

An important development in late April 2009 was the DOJ's announcement that it had opened an antitrust inquiry into the Google Books settlement.³⁵ This happened just over a week before the initial deadline for class members to object or opt-out of the settlement and about six weeks before the scheduled fairness hearing. Prompted in part by requests from some class members for an extension of time,³⁶ but perhaps also by DOJ's antitrust investigation announcement, Judge Chin granted a four-month extension for filing opt-outs and objections to the proposed settlement and reset the fairness hearing for October 7, 2009.³⁷

The next significant development was a letter sent to Judge Chin by the DOJ on July 2 stating that although the DOJ "ha[d] reached no conclusions as to the merit of th[e antitrust] concerns [about the settlement] or more broadly what impact the settlement may have on competition," it believed the allegations were serious enough to "warrant further inquiry."³⁸ The letter stated that the DOJ was issuing civil investigative demands, seeking documents and information from the settling parties, and interviewing various persons about the proposed settlement to continue its investigation.³⁹ The letter said that the DOJ would keep the court "apprised of the status of [its] investigation."⁴⁰

The DOJ letter prompted Judge Chin to issue an order that same day indicating that if the DOJ wished to present its views on the antitrust implications of the proposed settlement, it needed to do so by September 18, 2009.⁴¹ The order made it clear that, if the DOJ wished

members about its terms. More than one million notices were mailed to class members. *Authors Guild*, 770 F. Supp.2d at 676.

34. See, e.g., James Grimmelmann, *Author's Guild Settlement Insta-Blogging*, THE LABORATORIUM (October 28, 2008, 4:54 PM), http://laboratorium.net/archive/2008/10/28/authors_guild_settlement_insta-blogging; Picker, *Orphan Works Monopoly?*, *supra* note 7.

35. Miguel Helft, *Justice Department Opens Antitrust Inquiry Into the Google Book Deal*, N.Y. TIMES, April 28, 2009, at B5, available at http://www.nytimes.com/2009/04/29/technology/internet/29google.html?_r=0.

36. The court received letters from a group of authors requesting a four-month extension, a group of academic authors represented by Pamela Samuelson for a six-month extension, and the settling parties suggesting an approximately sixty-day extension. Order at 1, *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), ECF No. 89.

37. *Id.*

38. Letter from William F. Cavanaugh to Hon. Denny Chin (July 2, 2009), *Authors Guild*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC), ECF No. 120 (attached to Order at 2).

39. *Id.*

40. *Id.*

41. Order at 1, *Authors Guild*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), ECF No. 120.

to appear and make an oral presentation at the fairness hearing, Judge Chin would allow it.⁴²

In general, the DOJ conducts antitrust investigations at its own pace. But with the fairness hearing only three months away and a written submission due a few weeks before, the DOJ must have realized it was unlikely it could conduct a full investigation before the hearing about the effects that the Google Books agreement, if approved, would have on the market for books, or on competition in the market for search engines (about which Yahoo! and Microsoft were raising concerns). It must also have realized that an inter-departmental consultation with various agencies on this matter would also take time. There was, moreover, some risk, as Professor Randal Picker has suggested, that if the DOJ did not challenge the Google Books settlement before it was approved, the DOJ might be foreclosed under the *Noerr-Pennington* doctrine from attacking the arrangement later.⁴³ Thus, the DOJ was forced to investigate the antitrust implications of the settlement as intensively as possible in the two and a half months DOJ had before it would have to file a statement with Judge Chin.

The antitrust concerns raised in the DOJ's first Statement of Interest filed in the Google Books case were necessarily tentative. Because its investigation was incomplete, DOJ made clear that while "the United States cannot now state with certainty whether the Proposed Settlement violates the antitrust laws . . . , the Department's views on certain core issues are sufficiently well developed that articulating them now may be beneficial to the Court"⁴⁴

The two serious antitrust issues identified in the Statement were: first, that "the Proposed Settlement appears to give book publishers the power to restrict price competition," and second, that "as a result of the Proposed Settlement, other digital distributors may be effectively precluded from competing with Google in the sale of digital library products and other derivative products to come."⁴⁵

Concerning price competition restrictions, the DOJ noted that:

- (1) the creation of an industry-wide revenue-sharing formula at the wholesale level applicable to all works,
- (2) the setting of default prices and the effective prohibition on discounting by Google at the retail level, and
- (3) the control of prices for orphan

42. *Id.*

43. Picker, *Assessing Competition Issues*, *supra* note 7, at 4. See, e.g., *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (immunizing efforts to influence government decision-making, even if outcome would have anti-competitive effects).

