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Randal C. Picker

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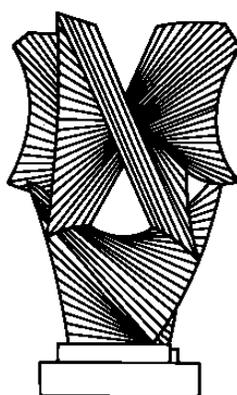
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Randal C. Picker

THE LAW SCHOOL
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Assessing Competition Issues in the Amended Google Book Search Settlement

*Randal C. Picker**

Late in the evening on Friday, November 13, 2009, Google, the Authors Guild and a group of publishers filed their proposed amended settlement agreement to resolve the litigation over Google Book Search. The original settlement agreement (“OSA”) had been scheduled for a fairness hearing in October, but with hundreds of objections filed—including, most notably, a statement of interest by the Department of Justice—the settlement parties set to the task of altering their settlement.

We should start big picture and then drop down a level. The amended settlement agreement (“ASA”) is clearly designed to respond to the Department of Justice’s statement of interest. That goes both to the Rule 23 class action issues identified by DOJ in that filing and to the competition issues as well. I discuss the successes and failures of that response below. France and Germany had objected to the breadth of the original settlement agreement especially as it applied to works by non-United States authors. The ASA responds to that by narrowing the scope of the works covered by excluding many foreign works. In the face of the objections, narrowing coverage is an understandable and probably prudent course, but of course it comes at the cost of lost access to users and a greater risk of marginalization for authors who will now be invisible to those who restrict their attention to the new Google database.

Privacy advocates were very unhappy with the OSA and will be no happier with the ASA, except now they will find the studied

* Copyright © 2009, Randal C. Picker. All Rights Reserved. Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. I thank the John M. Olin Foundation and the Paul H. Leffmann Fund for their generous research support.

unconcern about their issues willful. There are very few changes in the ASA that address privacy issues.¹ Some librarians have feared that Google will be able to charge monopoly prices for the institutional subscriptions that will be created through the settlement. The DOJ statement of interest didn't address that concern nor did I discuss it in my original paper on competition issues. The Supreme Court has been very clear that high prices alone don't violate Section 2 of the Sherman Act, so long as the monopoly is obtained legitimately.² Google may be addressing pricing issues through individualized negotiations with libraries, but the overall terms of the new ASA don't create a mechanism to control any monopoly power that will emerge from GBS. And there are undoubtedly large classes of other objectors—publishing agents for example and photographers—who presumably will see few changes that address their issues.

With that as a broad sweep, turn in detail to the competition issues in the ASA. In my original paper on the settlement, I addressed three competition policy issues: (1) a risk that antitrust immunities might attach to the approval of the settlement agreement; (2) concerns about coordinated pricing in the consumer purchase model created by the agreement; and (3) a concern that the OSA permitted Google (and only Google) to use the orphan works.³ DOJ identified a fourth competition issue, namely, that the agreement operated as a horizontal price agreement among publishers at the wholesale level.

The ASA makes changes to respond to each of these. The parties have waived the benefit of any possible antitrust immunities that might otherwise attach to the approval of the ASA and that

¹ See Cindy Cohn, Google Book Search Settlement Revised: No Reader Privacy Added, Nov 14 2009 (online at <http://www.eff.org/deeplinks/2009/11/google-book-search-settlement-revised-no-reader-pr>).

² Pacific Bell Telephone Co. v linkLine Communications, Inc., 129 SCt 1129 (2009).

³ Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J Comp Law & Econ 383 (2009).

has important consequences for the timing of any possible challenges by DOJ. They have also made changes to the relevant language on pricing under the ASA. The most favored nations clause (OSA 3.8(a)) is gone. Most interestingly, as to the orphan works, the parties have created a new player in GBS, the Unclaimed Works Fiduciary (UWF). The UWF is to take over some of the responsibilities for managing unclaimed works that the OSA had assigned to the new book registry created in the settlement.

Now I feel like Moses: I can see the promised land but apparently I can't get there. Creating the UWF is a nice way to solve the conflicts problem identified by DOJ. DOJ had expressed a concern that holders of unclaimed works didn't necessarily have the same interests as those of active rightsholders. The UWF mechanism enables separate representation of those interests. But the settling parties have limited the role of the UWF to merely stepping into the shoes of the registry in some circumstances. They could have broadened the role for the UWF to have the UWF step into the shoes of the rightsholders of unclaimed books instead. Had that been the focus, the UWF would then be an elegant solution to the going forward problem of how to license the orphan works.

