

Competition that Works: Why the Google Books Project Is Good
for Consumers and Competitors

Testimony of David A. Balto

Before the House Judiciary Committee

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Hearing on Competition and Commerce in Digital Books

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Mr. Chairman, Ranking Member Smith, and other members of the Committee, I am David Balto, a Senior Fellow at the Center for American Progress Action Fund. I appreciate the privilege of testifying before you today on Competition and Commerce in Digital Books which focuses largely on the Google Books project and the proposed settlement of litigation between Google and authors and publishers. As many of you know, I had a long career as a trial attorney in the Antitrust Division of the Justice Department and as the policy director of the Federal Trade Commission, and I frequently represent consumer and public interest groups in antitrust and intellectual property matters and testimony before Congress.¹ Based on my extensive review of the proposed settlement and the filings in the litigation, I strongly believe that the settlement in the Google Books project litigation does not pose significant competitive concerns and should be approved.

I have two simple points to my testimony. The Google Books project is a remarkable transforming achievement that we should all recognize has tremendous potential to democratize information and knowledge. I do not think anyone can dispute that. Second, the competitive concerns raised about specific narrow provisions of the settlement are not a basis to reject the settlement.

One of the greatest achievements in the last several years is the Google Books project, which scanned millions of books, many of which were available in only a handful of the most preeminent research libraries. This project led to class action litigation brought by publishers and authors charging a violation of copyright laws. To resolve the litigation, the protagonists entered into a settlement, which created a Book Rights Registry to make sure authors are appropriately compensated for their works. This settlement is currently under review by a federal district court.

The tremendous benefits from the Google Books project

The Internet is a great device for creating new markets, democratizing knowledge, and increasing competition. Google Books takes full advantage of this opportunity to expand the world's access to knowledge. Anyone can simply go on the web and, through Google Books, reach an almost endless array of information on nearly any topic. At the start of the 20th century, Andrew Carnegie spent an enormous sum to build the first truly public libraries in this country—before then, our libraries were for the most part only available to the educated and affluent. Google has taken on tremendous risk and expense to perform a comparable service, one that creates a virtual library of unprecedented proportions to millions of people, regardless of location, economic status, or resources. Thanks to the Google Books project, any individual anywhere in the United States will have access to an unprecedented corpus of information.

¹ A listing of my advocacy for consumer groups such as the Consumer Federation of America, Consumers Union, Families USA, AARP, and US PIRG is attached. Many of the arguments discussed in my testimony are set forth in an earlier paper: David Balto, "The Earth Is Not Flat: the Public Interest and the Google Book Search Settlement: A Reply to Grimmelmann," July 22, 2009, available at <http://www.acslaw.org/node/13812>. A later version of the paper is attached.

Under the settlement, Google Books will put out-of-print, expensive, or otherwise rare and hard-to-come-by texts online at reasonable prices. Libraries across the country will give people free access to Google Books: Google has pledged to give all public and university libraries across the country free, full-text, online viewing of millions of books at designated computers. Low-income, isolated, and underserved communities will have access to books that would have previously required enormous effort to track down. Lateef Mtima, a law professor at Howard University School of Law, has said that the settlement, by giving broad access to books and research materials to low-income communities, will “bridge the digital divide.” Google’s efforts will have the effect of expanding the body of knowledge readily available to the public, and make it even more accessible to people with disabilities and low-income or isolated populations.

It is not surprising that numerous public interest organizations and consumer rights advocacy groups have come out in favor of the settlement, including:

- United States Students Association
- American Association of People with Disabilities
- League of United Latin American Citizens
- Leadership Conference on Civil Rights
- National Federation of the Blind

Just to give one example of the remarkable consumer benefits, just consider the world of people with visual impairments—approximately 15-30 million in the United States alone. Google has committed to providing access to these users so that they “have a substantially similar user experience as users without print disabilities.”² Google’s commitment to making all books available to people with visual impairments through screen enlargement, screen reader, and Braille display technologies will completely transform the educational experience for the blind and visually impaired in this country and, indeed, around the world. The National Federation of the Blind, the nation’s leading advocate for access to information by the blind, has stated that the settlement will have “a profound and positive impact on the ability of blind people to access the printed word.”³

The settlement will also provide researchers with the ability to analyze books and language in ways that were previously impossible. They will, for example, be able to search the entire digital library corpus to compare language and cultural development, and to track literary developments across countries. The potential to unlock knowledge is seemingly unlimited. Not surprisingly, universities around the country have overwhelmingly acknowledged these benefits. According to Michael Keller, Stanford University’s librarian and publisher of the Stanford University Press, “[t]he settlement promises to change profoundly the level of access that may be afforded to the printed

² eSight Community News , “Google Settlement with Authors, Publishers,” Press release , November 23, 2008, available at http://www.tabinc.org/blog/archives/2008/11/google_settleme.html.

³ Ibid.

cultural record, so much of which is presently available to those who are able to visit one of the world's great libraries.”⁴

As a public interest attorney, I represent many who often cannot afford to purchase books and who do not live near Harvard or Stanford or other research libraries. For all of these people, and millions more, the settlement will unleash greater access to a tremendous amount of information. The public benefit of the settlement is, to me, unmistakable.

Imagine if you are an energetic and inquisitive student at the Wayne State University, or at a community college in Alaska, and you are doing research on an obscure medieval text. Currently, you might have to travel to one of the great research libraries in Cambridge or Stanford to conduct research. Now, the corpus of many of the major research libraries will be only a click away on your computer.

The Google Books project is a tremendous achievement. The scope of that achievement and its potential to open access and information for millions of consumers should be considered as the committee and the courts consider the limited competitive issues raised by the settlement.

Competitive concerns of the settlement are unfounded

A tremendous amount of ink and paper has been spent raising the specter that the Google Books settlement will be harmful to consumers. In fact, some of the witnesses testifying today have claimed that Google will become a “cartel ringmaster” and coordinate a cartel of publishers and authors, a “monopolist” and charge excessive prices to consumers for digital books, and a “monopsonist” and decrease compensation to authors, thus resulting in the reduction of output of books. As I explain in a moment, none of these labels are supported by real world facts.

As I explain in my testimony it is easy, but misleading, to confuse popularity with market power (*i.e.*, the ability to harm consumers by raising price). Google may have popular products, but it has not harmed consumers. To paraphrase Senator Lloyd Bentsen in the Bentsen-Quayle vice-presidential debate in 1988: “I know monopolists, I have sued monopolists, and Google is no monopolist.”⁵

My experience of over 15 years as an antitrust enforcer taught me to be cautious about substituting labels for real antitrust analysis. Antitrust labels may be attractive to the press or in a public debate, but they are not a substitute for analysis. As Justice Byron White cautioned in the *Broadcast Music* case thirty years ago, “easy labels do not always supply

⁴ University of Michigan News Service, “Major Universities See Promise in Google Book Search Settlement,” Press release, October 28, 2008, available at <http://www.ns.umich.edu/htdocs/releases/story.php?id=6807>.