44. DOJ Statement of Interest I, *supra* note 3, at 16.

45. *Id.*

books by known publishers and authors with whose books the orphan books likely compete . . . bear an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential per se violations of the Sherman Act.⁴⁶

Although the settling parties likened the Google Books agreement to the blanket licensing scheme that the Supreme Court approved in *Broadcast Music, Inc. (BMI) v. Columbia Broadcasting System, Inc.*,⁴⁷ the DOJ considered the Google Books agreement to be “quite different” from *BMI*.⁴⁸ Google would be acting as a joint sales agent for the publishers for sale of individual books, not just as the grantor of a blanket license. The collectively-set revenue sharing arrangement also distinguished this case from *BMI*, for it “reduce[d] incentives for authors and publishers to compete at the wholesale level through bilateral negotiations with Google.”⁴⁹ Unlike the music rights holders who needed organizations such as BMI to license their works effectively, “book authors and publishers have not shown that they lack a practical means to be paid for uses of their works in the absence of collectively negotiated pricing mechanisms.”⁵⁰ There was, moreover, no antitrust consent decree in place to govern the Google settlement, as there was with BMI, through which courts could set prices if necessary to protect licensees from abusive terms.⁵¹

Concerning foreclosure of competition, the DOJ noted that under the settlement, “competing authors and publishers grant Google de facto exclusive rights for the digital distribution of orphan works.”⁵² Joint efforts to deny competitors opportunities to offer comparable products or services “have significant anticompetitive potential and may violate the antitrust laws.”⁵³ The author and publisher plaintiffs were granting Google a license to exploit orphan works that none of its competitors could hope to attain. “This *de facto* exclusivity (at least as to orphan works) appears to create a dangerous probability that

46. *Id.* at 17.

47. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). In considering similarities between BMI and the commercial arrangement contemplated by the ASA, it is worth noting the longstanding and ongoing antitrust scrutiny under which BMI has operated. *See, e.g.*, Brief of United States Government, *U.S. v. Broad. Music Inc.*, in the Matter of Application of AEI Music Network, Inc., Civ. No. 00-6123 (S.D.N.Y. June 2000), available at <http://www.justice.gov/atr/cases/f5000/5090.htm> (describing this history).

48. DOJ Statement of Interest I, *supra* note 3, at 18.

49. *Id.* at 19.

50. *Id.*

51. *Id.*

52. *Id.* at 23.

53. *Id.* (citing *Toys “R” Us, Inc. v. Fed’l Trade Comm.*, 221 F.3d 928, 936 (7th Cir. 2000)).

only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription."⁵⁴

The Statement noted that the "risk of market foreclosure would be substantially ameliorated if the Proposed Settlement could be amended to provide some mechanism by which Google's competitors could gain comparable access to orphan works (whatever such access turns out to be) assuming the parties negotiate modifications to the settlement."⁵⁵

The DOJ also expressed concern about the "most favored nation" clause in the proposed settlement which would "discourage[] potential competitors (including those sponsored by rights holders) from attempting to follow Google into the digital-book distribution because it could not obtain better terms than Google."⁵⁶

The DOJ was thus signaling particular issues that it wanted the parties to renegotiate so that a revised settlement would pose fewer anti-competitive risks than the October 2008 agreement.

While some commentators may have been surprised that the DOJ raised such strong antitrust concerns about the proposed Google Books settlement,⁵⁷ more surprising at the time the DOJ filed its first Statement of Interest was the DOJ's strong stance against the settlement on Rule 23 grounds. The DOJ urged the parties to modify the forward-looking provisions of the Google Books settlement so that they conformed to Rule 23 requirements. In particular, the Statement suggested that a revised agreement should adopt an opt-in to Google's commercialization projects instead of an opt-out regime.⁵⁸ It raised concerns about conflicts of interest within the class, adequacy of representation of the diverse interests of class members, and adequacy of notice to class members.⁵⁹ The Statement indicated the DOJ's willingness to engage in dialogue with the settling parties and work with them toward a more approvable settlement of the Google Books litigation.⁶⁰

Shortly after the DOJ filed its Statement in mid-September 2009, the plaintiffs asked the court to give the settling parties some time to negotiate an amended settlement that would address concerns raised by the DOJ, among others.⁶¹ Judge Chin gave them about two months

54. *Id.* at 24.

55. *Id.* at 25.

56. *Id.* at 24.

57. *See, e.g.,* Elhauge, *Framing the Issues*, *supra* note 7, at 7.

58. DOJ Statement of Interest I, *supra* note 3, at 13–14.

59. *Id.* at 14–16.

60. *Id.* at 1, 8.