I. It's All About the Timing: The No *Noerr* Clause

We might start deep in the revised filing—page 362 out of 377 in the Adobe .pdf of the blacklined revisions version if you are following along—which adds a new Paragraph 17 to the proposed final judgment: “this Final Judgment and Order of Dismissal is not intended to and does not provide any antitrust immunities to any Persons or parties.” As the plaintiffs note in their memorandum of law in support of their motion for preliminary approval of the amended settlement agreement, this is intended to address the possibility that some sort of *Noerr-Pennington* immunity might

attach to approval of the settlement agreement by a federal district court.⁴

This is of critical importance, as it changes substantially the opportunities and choices that the Department of Justice faces with regard to the settlement agreement. With the possibility of immunity attaching, DOJ faced a possible all-or-nothing judgment about whether to challenge the agreement now. Failing to mount a challenge now might forfeit that challenge seemingly forever. Put that way, that might suggest why *Noerr-Pennington* immunity should clearly not attach, but the case law is unclear on this.

Focus on why the waiver matters for the timing of a possible DOJ inquiry. The no-*Noerr* clause preserves the antitrust issues going forward and allowing time to pass will give us a better assessment of what matters in the settlement and what does not. Is the consumer purchase sales model an Edsel or the second coming of, well, Google itself? Is this something that the public really wants or not? If not, possible competition issues about the pricing algorithm are purely academic and not worthy of attention for either the court system or DOJ.

So why fight now? Again, absent the *Noerr* waiver, DOJ would have had to choose whether to fight now but instead DOJ can now wait to assess how the pricing issues actually play out under the agreement. DOJ can use the normal tools of antitrust investigations—civil investigative demands and the like—as it would for any other joint venture.

There is also the question of how the *Noerr* waiver should matter for Judge Denny Chin. We should start, perhaps surprisingly, with the Second Circuit. Were I an appellate judge, I suspect that I would find it quite difficult to conclude that Judge Chin had abused his discretion were he to conclude that the pricing issues should not be addressed now but instead should be deferred to a point in time in which the actual operation of

⁴ Memorandum of Law in Support of Plaintiff's Motion for Preliminary Approval of Amended Settlement Agreement, p.8.

agreement has been observed. We just don't know where we are on the pricing issues—both in the operation of the ASA mechanisms and on the all-important question of how much the market wants the products—and therefore as an appellate judge I wouldn't find it unreasonable for Judge Chin to push these issues out to the future now that the *Noerr* waiver gives him that option.

II. Pricing Revisions in the ASA

Turn to the changes in the pricing mechanisms themselves. In the original settlement, the consumer-purchase pricing mechanism struck me—and vastly more importantly, the Department of Justice—as raising concerns about coordinated horizontal pricing among the authors with Google as the facilitator. That struck me as wholly unnecessary to the overall deal and therefore quite surprising. The revised settlement backs away from that framing in making two changes to the critical operative language. The new agreement makes clear that the consumer-purchase pricing mechanism is intended to imitate the pricing that would emerge in a competitive market and is to be done unilaterally by Google.⁵ That was the baseline that I pushed for in my original paper. While I should spend some time considering the actual language more carefully, it clearly moves in the right direction.

There still is this characterization question: should we think of this arrangement as a horizontal arrangement or as a vertical arrangement much more like iTunes? The fact that the authors are

⁵ ASA 4.2(c)(ii)(2): “Google will develop the Pricing Algorithm unilaterally, with no involvement of or control by the Registry or any Rightsholder; provided, however, that Google employees and contractors who may be Rightsholders are not precluded from performing their assigned duties with respect to development of the Pricing Algorithm. In developing the Pricing Algorithm, Google will analyze sales data to ensure the reasonableness of the Pricing Algorithm. The Pricing Algorithm shall base the Settlement Controlled Price of a Book, on an individual Book by Book basis, upon aggregate data collected with respect to Books that are similar to such Book and 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.” See also ASA 4.2(b)(i)(2).

acting in unison with Google is what pushes this towards horizontal characterization and nominal antitrust doctrine—think *Socony-Vacuum*—is quite unfriendly to any horizontal agreement on prices⁶ even, perhaps, one that says we are going to agree on competitive prices. That is almost certainly to allow form to trump reality if the ASA actually operates in the manner that it sets out.

The second pricing issue is the question of whether or not there is horizontal price-fixing among publishers at the wholesale level through the 63%/37% split with Google. The agreement adds a new mechanism that allows either Google or a rightsholder to request a renegotiation of the revenue split. Under ASA 4.5(a)(iii), either side can walk away from the deal as to the books in question if a new agreement cannot be reached. I need to think about this more to see whether this really addresses the concerns expressed by DOJ.