⁵ Ed Black, president and CEO of the Computer and Communications Industry Association, made the identical observation in his June 10, 2009 article for *The Hill* entitled “Google venture; no violation of copyright or antitrust laws,” saying “I know what a high-tech monopoly looks like. This isn’t one.” See <http://thehill.com/opinion/letters/7012-google-venture-no-violation-of-copyright-or-antitrust-laws>

ready answers” to the question of whether conduct is illegal under the antitrust laws. Anyone looking at the unique issues in the settlement should be guided by that cautionary instruction. Rather than relying on easy labels, the critical question in analyzing whether conduct is anticompetitive is what is the incentive and ability for a firm to engage in the alleged anticompetitive conduct?

To answer that question we need look no further than Google’s conduct in the numerous markets it currently participates in. Certainly, Google is large, innovative, and remarkably popular in search. But one should not confuse size and popularity with market power. Google does not charge consumers for the use of its very popular search product. That is because it lacks the incentive to charge for its use—its product is valuable to advertisers because of the numbers of users of the product. It also lacks the ability to charge because of the numerous free search alternatives also in the market. When it comes to allegations of anticompetitive conduct concerning Google search, the proof is in the pudding: Google lacks the incentive and ability to harm consumers.

So let’s return to the claims of the critics of the settlement. Does Google, through the Book Rights Registry, have the incentive and ability to act as a “cartel ringmaster” directing thousands of authors or publishers in some sort of cartel waltz and facilitating a price increase? No. Over 95 percent of Google’s revenue is through the sale of search advertising. It has no incentive to artificially increase book prices since that will undermine its advertising revenue. The amount of revenue Google would earn from trying to form or facilitate a publisher or author cartel is inconsequential compared to the advertising revenue they would lose. “Cartel ringmaster” is a job Google would never apply for.

The critics of the settlement create the specter of harm by conflating Google and the Book Rights Registry as if they were one entity. They are not. The board of the registry will be appointed by authors and publishers. The registry will be charged with getting the most money for authors, whereas Google will be interested in books being as inexpensive as possible, because it wants to increase usage of its site and search tools, so it can make money the way it usually makes money: advertising. Rather than be in a collusive relationship, Google and the registry are more likely to be in an adversarial relationship.

Would Google act as a “monopolist” and drive up the costs of digital publications offered through the registry? Again, acting in this fashion would be contrary to its economic incentives. Moreover, since there are many other sources for the most valuable and popular books, it seems unlikely this effort to charge supracompetitive prices would be anticompetitive.

Those who suggest that Google can act as a “monopolist” also misunderstand how books will be priced. Critics point to the fact that some books will be priced through an algorithm. The settlement provides only an offer to sell rightsholders’ books at certain prices, however, and authors may reject this offer. This is no different than a situation in which a distributor offers multiple suppliers the chance to sell through the distributor at a given price, and sellers can reject or accept the offer. Further, I believe that 80 percent of

digital books will initially be priced under \$10.⁶ Over time, the algorithmic pricing must be designed to mimic a perfectly competitive market.⁷ Moreover, authors have the choice to opt-out of these “pricing bins” and determine their own price.⁸ The result of this is that if Google sought to set monopoly prices, each author would have an incentive to undercut the market price in order to make additional sales.

And of course, all of these books will have to compete with: (1) public domain books which are free and downloadable from the site, and (2) the fact that every public and university library in the country will be able to have a free public access service terminal.⁹ So any monopoly rents that Google might try to secure will be undercut by the fact that you can get the same thing for free at your local public library.

For the same reason that magazines practically beg you to subscribe, offering a fraction of the newsstand price, Google is more likely to pursue a model of broad access rather than price gouging for its subscription product, because that increases the advertising base. And even if Google misunderstood this, it is nevertheless obligated under the settlement to price the subscription to ensure “the realization of broad access to the Books by the public, including institutions of higher education.”¹⁰

Finally, there is the claim that Google will act as a “monopsonist.” A monopsonist is a firm that has market power in purchasing and may use that power to drive down compensation for a service provider resulting in a reduction in output. I have testified before Congress on behalf of farmers, nurses, doctors, and other healthcare workers about monopsony concerns, and there are very serious monopsony concerns in their markets. Monopsony concerns can arise where a service or good provider has limited outlets to sell its service or good. The Book Rights Registry is just one of dozens of means for authors or publishers to reach the market. If the prices are set too low, authors and publishers have numerous alternatives. The claims that Google would have the incentive or ability to become a monopsonist are simply fanciful.

⁶ See Settlement § 4.2(c)(ii).

⁷ See Settlement § 4.2(b) (“The Pricing Algorithm shall base the Settlement Controlled Price of an *individual* Book upon aggregate data collected with respect to Books that are similar to such Book.”) (emphasis supplied).

⁸ See Settlement § 4.2(b)(i) (“A rightsholder may select one of two pricing options for Consumer Purchases”).

⁹ See Settlement § 4.8(a)(i).

¹⁰ See Settlement § 4.1(a)(i).

The settlement enhances the potential for entry¹¹

The remaining competitive concerns are actually very narrow. There are two questions. First, does Google's access to "orphan works" limit the ability of alternative digital libraries to arise and compete against Google? Second, does a most favored nation provision restrict entry?

Both of these questions focus on entry barriers, and it is essential to get the entry barrier question right. The question is not whether it is hard to enter the digital books arena—it obviously is not easy. The operative question is whether the settlement *increases* entry barriers for the market. And to that, the answer is unequivocally no. As a group of 30 of the most preeminent antitrust law professors has observed, the "settlement overcomes barriers to entry for Google, without raising them for any rival because every right the settlement gives to Google to digitize, display, or sell books is expressly non-exclusive."¹² Thus, any right secured by Google can be shared with any existing or potential rival of the Google Books project.

Actually, the settlement makes it easier for others to follow in Google's footsteps in trying to enter the digital library arena. The settlement offers the potential to increase output and choice by expanding reducing legal and logistical barriers to similar digital books projects.

First, by expanding the public domain and resolving the uncertainty of rights of millions of books, the settlement will decrease entry barriers. Many books that have already been scanned by Google actually belong in the public domain; however, their status is currently unclear. In order to determine the copyright status of books under the settlement, Google is using records that have been scanned, compiled, corrected, and disseminated by Carnegie Mellon, Project Gutenberg, the Distributed Proofreaders, and Google itself. In addition to expanding the public domain in this way, the settlement also creates a procedure for publishers and authors to determine who should own digital rights, and it is expected that this will result in the clarification of these rights for thousands of publications. All of these efforts significantly expand access and facilitate entry. One study projects that the settlement should identify and resolve rights issues for at least 80 percent of rightsholders.¹³

Second, the settlement will also facilitate entry in another way: through its creation of the Book Rights Registry, an independent, nonprofit organization. The registry will significantly enhance the ability of subsequent entities to pursue book digitization initiatives.

¹¹ In a very thoughtful amicus brief, the Computer and Communications Industry Association explains how the settlement will enhance market entry. They explain "[b]y thus lowering risks and licensing costs, the settlement may encourage competitors to enter the market, or may encourage participants who exited the market to reenter." Brief of Amicus Curiae Computer and Communications Industry Association on Proposed Settlement at 11, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009).

¹² Brief of Amicus Curiae *Antitrust and Economics Professors in Support of the Settlement* at 19, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009).