61. *See* Plaintiffs' Memorandum in Support of Unopposed Motion to Adjourn October 7, 2009 Final Fairness Hearing and Schedule Status Conference, *Authors Guild v. Google, Inc.*, 770 F. Supp.2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), ECF No. 729.

to achieve this objective. In mid-November, the parties submitted the ASA to the court.⁶²

As the DOJ noted in its February 2010 Statement of Interest, the ASA had made “substantial changes” to some troubling provisions.⁶³ The “most favored nation” clause, for instance, was omitted, and the parties agreed to waive any *Noerr-Pennington* defense to a post-approval implementation of the settlement.⁶⁴ The ASA was “more circumscribed in its sweep” than the first proposed settlement.⁶⁵

However, the DOJ in its second Statement of Interest regarded the ASA as “suffer[ing] from the same core problem as the original agreement: it is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.”⁶⁶ The rights that the ASA would grant to Google were still difficult to reconcile with the default rules of copyright and they “in turn, confer significant and possibly anticompetitive advantages on a single entity — Google.”⁶⁷

Although certain aspects of the ASA's pricing mechanisms were “much improved,” the DOJ regarded its concerns about price-related terms in the ASA to remain valid.⁶⁸ “[R]eliance on a classwide-negotiated price raises . . . important antitrust concerns.”⁶⁹ The ASA still placed troubling constraints on price-discounts and on negotiation of non-price terms.⁷⁰ Certain aspects of the price-setting arrangements for orphan works raised significant anticompetitive concerns as well.⁷¹ The DOJ also continued to express serious reservations about the *de facto* exclusivity that the ASA's license to commercialize out-of-commerce works would still confer on Google.⁷²

Responding publicly for the first time to concerns raised by Microsoft and Yahoo!,⁷³ the DOJ's second Statement noted that “Google's exclusive access to millions and millions of books may

62. Amended Settlement Agreement (Attachment 1), Declaration of Michael J. Boni in Support of Plaintiffs' Motion for Preliminary Approval of Amended Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), ECF No. 770. See also Dan Clancy, *Modifications to the Google Books Settlement*, GOOGLE PUBLIC POLICY BLOG (Nov. 13, 2009, 11:54 PM), <http://googlepublicpolicy.blogspot.com/2009/11/modifications-to-google-books.html>.

63. DOJ Statement of Interest II, *supra* note 3, at 1.

64. *Id.*; Picker, *Assessing Competition Issues*, *supra* note 7 at 2–3.

65. DOJ Statement of Interest II, *supra* note 3, at 2.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 18.

70. *Id.* at 19–20.

71. *Id.* at 20.

72. *Id.* at 21–23.

73. See, e.g., Microsoft Objection, *supra* note 3; Yahoo! Objection, *supra* note 3; Open Book Alliance Brief I, *supra* note 3; Open Book Alliance Brief II, *supra* note 3.

well benefit Google's existing online search business," in that it would "further entrench[]" Google's dominant position in that market.⁷⁴ This advantage would not be due to technological advances or the operation of a normal market, but rather to the class action settlement that no other competitor could attain.⁷⁵ The DOJ Statement did not, however, characterize this implication of the ASA as an antitrust violation, although it was discussed in the antitrust section of the Statement.

The DOJ's second Statement against the Google Books settlement was filed less than a week prior to the fairness hearing for the ASA. Despite the government's serious objection, the settling parties decided to go ahead with the hearing rather than ask permission from the court to undertake another round of revisions.

The DOJ made clear that "the public interest would best be served by direction from the Court encouraging the continuation of settlement discussions between the parties and, if the Court so chooses, guidance as to those aspects of the ASA that need to be addressed."⁷⁶ As noted in Part II, Judge Chin appears to have taken this advice very seriously, as his opinion reads like a road map of revisions that might be viewed favorably. The DOJ also indicated its willingness to work with the parties on a settlement agreement that could be approved,⁷⁷ as well as offering some suggestions about further revisions that the settling parties should consider.⁷⁸

Although Judge Chin encouraged further settlement discussions in the months following his decision rejecting the ASA,⁷⁹ the parties were unable to reach a consensus. Judge Chin then established a schedule for resumption of the lawsuits.⁸⁰ The publishers, however, were able to settle with Google about a year later on terms that have

74. DOJ Statement of Interest II, *supra* note 3, at 22. It is worth noting that the Federal Trade Commission recently decided not to move forward with an antitrust challenge to certain of Google's practices in its search and search advertising markets. It would not have been an easy matter to prove that Google had market power in a search or search advertising market. See, e.g., Will Oremus, *The Government Decided That Google Isn't an Illegal Monopoly. Here's Why*, SLATE, 1/3/13, http://www.slate.com/blogs/future_tense/2013/01/03/google_antitrust_settlement_why_the_ftc_cleared_google_of_search_bias_claims.html.