III. The Unclaimed Works Fiduciary: So Close and Yet So Far Away

The most interesting change in the amended settlement agreement is the appearance of the unclaimed works fiduciary. The DOJ statement of interest suggested that there was a conflict between the active rightsholders and the orphan authors which in turn led them to question whether the class representatives could adequately represent the orphan authors. DOJ suggested as a possible solution that the orphan works be excluded from the settlement but obviously also understood that losing the orphan works would subtract much of the value of Google book search itself.

The UWF and associated changes are a different response to this problem. It is important to try to be clear on what the UWF structure does and doesn't do, but let me describe the changes first.

⁶ “Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.” *United States v Socony-Vacuum Oil Co.*, 310 US 150, 221-22 (1940).

There are two critical changes. First, the ASA splits the powers that had previously been assigned to the registry between the registry and the new UWF. Section 6.2(b)(iii) structures this as a delegation of certain of the powers possessed by the registry to the UWF. As that suggests, I think it would be a mistake to think of this as a change in the powers available under the agreement but instead it is just an allocation of those powers to two different actors. Second, the amended agreement alters how revenues attributable to unclaimed books will be spent (ASA 6.3(b)). This change had been anticipated—indeed it was invited by the DOJ filing—and the amended agreement provides those funds be used to a number of ends, including the location of orphan authors; contributions to literary-based charities; and eventually escheat to the state.

It is just as important to understand what the UWF cannot do. The UWF is a nice way to solve the conflicts problem identified by DOJ, but the settling parties have limited the role of the UWF to merely stepping into the shoes of the registry in some circumstances. They could have broadened the role for the UWF to have the UWF act for rightsholders of unclaimed books instead.

Take that idea in pieces. First, there are a number of situations in the agreement in which rightsholders can exercise rights. Of course, the very exercise of rights requires someone to act actively to do so. That is well and good if we have an active rightsholder, something of a problem if we do not. Before, with orphan rightsholders, we were stuck, but now the agreement creates someone who might play that role, namely the UWF. Look at two situations in the agreement itself and then consider the broader licensing question for orphan works.

ASA 3.3(a) addresses display uses of books by Google. That turns on the status of a book as commercially available and that status is subject to dispute, either by a rightsholder or by the registry. This seems like a natural setting for the UWF to act instead of the registry. ASA 3.5 addresses the right to remove books from the database and creates a broad right in favor of

rightsholders to remove their works from the database. Again this is tied to having an active rightsholder but the agreement does not convey a similar right of the UWF who we should think of as acting for the orphan rightsholders. This contrasts strongly with other situations in which the UWF is given the authority to act, such as control over preview uses (ASA 4.3(g)) or the creation of new revenue models (ASA 4.7).

Focus on the all-important question of the licensing of the orphan works to competing database providers. We should start with the timing question. My analysis above of the pricing issues suggests that there are good reasons for DOJ or Judge Chin to leave for a later time the question of whether these arrangements are anti-competitive. Given the *Noerr* waiver, DOJ will have full authority to challenge these arrangements at a later point in time when more information is available as to how they are actually functioning.

I don't think DOJ is similarly situated with regard to orphan works licensing. It isn't clear to me on what basis they could challenge Google or the Authors Guild for failing to create a license of the orphan works to another competitor. As I have tried to frame this in my second paper on the settlement, the orphan-works licensing issue is fundamentally a question of government licensing design—almost a government franchising question—and much less a traditional antitrust question.⁷

We might also look briefly at the history of licensing in ASCAP and BMI as that is the most natural US comparison to the collective copyright regime being established in the settlement. Focus on two highlights—or lowlights depending on your perspective—in ASCAP and BMI.⁸ First, we have been operating under antitrust consent decrees since 1940. Full stop. That should

⁷ Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, GCP: The Antitrust Chronicle, October 2009 (online at <http://ssrn.com/abstract=1499482>).

⁸ I discuss this in greater detail in Randal C. Picker, *Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers?*, 72 U Chi L Rev 189 (2005).

be thought to be remarkable. Second, the government has struggled to create meaningful alternatives to the blanket license in that time. In a recent iteration, implemented in mid-2001 in a new amended final judgment, the government hopes to get that new license structure by encouraging competition through the entry of new performing rights organizations (“PROs”). But they have done that by trying to limit the scope of the license terms of ASCAP and BMI themselves rather than by facilitating direct licensing opportunities for a new PRO. All of that means that there is not a particularly direct within-antitrust route to broader licensing of the orphan works. Refusals-to-deal doctrine is uncertain enough—read *Aspen Skiing* and *Trinko*—without layering on top of that the fact that the license is being sought for the works of third parties.