¹³ *Ibid* at 5

Third, the registry will represent the interests of authors and publishers and locate rightsholders who have been separated from their works. With rightsholders' permission, it will be able to license millions of books, among them the most commercially valuable works covered by the settlement, to third parties, including Google competitors, on terms that might disfavor or disadvantage Google. Licenses will be provided on a nonexclusive basis, which means that authors and publishers will have the ability to negotiate with the registry or separately with other digital book providers. The ability to negotiate with other entities makes it unlikely that the registry could impose unreasonable license fees or otherwise restrict the availability of electronic books.

Finally, any institution with a license will be able to share the works in the project with other entities, including potential entrants into the digital books arena.

Access to orphan works

Much of the remaining competitive concerns surround Google's supposed exclusive access to orphan works. Orphan works are books that "retain their copyright but for which the rightsholders are unknown or cannot be found."¹⁴ The concern is that Google's so-called control over these works will limit the ability of other other book scanning projects to be successful. These claims are overstated.

This provision affects a small number of books

First, there are a relatively limited number of orphan works. According to a careful economic study, orphan works probably make up less than 9 percent of the works at issue. Other estimates suggest there may be as few as 1.4 million works, of which Google may have scanned around 580,000.¹⁵ Further, this number should decrease over time as the efforts of the Book Rights Registry to reach out to authors and publishers allow them to clarify the copyright status of a number of the books in questions.

It is hard to see how this small set of orphan works would be some kind of bottleneck to limit market entry. Moreover, these works may be "orphaned" for a reason—they may have gone out of print because other works were superior.

As soon as an author or publisher clarifies their rights to an orphan book, that book ceases to be an orphan. The rights holder can then contract directly with potential users, such as libraries, and Google will not enjoy any special advantages at this stage, either.

¹⁴ Jerry A. Hausman and J. Gregory Sidak, "Google and the Proper Antitrust Scrutiny of Orphan Works," *Journal of Competition Law and Economics* 5 (3) (2009): 411, 419.

¹⁵ Brief of Amicus Curiae Computer & Communications Industry Association on Proposed Settlement at 12, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009); A. Mark Lemley, "A New Balance Between IP and Antitrust," John M. Olin Program in Law and Economics, Stanford Law School. Working Paper No. 340. (April 2007)..

The settlement does not grant Google exclusive access to orphan books

Second, the settlement only provides Google with nonexclusive access to orphan books. The settlement does not give Google any advantages over second entrants for books which still have orphan status, and Google's current efforts in fact lower the barriers for second entrants. Any company that chooses to begin scanning orphan books will face fewer obstacles than Google has confronted. Critics claim that other firms would be unlikely to attempt a similar class action suit to obtain their own default licensing rights to orphan books. This is not necessarily the case. By increasing the size of the public domain, clarifying uncertain rights, and addressing innumerable complex legal issues, Google Books simultaneously provides a map and blazes trails through previously uncharted territories that others will be able to use for their own explorations.

The settlement creates value for orphan works

Finally, it is important to recognize that the value of orphan works is currently zero—there is no demand for them.¹⁶ If they already had value, they would be in print or otherwise available to consumers. The Google Books Settlement creates economic value for these books by creating a means for consumers to access them and exercise demand for them.

The combined effect of the settlement's rights clarification efforts and financial incentives will be to clarify the copyright status of many works. As a result, the number of orphan works will be substantially reduced. The settlement enhances the ability of companies other than Google to provide digital access to books including orphan works.

The so-called most favored nation clause

A careful analysis of the most favored nation provision also shows that it is unlikely to increase entry barriers or harm competition in any other fashion. The "most favored nation," or MFN, provision of the settlement is extremely limited. It prevents the registry from offering a more favorable deal to other entities and the provision lasts for only ten years. I have written extensively and testified about the competitive implications of MFNs. These clauses can promote consumer welfare by permitting first movers to recoup their investments in innovation. Conversely, MFNs can impede entry and adversely impact competition. The MFN clause in the settlement falls into the former category.

The so-called "MFN" clause is narrow

The MFN provision is probably the most misunderstood provision of the agreement. This provision will have a limited effect on the marketplace. Nothing prevents the registry from striking better deals with Google competitors.¹⁷ Specifically, the registry can pursue better deals with Google's competitors for all in-print works, which represent the vast

¹⁶ Jerry A. Hausman and J. Gregory Sidak, "Google and the Proper Antitrust Scrutiny of Orphan Works," *Journal of Competition Law and Economics* 5 (3) (2009): 411, 419.

¹⁷ Settlement § 3.8(a).

majority of today's book sales. Google competitors could also wait to see what the top-selling books are and strike deals only with respect to those books. Competitors could surely function in this way, like radio stations that seem to succeed despite playing only the top 30 songs over and over again. Section 3.8(a) pertains only to unclaimed works, that is, truly orphaned works, which no one comes forward to claim.¹⁸ It also only operates *if* the registry is later authorized to license unclaimed works that fall within the scope of the settlement. The Book Rights Registry does not have this authority, and it may never receive this authority within the ten years that Section 3.8(a) operates. Thus, even Professor Picker's paper appears to concede that when the settlement first goes into effect, this provision will have no effect whatsoever.¹⁹

Clearly, the parties recognized that they were negotiating in an environment where Congress was very likely to legislate—*orphan works*. In fact, Google continues to advocate for orphan works legislation. This provision ensures that if legislation, or perhaps some future class action settlement, provides the registry authority that it does not have now that Google will receive equal treatment (not preferred treatment) under the new regime.²⁰ If that never happens, then this provision will have little relevance. This point has been lost on many of the provision's critics.

This is therefore a provision that will have no impact when the settlement goes into effect, and may never have any impact, and even if it does have an impact, it will only affect books which no one has claimed—books that have the *least* expected economic value.

The so-called MFN clause has efficiency justifications

Setting aside how narrow this provision is, it is worth noting that non-discrimination provisions are not uncommon. They are often used to protect the investment of first-movers who anticipate that their efforts will reduce the costs for second-movers, who can then strike more advantageous deals by free-riding off the investment of the first-mover. In fact, copyright law itself serves the same purpose: it protects the economic investment of the first mover—the author—who might not write if everyone could then free-ride off his investment. That is an undesirable outcome for all involved, including consumers. Google has invested \$34.5 million in helping to create the registry, and millions more in legal fees, and thus, has a legitimate economic interest in protecting the value of that investment from free-riding.

¹⁸ The provision is limited to “rights granted from a significant portion of rightsholders other than registered rightsholders.” Because “registered rightsholders is defined by the settlement to mean “any person who is a rightsholder and who has registered with the registry his, her or its copyright interest in a book or insert.” See § 1.122, and a “rightsholder” is “a member of the settlement class who does not opt out...”, see § 1.132, this section only governs works of settlement class members that do not register with the registry.

¹⁹ Randall C. Picker, “The Google Book Search Settlement: A New Orphan Works Monopoly?” John M. Olin Law and Economics Working Paper No. 462, at 21.

²⁰ Antitrust scholars Areeda and Hovenkamp take the position that provisions requiring equal treatment are unlikely to cause antitrust problems. III.B Philip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 768a6, at 159-160 (3rd edition 2008).