75. DOJ Statement of Interest II, *supra* note 3, at 22–23.

76. *Id.* at 4.

77. *Id.* at 25.

78. *Id.* at 23–25.

79. See *Authors Guild*, 770 F. Supp. 2d at 686 (urging the parties to revise the settlement); Marc Ferranti & Juan Carlos Perez, *Discussions Continue in Google Books Lawsuit, Attorneys Say*, PC WORLD (Sep. 15, 2011, 10:15 AM), http://www.pcworld.com/article/240108/discussions_continue_in_google_books_lawsuit_attorneys_say.html.

80. Scheduling Order, *Authors Guild*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05-CV-8136-DC), ECF No. 982.

not been publicly disclosed.⁸¹ The class action lawsuit brought by the Authors Guild and three of its members is still ongoing.⁸²

Under the circumstances, the DOJ did a creditable job articulating its antitrust and Rule 23 concerns about the Google Books settlement. Like Judge Chin, it offered guidance to the parties about what a more approvable settlement might look like. Critics of the DOJ's antitrust analysis of the Google Books Settlement should take into account the unusual circumstances brought about by court-imposed deadlines that restricted the ability of DOJ to conduct a full investigation of antitrust implications of the ASA.

IV. SOME ANTITRUST OBJECTIONS TO THE ASA HAD MERIT

The ultimate failure of the Google Books settlement arguably moots the need to probe further into the merits of the antitrust concerns posed by DOJ and others. Yet, Professor Lao's post-rejection article attacking the antitrust objections to the ASA suggests that the matter is still worthy of academic debate.⁸³ This Part takes issue with some of her analysis and discusses two aspects of the Google Books settlement that, in my view, did raise serious antitrust concerns.⁸⁴

The first has to do with the price-setting mechanism the ASA would have utilized for books whose rights holders had not claimed them through the collecting society, which would have been known as the Book Rights Registry (BRR). The ASA would have established a price-setting mechanism enabling BRR to receive 63 percent of the revenues that Google earned from its commercialization of books

81. See Press Release, News from Google, Publishers and Google Reach Agreement (Oct. 4, 2012), <http://googlepress.blogspot.com/2012/10/publishers-and-google-reach-agreement.html>. Although the publishers participated in the Google Book settlement as a subclass, the publishers did not pursue a class action after the failure of the settlement. Because its separate lawsuit against Google was not a class action, it could be settled without judicial approval.

82. Judge Chin granted a motion to certify the class in the *Authors Guild* lawsuit in May 2012. Opinion, *Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012) (No. 05 Civ. 8136 (DC)). Google petitioned for an interlocutory appeal to the Second Circuit Court of Appeals. This petition was granted. *Id.*, *appeal docketed*, No. 12-3200 (2d Cir. Aug. 14, 2012). The Second Circuit subsequently ordered proceedings on the merits of the *Authors Guild* lawsuit to be stayed pending resolution of the class certification appeal. Order of USCA, *Authors Guild v. Google, Inc.*, No. 12-3200 (2d Cir. Sep. 17, 2012). In the fall of 2011, the Authors Guild filed a related copyright lawsuit against several universities based on their possession and use of digital copies of books that Google had scanned from their research library collections. A year later, Judge Baer granted the universities' motion for summary judgment, ruling that the libraries had made fair uses of the in-copyright books. See *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351(HB), 2012 WL 4808939 (S.D.N.Y. 2012). The Guild is appealing this decision.

83. Lao, *supra* note 7.

84. One should not infer from my decision not to discuss other antitrust issues raised by the DOJ about the ASA that I think they are lacking in merit. The matters discussed in this Part have simply been of particular interest and concern to me.

within the scope of the ASA. The second concerns the insurmountable entry barriers that approval of the ASA would have created to insulate Google from competition in the market of a comprehensive database of digital books. To focus only on the license that the ASA would have given to exploit orphan works unduly narrows one's perspective on how much of a competitive advantage this collectively negotiated deal would have given Google.

A. The ASA's Algorithmic Pricing Mechanism for Unclaimed Books Was Anti-Competitive

The ASA would have given rights holders in books covered by the settlement a choice between setting individual prices for individual books and authorizing Google to use a pricing algorithm to establish those prices.⁸⁵ The ASA provided that Google would design the algorithm to set an optimal price so as to maximize revenues for each book, and Google would consider historical data about book sales, as well as other factors, in its price-setting process.⁸⁶

The pricing algorithm was the default option as to all books whose rights holders did not register their copyright claims with BRR. Affected books would obviously have included all orphan works. But also affected would have been books whose rights holders had simply not come forward to claim them (e.g., retired professors in nursing homes or grandchildren who did not know that grandma wrote a book way back when). Some commentators on the Google Books settlement expected that as many as seventy-five percent of books covered by the ASA would remain unclaimed.⁸⁷ The pricing algorithm would thus potentially have been used as to millions of books, and those books would compete with the books that had been claimed by their authors or publishers or both.