That means it is far superior to have a solution to this issue within the settlement agreement itself. In my original paper, I suggested creating some mechanism to enable this possibility going forward as I thought that it might be difficult to craft licenses as part of the current settlement. I wasn’t sure what mechanism might make sense. At a House Judiciary Committee hearing on the settlement, Congressman Hank Johnson suggested the possibility of a fiduciary to act on behalf of the orphan works holders.⁹ The parties have now done exactly that in the revised

⁹ Rep. Johnson stated: “No, I understand. I understand. So you—it’s totally impossible to have a group that represents the orphan works owners. But perhaps there could be some entity set up that would be like a fiduciary, a guardian ad litem, if you will, for the orphan works owners.” He later asked me: “Well let me ask you Professor Picker for his response. Why should Google be the only entity permitted to sell access to orphan works?” I responded: I guess I’d start where you started which was the question of how are the orphan works represented in the case. So in many class actions or in bankruptcy settings where you’ve got for example in tort situations you’ve got current tort victims and then you’ve got the possibility of future tort victims. It’s pretty routine to appoint a separate representatives just as you said that’s guardian ad litem for those future claimants. And so the natural approach here would have been to appoint an independent representative as a guardian of litem for the orphan works. Had that been done, God only knows exactly what kind of licensing scheme would have emerged and whether that licensing scheme would have involved an exclusive license or would have involved a broad license. ...” Hearing of the House Judiciary Committee, Competition and Commerce in

settlement save for the fact that they have unnecessarily hobbled the UWF.

Consider an alternative possibility. Section 6.7 of the original settlement agreement created an authorization in favor of the registry to act on behalf of the rightsholders in certain circumstances. That is unchanged in the ASA. But we need a new section 6.8, Authorization of Unclaimed Works Fiduciary, to create powers to act on behalf of the rightsholders of unclaimed books. Such an authorization would make it possible for the UWF to license the unclaimed works to third parties, just as the settlement agreement authorizes the UWF to act in various ways in its dealings with one particular licensee of those works, namely Google.

Consider briefly the question of whether we think the registry or the UWF can license the orphan works under the terms of the ASA. I don't think that the analysis is changed from the original settlement. ASA 6.2(b)(ii) authorizes the license of works by the registry and by the UWF "to the extent permitted by law" just as the former OSA 6.2(b) did. My understanding is that Google does not believe that that provision actually enables either the registry or the UWF to license the works to third parties and that they instead believe that legislation would be required by Congress to make that operative. Be very clear: the settlement agreement is giving Google rights directly to use the orphan works. Google is not getting rights to the extent permitted by other law. It is that equivalence which the settlement agreement should seek to create and the clever solution, suggested by Congressman Johnson and implemented in the ASA, of adding a fiduciary now makes that a real possibility.

The amended agreement contains a new resale provision (ASA 4.5(b)(v)(2)). That provision isn't completely clear on what it accomplishes but it seems to be limited to individuals who wish to compete in consumer sales with Google. This seems to be a

Digital Books, September 10, 2009.

program in which other sellers can effectively act as agents for Google in the sale of the books. Google will host and serve the books, so Google presumably will see much of the transactional information that arises from the sales. Amazon expressed little interest in this program at the House Judiciary committee hearing.

Conclusion

Google takes products out of beta status slowly, even while it is making substantial improvements in the product. Objectors will see the amended settlement agreement as a mixed bag, with some finding almost nothing in the changes (privacy advocates and those who fear high prices for institutional subscriptions), while others will find their concerns addressed (foreign governments acting, one hopes, with the correct sense of the interests of foreign authors).

The amended settlement agreement clearly responds to the concerns raised by the Department of Justice. In waiving the benefits of possible doctrines of antitrust immunity, the ASA solves a timing problem for DOJ. DOJ faced an all-or-nothing quandary: challenge the agreement now or risk the possibility losing the right to challenge it later. The *Noerr* waiver solves that problem. There may be real benefits to seeing how the pricing provisions play out in actual operating conditions. Don't shadow box now but fight later if necessary. I could easily see DOJ or Judge Chin reaching that conclusion and choosing to defer consideration of the pricing issues to another day.

The orphan works licensing is differently situated. The revised agreement creates a new unclaimed works fiduciary but does so in incomplete fashion. The UWF takes over some of the registry's responsibilities rather than acting as a true fiduciary for orphan works holders. Such a fiduciary would be situated to license the orphan works to third parties on a going forward basis. That would have been an elegant solution to the competitive issues raised by the current plan to grant a license to the orphan works to Google and only to Google. The revised settlement makes real progress on

these issues only to stop short of a visible and attainable real solution.

Readers with comments should address them to:

Randal C. Picker
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
rpicker@uchicago.edu

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