Conclusion

As Judge Learned Hand instructed over half a century ago, the antitrust laws are not intended to punish “superior skill, insight, and industry.” When Google announced this project five years ago, book scanning technology was in its relative infancy and cost-prohibitive. At its own risk, Google developed its own scanning technology, negotiated numerous agreements with libraries, and navigated the uncertainty surrounding complex copyright issues. Its ability to do all of these things led to a virtual library that offers an unprecedented level of access to millions of consumers. The purpose of the antitrust laws is to open access and opportunities and that is precisely what the Book Rights Registry and the settlement does. Innovation should not be confused with monopoly power. The Google Books settlement is in the public interest and should be approved.

Appendix A

Public Interest Advocacy

by David Balto

Testimony on behalf of a number of the leading consumer groups in the United States:

- On behalf of the **Consumer Federation of America, Consumers Union, and U.S. Public Interest Research Group** before the House Small Business Committee regarding health insurer consolidation (October 25, 2007).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the concentration in agriculture and an examination of the JBS/Swift acquisitions (May 7, 2008).
- On behalf of the **Consumer Federation of America** before the House Small Business Committee regarding small business competition policy (September 25, 2008).
- On behalf of the **Consumer Federation of America** before the House Judiciary Committee regarding competition in the package delivery industry (September 9, 2008).
- On behalf of the **American Antitrust Institute, the Consumer Federation of America, the National Association for the Self-Employed, and the U.S. Public Interest Research Group** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding consolidation in the Pennsylvania health insurance industry (July 31, 2008).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the competitive impact of the Ticketmaster/Live Nation merger (February 24, 2009).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee regarding the nomination of Christine Anne Varney as Assistant Attorney General for the Antitrust Division of the Department of Justice (March 10, 2009).

Other congressional testimony:

- Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding GPO contract negotiations for medical supplies and devices (Sept. 14, 2004).
- Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the competitive impact of the XM/Sirius merger (March 20, 2007).
- Before the Antitrust Taskforce of the House Judiciary Committee regarding the impact of antitrust laws and their impact on community pharmacies and their patients (October 18, 2007).
- Before the Consumer Protection, Product Safety, and Insurance Subcommittee of the Senate Committee on Commerce, Science, and Transportation regarding competition in the health care marketplace (July 16, 2009).

Amici curiae briefs:

- On behalf of **AARP, the Consumer Federation of America, Consumers Union, and Families USA**. *J.B.D.L. Corp. v. Wyeth-Ayerst Lab., Inc.*, Nos. 05-3860/3988 (6th Cir., Nov. 2005).
- On behalf of **the American Antitrust Institute and the Consumer Federation of America**. *McKinsey v. Peace Health*, No. 05-35627 (9th Cir., Mar. 2007).
- On behalf of the **American Antitrust Institute, AARP, the Consumer Federation of America, Consumers Union, and Families USA**. *In re DDAVP DIRECT PURCHASER ANTITRUST LITIGATION*, No. 06-5525 (2nd Cir., May 25, 2007).
- On behalf of **the American Antitrust Institute, the Consumer Federation of America, and the Organization for Competitive Markets**. *Federal Trade Commission v. Whole Foods Market*, No. 07-5276 (D.C. Cir., Aug. 23, 2007).
- On behalf of the **Consumer Federation of America and the Medical Device Manufacturers Association**. *Masimo Corp. v. Tyco Healthcare Group, LP*, Nos. 07-55960/56017 (9th Cir., Dec. 27, 2007).

- On behalf of the **American Antitrust Institute**, the **Consumer Federation of America**, and the **Public Patent Foundation**. *Rambus, Inc. v. Federal Trade Commission*, Nos. 07-1086/1124 (D.C. Cir., June 11, 2008).
- On behalf of several consumer groups. *Tafas and Smithkline Beecham Corp. v. Dudas and U.S Patent and Trademark Office*, No. 08-1352 (Fed. Cir., July 29, 2008).
- On behalf of **AARP**, **Patients not Patents**, and the **Public Patent Foundation**. *Apotex Inc. v. Sanofi-Synthelabo Inc.*, No. 09-117 (U.S. Supreme Court, Aug. 27, 2009).

Other public interest advocacy:

- On behalf of **the American Antitrust Institute** in opposition to the ExpressScripts/Caremark merger (white paper to FTC, Feb. 2007).
- On behalf of the **Consumer Federation of America**, **Consumers Union**, and **U.S. PIRG** in opposition to the FTC's proposed Consent Order against Kmart for deceptive marketing of gift cards (March 2007).
- On behalf of the **Organization for Competitive Markets**, and other groups in opposition to the Premium Standard/Smithfield merger (May 2007).
- On behalf of the **American Antitrust Institute**, the **Consumer Federation of America**, and the **Public Patent Foundation** on support for the FTC's proposed Consent Order in the Negotiated Data Solutions matter (white paper to FTC, April 24, 2008).
- On behalf of the **American Antitrust Institute** on Express Scripts' proposed acquisition of Wellpoint's PBM business (May 11, 2009).
- On behalf of the **Consumer Federation of America**, **U.S. PIRG**, and **Consumers Union** on pharmaceutical patent settlements (June 6, 2009).
- On behalf of the **Consumer Federation of America**, **U.S. PIRG**, and the **National Legislative Association on Prescription Drug Prices** on transparency by pharmacy benefit managers (letter to Speaker Pelosi, August 20, 2009).

Appendix B

The public interest and the Google Book Search settlement

By David Balto, Senior Fellow, Center for American Progress Action Fund

(September 9, 2009 version)

In 2004, Google began working with large research libraries to digitize their book collections and to make the content searchable online. Not long after the project was announced, a collection of authors and publishers sued Google for copyright infringement. After almost three years of negotiations, Google and the plaintiffs announced in October 2008 that they had agreed to a proposed settlement. While some commentators have lauded the settlement, others have vociferously claimed that it poses competitive concerns and does not promote the public interest.

As an advocate for consumer interests and a former antitrust enforcer, I took great interest in this debate early on and started to study the settlement. Over the last few months, I have learned much about Google Book Search, the ensuing litigation, the settlement, and the settlement's competitive implications. In doing so, I have come to the firm conclusion that the competition criticisms of the settlement are unfounded. I believe the settlement is good for consumers and should be approved.

At the outset, it is important to recognize what Google and the plaintiffs have accomplished. When Google started the project, book scanning technology was in its relative infancy and cost-prohibitive for operations at scale; the company thus had to develop its own scanning technology to move forward with the project.²¹ At the same time, Google had to negotiate numerous agreements with libraries to gain access to their books and had to secure other rights directly from publishers and authors.²² An additional deterrent was the great uncertainty surrounding the ownership of digital book rights. Indeed, it became abundantly clear that Google had undertaken considerable economic risk when its Book Search program became the subject of a class action lawsuit.

²¹ Maureen Clements, "The Secret of Google's Book Scanning Machine Revealed," National Public Radio, April 30, 2009, available at www.npr.org/blogs/library/2009/04/the_granting_of_patent_7508978.html.