The ASA would have established twelve price bins for Google's algorithmic pricing, ranging from \$1.99 to \$29.99, and set fixed percentages of books in each bin.⁸⁸ Thus, five percent of the books would be priced at \$1.99 and another five percent at \$29.99.⁸⁹ Thirty-one percent of the books would have been priced at or below \$4.99, thirty-two percent would have been priced at or above \$9.99, and the rest of the books would have been priced between \$4.99 and \$9.99.

Professor Lao is correct that a default pricing algorithm was necessary if Google was to be able to sell unclaimed books at all.⁹⁰ She

85. ASA, *supra* note 1, § 4.2(b)(i).

86. *Id.*

87. *See, e.g.*, Band, *supra* note 1, at 294.

88. ASA, *supra* note 1, § 4.2(c)(i).

89. *Id.* § 4.2(c)(ii).

90. Lao, *supra* note 7, at 410.

also emphasized that Google would design the pricing algorithm for individual books unilaterally.⁹¹

But consider this: the average price of settlement books under the algorithm, if you consider the percentages of books that had to be priced just so for each of the twelve bins, was \$8.74. Moreover, the ASA would have required just under one-third of the algorithmically priced books to be sold at \$9.99 or above.⁹² And importantly, the parameters within which the pricing algorithm were to be set — the twelve pricing bins, the specific prices for each bin within the range, and the percentages of prices per bin — were set by the settling parties in concert. The DOJ’s concern was that competitors should not be able to “delegate to a common agent pricing authority for all of their wares.”⁹³

When one considers that Amazon has typically been selling hundreds of thousands of recently published commercially available e-books at \$9.99, the average price for algorithmically priced books under the collectively negotiated ASA seems high.⁹⁴ This is especially so given that the algorithmically priced books would all have been out-of-print/commerce works (except for the new commercial life that the ASA would have given them), and given that Google settlement e-books would have been available only “in the cloud” (i.e., a purchaser

91. Professor Lao was more reassured than the DOJ was by an ASA provision that the algorithm “will be designed to operate in a manner that simulates how an individual Book would be priced by a Rightsholder of that Book acting in a manner to optimize revenues in respect of such Book in a competitive market, that is assuming no change in the price of any other Book.” ASA, *supra* note 1, § 4.2(c)(ii)(2); Lao, *supra* note 7, at 410.

92. ASA, *supra* note 1, § 4.2(c)(ii)(1). (11% of books were to be priced at \$9.99, 8% at \$14.99, 6% at \$19.99, and 5% at \$29.99).

93. DOJ Statement II, *supra* note 3, at 19. This concern resonates with a recent Supreme Court decision in *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201. The Court reversed the dismissal of an antitrust claim in which the NFL and its teams had delegated pricing authority to Reebok as its joint sales agent for trademarked headwear. Even if there might be some efficiencies in having a joint sales agent and even if NFL had to coordinate team activities to some degree, each of the 32 NFL teams was a substantial independently owned and managed entity, and the teams had previously set their own prices for headgear. The case was remanded for consideration of the antitrust claims under the rule of reason.

94. In April 2012, DOJ filed an antitrust lawsuit against Apple Inc. and five publishers of electronic books for colluding to raise the price of e-books above the \$9.99 standard Amazon e-book price. *U.S. v. Apple, Inc.*, No. 12-cv-2826 (DLC) (S.D.N.Y. filed Apr. 11, 2012). The publishers have since settled with DOJ without admitting any violation of the antitrust laws. Apple remains a defendant in this case. Apple and publishers have argued that Amazon has engaged in predatory pricing of e-books in an effort to dominate this market, and at least some commentators think there is merit to this claim. *See, e.g.*, Albert A. Foer & Tyler Patterson, *E-books and Amazon*, COMPETITION LAW INSIGHT, July 31, 2012, at 8.

of the book could only access a purchased copy on Google servers, not download it and carry it with him/her or share it with friends).⁹⁵

When one considers also that algorithmically priced books would generally be in direct competition with books whose rights holders had set prices individually, it becomes evident that there was reason for DOJ to worry that publisher and author groups, when negotiating the ASA, may have been intent on seeing to it that algorithmically priced books would not undercut the prices for books that they intended to set individually.⁹⁶

