



Statement of
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Committee on the Judiciary
United States House of Representatives

Hearing on
“Competition and Commerce in Digital Books”

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Good morning, Chairman Conyers, Ranking Member Smith, and members of the Committee. My name is Paul Misener, and I am Amazon.com’s Vice President for Global Public Policy. Thank you for inviting me to testify on this important topic.

On behalf of our customers and company, and in the interests of promoting competition and commerce in digital books, Amazon.com strongly objects to the proposed class action settlement among Google, the Authors Guild, and some book publishers. If approved, this proposal would create national copyright and competition policy with enduring adverse effects on consumers and Google’s competitors.

Amazon has joined librarians, legal scholars, authors, publishers, and other technology companies in the Open Book Alliance to counter the proposed settlement.*

* The Alliance’s membership includes the Special Libraries Association, the New York Library Association, the American Society of Journalists and Authors, the Council of Literary Magazines and Presses, Small Press Distribution, the Internet Archive, Microsoft, and Yahoo! See www.openbookalliance.org.

Our shared view is that we strongly support mass digitization and electronic distribution of books, but we insist that any such efforts be undertaken in the open, grounded in sound public policy, and mindful of the need to promote long-term benefits for consumers rather than those of a few commercial interests.

Mr. Chairman, Amazon takes no pleasure in opposing Google in the class action case or in today's hearing. As you may recall, we work closely with Google on other matters before your Committee, including net neutrality, where we both want rules to protect consumers in the absence of competition, and Google has often said they seek such rules to enable "the next Google."

Similarly for book scanning and distribution, Amazon seeks to preserve the competitive market so that we may continue to provide our customers the great selection they have come to expect from us. Unfortunately, however, under the threat of liability for what the Authors Guild called "massive copyright infringement," Google has taken another course. Rather than ask Congress to protect consumers and competition, Google instead has asked a trial court to approve a class action settlement that would establish national copyright and competition policy exclusively in favor of Google above all potential competitors.

Mr. Chairman, the proposed settlement is exceedingly complex, primarily because it is much more of a joint venture agreement and establishment of national policy, than a resolution of claims arising from past behavior. The proposal contains many flaws that run counter to consumers' interests but, in light of our limited time today, let me focus on two flaws, either of which is sufficient to condemn and reject the proposed settlement.

First, the proposal would create a cartel of rightsholders that, for sales of books to consumers, would set prices to maximize revenues to cartel members. This cartel, called the Book Rights Registry, could never have been established in the ordinary course of business. Currently, rightsholders may individually license their works for electronic distribution and, thus, compete against each other. But the proposed Registry is based on an agreement among erstwhile competitors to collectively set prices for their products. The Registry is a classic horizontal cartel and, with respect to electronic books sold to consumers (including those ultimately printed on paper using “print on demand” technology), the Registry cartel is novel mostly for the automation it applies to price setting. Instead of a cigar smoke-filled room, the Registry cartel would set book prices within the clean confines of a computer “Pricing Algorithm” designed by Google to “find the optimal such price for each Book and, accordingly, to maximize revenue for each Rightsholder.” This algorithm could optimize the price for a certain set of books simply by increasing all prices of similar books at the same time – a nifty, smokeless feat of collusion for revenue maximization.

Making matters much worse, in the proposed settlement's second fatal flaw, Google would get a privileged, exclusive deal, despite lip service to non-exclusivity. Except for works of rightsholders who affirmatively opt out, the settlement would give Google – and only Google – a license to digitize and sell every U.S. book ever written. This means that Google alone would have a permanent and exclusive right to copy, display, or sell digital versions of the millions of orphan works. It is nonsense to claim that potential Google competitors would have access to the same deal, either directly, through the Registry, or by following Google’s courtroom odyssey. For one thing, the

Registry cannot license competitors to scan orphan works because it can only license uses of books whose copyright owners have given their express approval. Moreover, it's not at all clear whether the Registry would be willing to license these registered works to compete with the Google deal. And, if a potential competitor to Google engaged in "massive copyright infringement" in the hopes of getting sued by the same plaintiffs in the Google litigation and making the same settlement deal, why would the rightsholders settle on the same terms when they already have a distribution partner and would stand a reasonable chance of obtaining massive statutory damages? In any case, the "MFN clause" of the proposed settlement would guarantee that a hopeful competitor to Google could not get a better deal.

As a result of these flaws, the proposed settlement would seriously harm individual book consumers and most libraries and schools because the rightsholders cartel and Google monopoly inevitably would set higher prices or provide worse service than would be available in a competitive market. The proposal also would harm existing and potential Google competitors, who would be denied a fair and reasonable opportunity to license a similar corpus of works under similar terms. Under the proposed settlement, "the next Google" wouldn't stand a chance, and customers of existing Google competitors would, instead of realizing the myriad benefits of market choices, find themselves at the mercy of a sole source provider. Under the proposed settlement, Google would become a consumer's nightmare: the only store in town.

Amazingly, the proposal also would exonerate Google of future claims based on future actions that would otherwise be prohibited by law. This is an impermissible result

of class action litigation and, again, makes the proposed settlement less about resolution of a legal dispute than about copyright policymaking and forming a joint venture.

Mr. Chairman, if you have not already, you undoubtedly will hear from Google and some others about the potential consumer benefits of the proposed settlement. Amazon has its own book scanning project, and clearly recognizes the benefits of digitization and distribution, and would welcome a statutory solution to the orphan works problem. But even if this matter were being evaluated purely on policy grounds, the costs of the proposed settlement far outweigh the potential benefits. A price-setting cartel and monopoly are means emphatically *not* justified by the ends, especially because legislation could produce the same benefits in a pro-consumer, pro-competitive manner.

Indeed, the novel copyright (and competition and class action litigation) policy matters at issue in the proposed settlement should be addressed in Congress, the appropriate venue for national policymaking. We hope that the court will not approve the proposed settlement when it acts, as expected, in the coming weeks. In the interim, we merely ask that this Committee carefully monitor developments in the case. If the court approves the proposal without fixing its serious anti-consumer, anti-competitive flaws, we respectfully request that Congress reestablish its public policy making authority and act quickly to supersede the settlement with appropriate legislation.

Thank you again for the opportunity to testify. I look forward to your questions.

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