²² In December 2004, Google entered agreements with the libraries at Harvard University, the University of Michigan, Stanford University, Oxford University, and the New York Public Library to scan parts of their collections of books and make the contents searchable online. Google received access to the collections, while the libraries received an electronic copy of the books that they provided to Google. See "Google Checks Out Library Books," Google Press Release, December, 14, 2004, available at www.google.com/press/pressrel/print_library.html.

In settling the litigation, the publishers, authors, and Google have pursued a sound and necessary approach to resolving a number of rights-sharing problems that, until now, have posed seemingly insurmountable hurdles to making books digitally available. For example, by creating a nonprofit organization, the Book Rights Registry (“BRR” or “Registry”), to represent the interests of authors and publishers and to locate rightsholders who have been separated from their works, the settlement will significantly enhance the ability of subsequent entities to commence book scanning initiatives. As such, the settlement should be viewed in light of what it provides for the general public—increased access to the world’s written cultural heritage, particularly books that have long been out of print. The settlement is, in other words, output-enhancing and procompetitive.

In this article, I first describe the settlement’s consumer benefits, and then examine the impact of the settlement on entry barriers. I explain how, rather than increasing entry barriers, the settlement significantly decreases such barriers for other entities. I then focus on the criticisms posed by Professor James Grimmelmann,²³ and explain how the settlement is ultimately procompetitive and beneficial to the market.

The settlement will create significant consumer benefits

The Library of Alexandria, which Grimmelmann mentions in his articles, was one of the largest libraries in the ancient world. Although it remains unclear to this day how the library was destroyed, the leading theory is that Julius Caesar set a fire that unintentionally burned the library down in 48 B.C. during the Alexandrian War. The ancient texts contained within the library were destroyed, and the knowledge contained within the books was lost forever.

This historical incident is noteworthy for two reasons: first, on a practical level, the creation of digital copies of the world’s books ensures that this disaster of the ancient world will not be repeated in modern times. Indeed, it would be borderline negligent not to use the electronic advancements of our generation to preserve the history and knowledge contained in books that have typically existed only on flimsy decaying paper. Second, despite the fact that there has been no fire or other calamity, a substantial percentage of the books in the United States (which Grimmelmann estimates is likely to be more than half of *all* books)²⁴ have been largely unavailable to the public, which amounts to a tragedy no less significant than the destruction of the Library of Alexandria. These are out-of-print books, which can be found in some public libraries and occasionally purchased second-hand, but which are otherwise inaccessible. There are a number of complications surrounding these books that have prevented them from being

²³ James Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books”(American Constitution Society, April 2009), available at <http://www.acslaw.org/files/Grimmelmann%20Issue%20Brief.pdf>; James Grimmelmann, “How to Fix the Google Book Search Settlement,” *Journal of Internet Law* 1 (April 2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=james_grimmelmann.

²⁴ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” *supra* note 3 at 8.

made more accessible. For many works, it is unclear whether they have fallen into the public domain because the rightsholder did not renew their copyright, as required by prior iterations of the Copyright Act. For some works, there is uncertainty as to who presently owns the rights to a book because the rights somehow got lost or otherwise disappeared over time. There is also ambiguity as to whether the author or the publisher owns the digital rights to hundreds of thousands of books. The combined impact of the varying shades of rights uncertainty has been to create gridlock,²⁵ which has prevented people from effectively accessing, and benefiting from, the knowledge encapsulated within an enormous number of books.

By settling their litigation, Google and the plaintiffs have ended the impasse. The settlement unleashes greater access to books, particularly to out-of-print books, which increases output in the marketplace of ideas.²⁶ Moreover, the settlement will serve as an equalizing force across socioeconomic, geographic, and linguistic barriers. Scholars and historians at the smallest schools in remote corners of this country will obtain the same access to knowledge as those at large, well-funded universities in our biggest cities. Citizens in poor communities will likewise have similar access to knowledge as those in affluent communities. And language barriers will be diminished under the settlement as Google's translation technology enables digital works in one language to be instantly translated into others.²⁷

In addition to tearing down socio-economic and linguistic access barriers, the settlement will provide considerable benefits to those who are blind or otherwise print-disabled. Under the terms of the settlement, Google can provide books to "users with print disabilities so that such users have a substantially similar user experience as users without print disabilities."²⁸ The National Federation of the Blind, the nation's leading advocate for access to information by the blind, has stated that the settlement will have "a profound and positive impact on the ability of blind people to access the printed word."²⁹ The settlement will also provide researchers with the ability to analyze books and language in ways that were previously impossible. They will, for example, be able to search the entire digital library corpus to compare language and cultural development, and to track literary developments across countries. The potential to unlock knowledge is seemingly unlimited.

Universities around the country have overwhelmingly acknowledged these benefits. According to Michael Keller, Stanford's university librarian and publisher of the Stanford

²⁵ See generally, Michael Heller, *The Gridlock Economy* (New York: 2008).

²⁶ James Gleick, "How to Publish Without Perishing," *The New York Times*, November 29, 2008, available at <http://www.nytimes.com/2008/11/30/opinion/30gleick.html> ("As a way through the impasse, the authors persuaded Google to do more than just scan the books for purposes of searching, but go further, by bringing them back to commercial life. Under the agreement these millions of out-of-print books return from limbo.... This means a new beginning — a vast trove of books restored to the marketplace.").

²⁷ See for example CNET News, "Google's Digital-Book Future Hangs in the Balance," June 15, 2009, available at http://news.cnet.com/8301-1023_3-10262203-93.html (noting that Google "increasingly sophisticated translation technology ... could bulldoze literary language barriers").

²⁸ eSight Community News, "Google Settlement with Authors, Publishers," Press release, November 23, 2008, available at www.tabinc.org/blog/archives/2008/11/google_settleme.html.

²⁹ *Ibid.*

University Press, “[t]he settlement promises to change profoundly the level of access that may be afforded to the printed cultural record, so much of which is presently available to those who are able to visit one of the world’s great libraries.”³⁰ Paul Courant, the Dean of Libraries at the University of Michigan, has likewise observed that Google Book Search will provide:

Ubiquitous online access to a collection unparalleled in size and scope, preservation of the scholarly and cultural record embodied in the collections of great research libraries, new lines of research, and greatly expanded access to the world's printed work for persons with print disabilities.³¹

For all these reasons, it is difficult to exaggerate the benefits that consumers will gain from the settlement—and important not to overlook the fact that these vast benefits will disappear if the settlement’s detractors succeed in derailing its approval. Even some of the settlement’s most vocal detractors, including Grimmelmann, acknowledge these fundamental facts.³²

The settlement substantially decreases entry barriers

Grimmelmann argues that the settlement will create various significant, if not insurmountable, barriers to entry that will prevent other potential competitors from competing in book scanning and online book sales. There is no doubt that book scanning is a difficult space to enter. Companies such as Microsoft and Yahoo have entered, seemingly determined that it would not be profitable, and exited.³³ Despite the costs and challenges, however, there are a number of entities that have entered book scanning and sustained their efforts.³⁴ As Grimmelmann acknowledges, the non-profit Open Content Alliance currently scans public domain works, and Amazon.com has the institutional capacity to make books available digitally on a “huge scale.”³⁵ Most importantly, any challenges that do exist for large-scale book scanning should not be conflated with the question of whether the settlement increases or decreases entry barriers. The following

³⁰ University of Michigan News Service, “Major Universities See Promise in Google Book Search Settlement,” Press release, October 28, 2008, available at www.ns.umich.edu/htdocs/releases/story.php?id=6807.