There were also some curious limitations on the price-setting and other powers of the fiduciary to which the ASA would have delegated power to represent the interests of unclaimed work rights holders.⁹⁷ That fiduciary had no power, for example, to make unclaimed books available on an open access basis or to set the price to \$0, even if he/she was convinced the books were true orphans or their academic authors would have preferred them to be available on an open access basis.⁹⁸ Unclaimed books were, moreover, to be priced algorithmically under the ASA through the rest of their copyright terms, no matter how clear it became that the books were true orphans. Contrast this with the view of the Copyright Office in 2006 that these works should be freely reusable once orphan status was established.⁹⁹ It may have seemed to the DOJ that rights holder groups wanted to use the ASA to ensure that unclaimed books would not be priced so low that it would drive down prices for their individually priced books.¹⁰⁰

95. See, e.g., Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1347–48 (2010) (discussing some disadvantages of Google e-books).

96. This is consistent with the agreements that five publishers reached with Apple to switch to a different e-book pricing model that would have significantly raised the prices of e-books above the level that Amazon had been charging, which in turn led to a DOJ challenge to the agreement. See, e.g., Foer & Tyler, *supra* note 94.

97. See, e.g., Samuelson Letter, *supra* note 17, at 45.

98. *Id.* at 6–7.

99. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 11–12 (2006). The Report defined the issue of orphan work as “the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” *Id.* at 1. Whereas a true orphan could be freely used, the Report also recommended that a later surfacing rights holder would be entitled to reasonable compensation. *Id.* at 12.

100. It is, of course, difficult to know in the abstract how much competition individual unclaimed books would pose in relation to claimed books, but the ASA evinced a collective interest among the settling parties in keeping price levels for unclaimed books relatively high.

B. The ASA Would Have Erected Insurmountable Entry Barriers to Development of a Comprehensive Digital Books Database

The ASA was, in a real sense, a joint venture agreement negotiated by representatives of the Association of American Publishers (“AAP”), the Authors Guild, and Google that would have conferred on the latter a set of competitive advantages that no other firm could possibly hope to attain, and from which AAP and Guild members would have benefited financially. Had it been approved, the ASA would have granted to Google on behalf of the fictional class of author/publisher-owners of book copyrights a set of licenses and other privileges that were truly breathtaking in their scope. These licenses and privileges would have created impossibly high barriers to entry for any firm wanting to compete with Google in these areas.

The most obvious and most discussed of these entry barriers was the license the ASA would have given Google to commercialize out-of-commerce works that remained unclaimed by their rights holders.¹⁰¹ Many (and perhaps most) of those unclaimed works were expected to be so-called “orphan works,” that is, works presumptively in-copyright but whose rights holders were either unknown (i.e., a photograph taken in the 1960s by an unknown person) or unlocatable after a reasonably diligent search. David Drummond, Google’s chief legal officer, testified before Congress that he anticipated that approximately twenty percent of the ten million or so books in the Google Books corpus at that time were probably orphans.¹⁰²

Orphan books were an important part of the license the ASA would have given Google to commercialize out-of-commerce works because, although competitors or would-be competitors could try to license rights from owners of claimed books if they wanted to make a subscription service to compete with Google, competitors could not get a license to an estimated two million plus orphan books because the class that granted this license would have ceased to exist upon approval of the settlement. Although any individual orphan book might have little or no commercial value, a database of millions of them could have become a very important asset for Google.

A comprehensive database of scholarly books from major research library collections, what the ASA called the “Institutional Sub-

101. The de facto exclusive nature of the license the ASA would have given to exploit orphan books was viewed as a significant antitrust concern in Grimmelmann, *supra* note 7, and Picker, *supra* note 7. Other commentators, notably Elhauge, *supra* note 7, and Lao, *supra* note 7, have been skeptical of this claim.

102. *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 6 (2009)* (Testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google, Inc.), available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/googleblogs/pdfs/google_091009testimony.pdf.

scription Database” (“ISD”) — the main product that the Google Books settlement would have allowed Google to monetize¹⁰³ — would have been impossible for anyone but Google to build and license to universities and other institutions. The ISD was expected to be of considerable value not only to colleges and universities, but also to public libraries and other types of schools, because it would have provided access to millions of scholarly works to which these institutions could not otherwise hope to have such comprehensive access.¹⁰⁴

Here are some of the other licenses and privileges that the ASA would have given to Google, which no other firm could hope to get from the class, a class that would have come into existence just long enough to give these advantages to Google:

1. A license to scan, store, and process digital copies of all books covered by the ASA;¹⁰⁵
2. A license to make “non-display” (i.e., computational) uses of all ASA-covered books in the Google Books corpus;¹⁰⁶
3. A license to display up to twenty percent of the contents of all out-of-commerce works covered by the ASA (unless their rights holders had opted out of this license) in response to search queries;¹⁰⁷
4. A license to run ads alongside the displayed contents of out-of-commerce works;¹⁰⁸
5. A license to negotiate new business models with the BRR that would bind all rights holders whose books were covered by the ASA;¹⁰⁹

103. ASA, *supra* note 1, § 4.1 (“Institutional Subscriptions”).

104. *See, e.g.*, Drummond Testimony, *supra* note 102, at 1–4. Professor Lao noted the “substantial, tangible, and undeniable social benefits” of broader access to knowledge that approval of the ASA would have brought about. *See* Lao, *supra* note 7, at 434. She thought that this social benefit “should be worthy of consideration, at least when the anti-competitive effects are somewhat speculative and in this case, the quirky consequence of the copyright laws rather than the terms of the ASA itself.” *Id.* She also emphasizes, as Elhauge has done, that allowing one provider of an ISD was better than none. *Id.* However, collusion to fix prices or erect insurmountable entry barriers cannot be justified on the ground that society will ultimately benefit from the agreement. *See, e.g.*, Nat’l Soc. of Prof’l Eng’rs v. U.S., 435 U.S. 637 (1978). Copyright law may be “quirky,” but collusive agreements aimed at taking advantage of those quirks should not be insulated from antitrust liability. The one-is-better-than-none argument proves too much, as Professor Picker has observed, for it would immunize anticompetitive conduct by any entity that might offer a new product to the market. Picker, *Antitrust and Innovation*, *supra* note 7, at 1.

105. ASA, *supra* note 1, § 3.1 (“Digitization, Identification and Use of Books”). At least some of the licensed uses discussed herein may be fair uses. *See* Authors Guild Inc. v. HathiTrust, No. 11 CV 6351(HB), 2012 WL 4808939, at *14-23 (S.D.N.Y. Oct. 12, 2012) (finding preservation, computational research, and print-disabled access to digital copies of books in library collections to be fair uses). The ASA would have allowed these uses at a time when the law was more unsettled on these points.

106. ASA, *supra* note 1, § 1.94 (definition of “Non-Display Uses”), § 2.2 (“Authorization of Google, Fully Participating and Cooperating Libraries”).

107. *Id.* § 4.3 (“Preview Uses”).

108. *Id.* § 3.14 (“Advertising Uses”).

6. A clear resolution of the intense dispute between publishers and authors over who owned rights to e-book forms of ASA-covered works (which was important because the ASA solved this problem for Google, whereas any competitor would, generally speaking, have had to clear rights with both contenders for these rights because the law was unclear on this hotly debated issue);¹¹⁰

7. Authorization to grant sublicenses to partner libraries so that they could maintain databases of their library digital copies of books that Google had scanned from their collections;¹¹¹

8. Authorization to grant licenses to two nonprofit educational institutions to host the full Google Books corpus and enable scholars from other nonprofit institutions (but never researchers from competitors) to conduct searches across the corpus in connection with specified research projects (e.g., a linguist's study of the origins of a word);¹¹²

9. A release from liability for infringement if Google had made a good faith but mistaken determination that a book was in the public domain or not available commercially;¹¹³

10. A compulsory arbitration regime so that virtually all disputes over rights to and remuneration for books covered by the settlement could be resolved without going to federal court;¹¹⁴

11. An immunity from awards of statutory damages and attorney fees from class members;

12. Other limitations of liability as to other obligations under the ASA, including breach of security requirements;¹¹⁵ and

13. Authorization to gather vast quantities of personally identifiable information about users of the ISD database with no obligation to protect reader/user privacy.¹¹⁶

When one considers these advantages in conjunction with the benefit that Google would have derived from the license to unclaimed books, it is evident that the ASA would have created entry barriers that no other entity could hope to surmount.

Professor Hemphill contends that these entry barriers were not of Google's making.¹¹⁷ However, Google *did* participate in constructing these barriers through its role in negotiating the settlement with the

109. *Id.* § 4.7 (“Additional Revenue Models”).

110. *Id.* Attachment A (“Procedures Governing Author Sub-Class and Publisher Sub-Class Under the Amended Settlement Agreement”).

111. *Id.* § 4.1 (“Institutional Subscriptions”).

112. *Id.* § 7.2(d)(ii) (“Host Sites”).

113. *Id.* § 3.2(d)(v) (“Safe Harbor Public Domain Determination”).

114. *Id.* § 9.1 (“Arbitration of Disputes and Exceptions”).