³¹ Paul Courant, “Other Voices: Google Agreement Will Extend U-M Libraries’ Accessibility,” Mlive.com, June 24, 2009, available at www.mlive.com/opinion/ann-arbor/index.ssf/2009/06/other_voices_google_agreement.html.

³² See Grimmelmann, “How to Fix the Google Book Search Settlement,” supra note 3 at 12 (“Everyone is better off than they would be in a world without Google Book Search . . .”).

³³ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” supra note 3 at 10.

³⁴ See, for example, Emory University, “Emory Partnership Breaks New Ground in Print-On-Demand Books” Press release, June 6, 2007, available at www.emory.edu/news/Releases/KirtasPartnership1181162558.html (announcing partnership with Kirtas Technologies, Inc., a maker of digital scanning technology to apply automated scanning technology to thousands of rare, out-of-print books in its research collections)..

³⁵ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” supra note 3 at 10..

sections explain the ways in which the settlement decreases entry barriers for book scanning and online book sales.

The settlement expands the public domain

Google has scanned approximately seven million works,³⁶ one million of which come from the company's partner program³⁷ and another million of which were published prior to 1923 and therefore are clearly in the public domain.³⁸ The copyright status of segments of the remaining five million works are unclear. Many of the books will actually belong in the public domain because the rights owners did not renew their copyrights, as required under previous iterations of the Copyright Act. As Grimmelmann notes, more than 85% of works published between 1923 and 1978 were not renewed, as required by the Copyright Act, and therefore fell into the public domain.³⁹ The catch here, because the Copyright Office did not keep effective records during this period, is identifying which works were not renewed. Carnegie Mellon, Project Gutenberg, the Distributed Proofreaders, and Google have, however, combined to scan, compile, correct, and disseminate these records.⁴⁰ And Google is now using the records to determine the copyright status of books under the settlement.

Notably, the Copyright Office examined the feasibility of scanning these records and placing them online in 2006. They expressed reluctance to commit to such a project, however, because it would "involve a significant expenditure of resources"⁴¹ as "preliminary figures estimated the costs to be about \$35 million."⁴² Fortunately, however, government inaction has not impeded progress because Google and others have filled the void – without the expenditure of public funds.

Each time that Google determines a book belongs in the public domain, consumers benefit by being able to download an entire PDF version of the text. Potential book scanning entrants benefit by having fewer books with uncertain rights — and can thereby avoid incurring expenses that Google had to incur to navigate these uncertain rights. By facilitating the clarification of the public domain status of potentially millions of works, the settlement thus significantly expands access and facilitates entry.

³⁶ Juan Carlos Perez, "In Google Book Settlement Business Trumps Ideals," IDG News Service, October 30, 2008) available at www.pcworld.com/businesscenter/article/153085/in_google_book_settlement_business_trumps_ideals.htm

³⁷ Ibid.

³⁸ Ibid.

³⁹ Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books," supra note 3 at 8.

⁴⁰ Google Book Search Blog, "U.S. Copyright Renewal Records Available for Download," available at <http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html>.

⁴¹ United States Copyright Office, "Report on Orphan Works" (January, 2006), 29-30 n.46, available at www.copyright.gov/orphan/orphan-report.pdf.

⁴² Ibid.

The settlement will lead to the resolution of uncertain digital rights

Another significant source of uncertainty surrounding the status of many out-of-print works is the ownership of the digital rights associated with particular books. Up until the 1990s, publishing agreements typically did not allocate digital rights to books, and publishers and authors have disagreed about who should retain these rights by default. The resulting standoff has harmed authors and publishers alike by denying them the possibility of gaining revenue from the sale of digital works. Consumers are likewise harmed by the loss of an effective option for accessing these publications. The settlement resolves this problem by creating a procedure for publishers and authors to determine who should own these digital rights. In addition, while publishers or authors may not have had any incentive to assert their digital rights in the past because their books were out of print or otherwise no longer profitable, the settlement creates an incentive for authors or publishers to come forward to assert their rights. Specifically, individuals and institutions can purchase access to out-of-print works that are still under copyright and the revenues that will be derived from these sales, combined with various inclusion fees described in the settlement, create financial incentives for owners of out-of-print books to claim them.

To ensure that copyright holders worldwide are aware of these financial incentives, the settlement has established the most comprehensive class-action notification program ever. Specifically, Google has funded a large direct-mail effort, created a dedicated Web site about the settlement in 36 languages, and spent about \$7 million on advertising in newspapers, magazines, and even poetry journals, with at least one ad in each country.⁴³

By creating an entity to resolve disputed digital rights claims between authors and publishers, providing financial incentives for rightsholders to claim their works, and funding the world's largest class-action notification program, the settlement generates substantial pro-competitive benefits and facilitates entry.

The 'orphanage' post-settlement

Grimmelmann alleges that the settlement will provide Google with "exclusive control" or a "monopoly" over "orphan works," which are works for which the current rightsholder is unknown. These claims lack economic substance.

⁴³ Noam Cohen, "A Google Search of a Distinctly Retro Kind," *The New York Times*, March 3, 2009, available at www.nytimes.com/2009/03/04/books/04google.html (noting that "200 advertisements have run in more than 70 languages: in highbrow periodicals like *The New York Review of Books* and *The Poetry Review in Britain*; in general-interest publications like *Parade* and *USA Today*; in obscure foreign trade journals like *China Copyright* and *Svensk Bokhandel*; and in newspapers in places like Fiji, Greenland, the Falkland Islands, and the Polynesian island of Niue (the name is roughly translated as Behold the Coconut!), which has one newspaper.").

First, Google will affirmatively not obtain a monopoly over orphan works because the settlement does nothing to make entry more difficult for a second entrant. Indeed, any company that chooses to begin scanning orphan works will face fewer obstacles – due to the settlement – than Google has confronted. In particular, by increasing the size of the public domain, clarifying uncertain rights, and addressing innumerable complex legal issues, the settlement simultaneously provides a map and blazes trails through previously uncharted territories than others will be able to use for their own explorations.

Second, we should remember that these works were orphaned because the rightsholders failed to keep track of their interests in the books. Thus, while it is obviously exciting that Google’s scanning efforts could result in the (re)discovery of works of genius that have sat anonymously in the stacks of our nation’s research libraries, we should also not forget that the true remaining orphans probably had indifferent parents and are likely of little value. As Roy Blount, President of the Authors Guild, noted, orphan works are books that “have been deemed unfit for continued commerce by traditional print publishers.”⁴⁴

Third, the number of true orphan works that will exist post-settlement warrants closer scrutiny. Contrary to the claims of Grimmelmann and others, the number of orphan works will be substantially reduced. Specifically, we know that:

- Over 85% of copyrighted works prior to 1964 were not renewed and belong in the public domain, which could amount to as many as 1.5 million works.⁴⁵
- The settlement creates financial incentives for copyright owners to come forward and claim works, which will facilitate rights clarification,⁴⁶ and
- The Registry is obliged to locate authors under the settlement and, according to Roy Blount, studies on efforts to locate the rightsholder of out-of-print work have typically resulted in an 80-85% success rate.⁴⁷

It is thus overwhelmingly apparent that the combined effect of these rights clarification efforts and financial incentives will be to clarify the copyright status of hundreds of thousands, if not millions of works, which will be an enormous improvement over the status quo. Studies on the number of true orphan works in the United State have,

⁴⁴ See, for example, Roy Blount, “Let’s Not Lose Our Heads Over a ‘Monopoly’ of Orphans,” The Authors Guild, June 24, 2009, available at www.authorsguild.org/advocacy/articles/roy-blount-on-google-orphans.html.

⁴⁵ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” supra note 3 at 8; Peter Hirtle, “Why the Google Books Settlement is Better Than Orphan Works Legislation,” LawLibrary Blog, May 27, 2009, available at <http://blog.librarylaw.com/librarylaw/2009/05/why-the-google-books-settlement-is-better-than-orphan-works-legislation.html>.

⁴⁶ The minimum inclusion fee under the settlement is, for example, \$60. Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, Case No. CV 8136-JES § 2.1(b) [hereinafter Settlement Agreement].

⁴⁷ Blount, “Let’s Not Lose Our Heads Over a ‘Monopoly’ of Orphans,” supra note 44; see also Hirtle, “Why the Google Books Settlement is Better Than Orphan Works Legislation,” supra note 45, (citing Carnegie Mellon University study that located 79 percent of rightsholders).

moreover, found few fewer true orphans than critics of the settlement allege. Peter Hirtle, for example, concluded that there is a total of 12 million out-of-print works in the United States and that approximately 1.4 million could be true orphans.⁴⁸ If Google has scanned about 5 million out-of-print but in-copyright works, this means its library might include about 580,000 orphan works.

According to Brewster Kahle,⁴⁹ the head of the Open Content Alliance, it costs Google about \$10 to scan a book and costs the Internet Archive about \$30 to scan a book with “superior quality.”⁵⁰ It thus would cost a rival to Google somewhere between \$5.8 million and \$17.4 million to scan the same body of orphan works—an expensive undertaking to be sure, but one that is certainly achievable. As such, it is entirely disingenuous to claim that the settlement increases entry barriers surrounding orphan works or that Google will obtain a monopoly over them.

The class-action nature of the settlement

Grimmelmann contends that the settlement is a good deal only for Google because “[i]n a post-settlement world ... potential competitors [in book scanning] face one insurmountable hurdle: copyright law.”⁵¹ This is absurd because the copyright law is no different in the “post-settlement world” than in the “pre-settlement world.” Indeed, when Google started scanning these books, it was sued for alleged copyright violations. And as the settlement shows, copyright law is a surmountable hurdle and indeed, the settlement itself is a valuable guide for others seeking to surmount it.

Nonetheless, Grimmelmann posits that any subsequent entrant would be “sued into oblivion by a mob of angry copyright owners.”⁵² Conversely, he expresses concern that the class action nature of the settlement will serve as a “remarkably effective barrier to entry” because a subsequent entrant would not be sued by a class action, similarly to Google.⁵³ These concerns are unfounded once one understands the requirements for class certification, which are found under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 states that a class should be certified if it comprises numerous plaintiffs with common questions of law or fact that share typical claims and defenses and have interests that can be fairly and adequately protected by class representatives. Defendants usually

⁴⁸ Hirtle, “Why the Google Books Settlement is Better Than Orphan Works Legislation,” supra note 45.

⁴⁹ Kahle’s criticisms of the settlement are unfounded. Kahle argued that the settlement should not be approved because Google would gain a monopoly over millions of orphan works yet also stated “[t]here are alternatives” to Google’s scanning efforts and that entry at scale is “not that expensive.” Brewster Kahle, “A Book Grab by Google,” *The Washington Post*, May 19, 2009, available at www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051802637.html. Kahle does not appear to appreciate that monopolies do not arise where alternatives exist and entry is viable.

⁵⁰ Brewster Kahle, “Economics of Book Digitization,” Open Content Alliance, available at <http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization>.

⁵¹ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” supra note 3 at 10.

⁵² Ibid..

⁵³ Ibid..at 11.

bitterly contest certification because it can mean the difference between exposure to individual damage claims that might amount to hundreds or thousands of dollars and the nationwide aggregation of these claims that might amount to millions or even billions of dollars in damages. In the book scanning context, however, a defendant will benefit from, and therefore support, class certification because it enables the defendant to simultaneously resolve all its copyright issues. Given the concerns of copyright owners, a supportive defendant, and the *Authors Guild v. Google, Inc.* class certification precedent, it seems highly likely any prospective class will be certified.

Innovation and transparency

Grimmelmann also worries about Google becoming a “chokepoint” for book distribution, and about the possibility of Google censoring information it does not want distributed. The irony of this argument is overwhelming. The Internet has facilitated an unprecedented explosion in the ability of individuals to publish content – regardless of how bizarre, tasteless, or offensive it may be – to the world at large. And Google, as the world’s most successful search engine, facilitates greater access to published content than any other entity in history. The suggestion that the company thus might find the need to censor the content of books obtained from its library partners while simultaneously providing search results to users on virtually any topic is seemingly fanciful. In addition, Grimmelmann’s argument appears to be premised on a Brave New World, where all other forms of distribution and access to literature have apparently become extinct. Even if Google were to decide not to distribute certain works through its system, one must remember that this settlement is non-exclusive, thus allowing copyright holders to freely negotiate with any potential competitors, and that these “censored” works could still be published, sold, and distributed through all the means of publication that exist today.

Furthermore, the settlement provides a mechanism to address this specific concern—if Google wishes to remove a book from its search results (which Grimmelmann notes is the company’s First Amendment right), then it must inform the BRR and provide the BRR with a digitized copy of that work. No such mechanism would exist if Google were to have successfully litigated its case against the authors and the publishers, so the settlement actually provides greater transparency than the ‘but for’ world.

For all of the above reasons, there simply is no merit to the contention that the settlement will raise entry barriers for other would-be providers of digital books. The settlement will result in an expansion of the public domain and in the resolution of disputes over digital rights that are currently impeding our ability to access to vast quantities of books. And while issues inherent in our current system of copyright law, including orphaned works, will continue to impede access, none of these problems is increased by the settlement. In the post-settlement world, it will be in no way harder and in many ways easier for companies other than Google to provide digital access to books.

Remaining antitrust concerns are equally unfounded

Grimmelmann raises a number of specific antitrust concerns about the settlement, including that it facilitates price-fixing, confers monopoly power on the Registry, and contains an anticompetitive most-favored nation (MFN) provision.⁵⁴ Although these are legitimate points to examine, a careful examination of the settlement and the underlying economics shows they are unfounded.