115. *Id.* § 8 (“Security and Breach”).

116. *Id.* § 15 (“Confidentiality”).

117. C. Scott Hemphill, *Collusive and Exclusive Settlements of Intellectual Property Litigation*, 2010 COLUM. BUS. L. REV. 685, 694 (2010).

AAP and the Authors Guild. There was, moreover, reason to think that the AAP and Guild members would have benefited if approval of the ASA created entry barriers that would make it easier for Google to charge monopolistic prices. The prospect of supracompetitive pricing was of great concern to library associations and others, as the pricing of the ISD was not seriously constrained by the ASA.¹¹⁸ It is, moreover, far from clear that the author and publisher groups would have been receptive to overtures from Microsoft or other firms seeking a comparable license since this might well undermine the chances of benefiting from monopoly rents from Google.¹¹⁹

V. CONCLUSION

This Article should not be understood as arguing that the DOJ would have won hands down if it had sued to enjoin an agreement such as the ASA on antitrust grounds. Nor does the Article assert that the antitrust objections to the Google Books settlement would, all other things being equal, have been a sound stand-alone basis upon which to reject the settlement. At the very least, a judge who decided to reject a settlement such as the ASA on antitrust grounds would have an obligation to conduct a serious antitrust analysis to justify this holding, including an assessment of its possible procompetitive aspects.

Antitrust and Rule 23 fairness proceedings are in a sense mismatched. The principal Rule 23 question in determining whether to approve a class action settlement is whether the agreement is "fair, reasonable, and adequate" to the class on whose behalf it was negotiated.¹²⁰ It is not whether the settlement is in the public interest or whether it is either anticompetitive or procompetitive. Indeed, as Professor Hemphill has observed, class members might well have benefited had an approved settlement had anticompetitive consequences, as they might have enjoyed more compensation because of it.¹²¹

The DOJ was not, however, making a direct challenge to the agreement on antitrust grounds. The context within which the DOJ was airing antitrust concerns was quite different. A judge had ordered the DOJ to file written comments by a certain date if it wished to communicate any concerns it might have about the Google Books settlement before he held a hearing on whether it should be approved.

118. Library Association Comments on the Proposed Settlement 19–21, *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (No. 05-CV-8136-DC) (requesting that Judge Chin maintain oversight of the pricing of the ISD over time).

119. Absent a class action lawsuit, moreover, the author and publisher groups could not have made a comparable offer to one of Google's competitors, even if they wanted to, for they could not grant licenses beyond the rights the groups and their members owned.

120. FED. R. CIV. P. 23(e)(2). *See also supra* note 5 and accompanying text.

121. Hemphill, *supra* note 117, at 701.

The DOJ's analysis was necessarily tentative because it could not conduct a full investigation in the given time frame, but it provided enough information about the specific nature of its concerns that Judge Chin was persuaded to cite antitrust concerns as a reason for his rejection of the settlement. Both the DOJ and Judge Chin made an effort to articulate the kinds of changes that might ameliorate their antitrust concerns.¹²²

The deepest flaw in the Google Books settlement and the most powerful reason to reject it was its abuse of the class action settlement process by trying to establish a forward-looking business arrangement that abridged the rights of class members and went far beyond the issues in litigation in the *Authors Guild v. Google* case (namely, whether scanning books to index their contents is fair use or copyright infringement).¹²³ The Google Books settlement can also be viewed as an effort to achieve a measure of socially beneficial copyright reform that would have been difficult for Congress to accomplish.¹²⁴ A class action settlement cannot, however, be used to achieve quasi-legislative outcomes, and this is why Judge Chin did and should have rejected the settlement.¹²⁵ One can always hope that the social benefits that the Google Books settlement aimed for can eventually be brought about in a more acceptable manner.¹²⁶

122. James Grimmelmann has argued that the Google Book settlement should be viewed not solely through a Rule 23 lens, solely through an antitrust lens, or solely through a copyright lens, for there were synergistic effects among the problematic features of ASA. The agreement was more troubling when one considered the problems in relation to each other than if one considered each set of problems in isolation. See James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COP. SOC'Y 497 (2011). This is something antitrust commentators on the settlement have typically failed to do. See, e.g., Hausman & Sidak, *supra* note 7.

123. *Authors Guild*, 770 F. Supp. 2d at 669.

124. See generally Pamela Samuelson, *The Google Book Settlement As Copyright Reform*, 2011 WISC. L. REV. 479.

125. Judge Chin agreed with this too. *Authors Guild*, 770 F. Supp. 2d at 677–78.

126. See, e.g., Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J.L. & ARTS 697 (2011).