The settlement does not facilitate price-fixing

Grimmelmann and others contend that the settlement will foster price-fixing among publishers and authors by creating an e-book program for consumer sales that gives copyright holders the option of allowing Google to determine sales prices. He points to a settlement provision that sets out twelve possible bin prices ranging from \$1.99 to \$29.99 and excitedly observes that “[s]urely the sophisticated companies with expert lawyers who drafted this settlement agreement wouldn’t use it to set up a system of naked price-fixing”⁵⁵

When these consumer sales provisions are examined, it becomes readily apparent that the settlement does not establish a cartel. These provisions actually provide two ways by which prices for consumer book sales can be determined: (1) the individual author or publisher can specify price; or (2) Google can select a price based on its own algorithm.⁵⁶ For algorithmic pricing, which is the focal point of Grimmelmann’s concern, the settlement states that “Google may change the price of an individual Book over time” and the “distribution of Books ... among the Pricing Bins may change over time.”⁵⁷ These provisions also prevent the Registry, authors, or publishers from interfering with Google’s pricing freedom. The settlement does not, in other words, create “a system of fixed prices.” Grimmelmann is plainly wrong.

Courts and antitrust authorities have recognized that in many environments collective price setting can be procompetitive when intellectual property is involved. The Supreme Court has noted that, especially when dealing with copyright issues, price-fixing is “not a question simply of determining whether two or more potential competitors have literally ‘fixed’ a ‘price.’”⁵⁸ The Supreme Court ruled in *Broadcast Music Inc. v. CBS* (“BMI”)

⁵⁴ For example, *Ibid.* at 1 (Google developing a “dominant platform with control over a huge catalog of books that no one else has access to”).

⁵⁵ *Ibid.* at 5; Settlement Agreement, § 4.2.

⁵⁶ Besides the pricing options provided in the settlement, authors and publishers can also opt-out of the settlement and negotiate sales prices and other access provisions directly with Google. When seen in this broader context, it’s even more difficult to contend that the consumer sale provisions will facilitate collusion.

⁵⁷ Settlement Agreement at § 4.2.

⁵⁸ *BMI*, 441 U.S. at 9 (further noting that “[l]iteralness is overly simplistic and often overbroad.”).

that music copyright clearinghouses were not violating the antitrust laws *per se*, and in doing so, it expounded upon the purpose of copyright in general that aptly applies here:

Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. *Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.*⁵⁹

As in *BMI*, the Google settlement will not facilitate a *per se* cartel violation, but instead will accomplish “the integration of sales, monitoring, and enforcement against unauthorized copyright use.”⁶⁰ This integrated facilitation of copyright enforcement and market enhancement in this manner is, as Grimmelmann himself has so often noted, unabashedly procompetitive and beneficial.

The registry is not a potential monopolist

Grimmelmann contends that the “Registry is also a potentially dangerous monopoly” because it “will speak on behalf of an entire industry.”⁶¹ At the same time, he argues that the “best way to make the Registry work well” is to expand its scope and powers.⁶² This is a perplexing contradiction. No economist or antitrust lawyer would recommend expanding the powers of an entity to eliminate the monopolization concerns it poses. If the Registry were a “dangerous monopoly,” it would be appropriate to curtail its powers. Period.

But his competitive concerns are simply misplaced. The Registry is no different than other collective rights management organizations that have been acknowledged as procompetitive under the antitrust laws. For example, the Department of Justice (“DOJ”) previously examined a licensing program proposed by the Copyright Clearance Center, Inc. (“CCC”), a non-profit organization created by authors, publishers, and users of copyrighted material to facilitate copyright licensing and clearance.⁶³ The DOJ concluded that CCC’s licensing arrangement, which authorizes users to make unlimited copies of any work in CCC’s library for an annual fee, did not raise competitive issues in part because the copyright holders that are CCC members may continue to negotiate separate licensing arrangements with users and competing firms.⁶⁴ As part of its analysis, the DOJ

⁵⁹ *Ibid.* at 18 (emphasis added).

⁶⁰ *Ibid.* at 20.

⁶¹ Grimmelmann, “The Google Book Search Settlement: Ends, Means, and the Future of Books,” *supra* note 3 at 6. He also noted that a “common theme” among his concerns “is that they all relate to, or are magnified by, centralized power.” *Ibid.* at 7.

⁶² *Ibid.* at 14.

⁶³ Department of Justice Business Review Letter, “Copyright Clearance Center, Inc.,” August 2, 1993, available at www.usdoj.gov/atr/public/busreview/211651.htm.

⁶⁴ *Ibid.*

also noted the procompetitive benefits of the blanket licensing agreement, such as encouraging use of copyrighted works among a wider range of users.⁶⁵ Similar to the CCC, the Registry will offer blanket licenses to digital book users on a nonexclusive basis. This is a key provision that Grimmelmann notes, but seemingly ignores its full implications.⁶⁶ Non-exclusivity means that, as with the CCC, authors and publishers will have the ability to negotiate with the Registry or separately with digital book providers. And because authors and publishers will have the ability to negotiate with other entities, the DOJ's conclusion regarding this provision in the settlement should be the same as the DOJ's conclusion with respect to the CCC—that absent exclusivity, it is unlikely that the Registry could impose unreasonable license fees or otherwise restrict the availability of electronic books.

Just because the Registry is important does not mean it is a monopoly, but ultimately it will provide significant benefits to consumers. Under the Settlement, the Registry will own and maintain a rights information database for books and their authors and publishers, locate rights holders, distribute payments from Google to rights owners, and assist in the resolution of disputes between those claiming to hold digital rights.⁶⁷ The Registry thus has the potential to significantly increase the amount of information and the number of books available in digital form to consumers.

The most-favored nation clause is procompetitive

Some critics suggest that the settlement's so-called Most-Favored Nation clause ("MFN") raises concerns; Grimmelmann suggests that it is "[t]he most pressing problem" because it "explicitly guarantees Google a privileged position."⁶⁸ I have written extensively and testified about the competitive implications of MFNs.⁶⁹ These clauses can promote consumer welfare by permitting first movers to recoup their investments in innovation. Conversely, MFNs can impede entry and adversely impact competition. The MFN clause in the settlement falls into the former category.

The MFN only applies in limited circumstances. Specifically, provision 3.8(a) states that the Registry will not license to third parties on terms that "disfavor or disadvantage Google" when such authorizations include rights granted from a "significant portion" of unclaimed works.⁷⁰ In other words, the Registry can license all the claimed works and some of the unclaimed works to third parties on terms that disfavor or disadvantage Google. The remainder of the works can moreover be licensed on identical terms to Google. It seems unlikely the MFN will hinder competition.

⁶⁵ Ibid.

⁶⁶ Grimmelmann, "How to Fix the Google Book Search Settlement," supra note 3 at 13.

⁶⁷ Settlement Agreement at § 6.1.

⁶⁸ Ibid at 6.

⁶⁹ See for example, David A. Balto, "Networks and Exclusivity: Antitrust Analysis to Promote Network Competition," *George Mason Law Review* 7 (523)(1999): 537-43.

⁷⁰ Settlement Agreement at § 3.8(a).

Conclusion

The universally accessible, searchable, digital library that will be realized by the Google Book Search settlement will provide unprecedented benefits to consumers worldwide. The settlement is an efficient and socially beneficial solution to the significant rights uncertainty that currently surrounds many books. Many of the leading critics of the settlement, such as James Grimmelmann, have failed to appreciate these procompetitive benefits while also dramatically overstating the antitrust risks. From a consumer welfare perspective, the settlement should unquestionably be approved.