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I. INTRODUCTION

The deal that Google would get under the proposed amended settlement in the *Authors Guild* case is exclusive in one very important sense. Many out-of-print books are so-called “orphan works”: they’re in copyright, but their copyright owners can’t be found. If you or I start printing new copies of these books, we’d be copyright infringers, subject to statutory damages of up to \$150,000 a book—or even jail time. Google, on the other hand, will be authorized to sell online copies of these books. That’s exclusivity: permission to do what is forbidden to others.

Some pro-settlement commentators have challenged this view. They believe that the market for electronic editions of orphan books is open to Google’s competitors.² They make three principal claims: first, that the settlement creates no new entry barriers; second, that it explicitly enables the new Book Rights Registry to issue licenses to competitors; and third, that competitors could reasonably expect to obtain class-action settlements substantially identical to Google’s. All three of these propositions are wrong. In this essay, I will explain why.

II. COMPARATIVE ENTRY BARRIERS ARE HIGHER AFTER THE SETTLEMENT THAN BEFORE

Settlement proponents typically start with the argument that the settlement is “nonexclusive” because it doesn’t prohibit copyright owners from dealing with Google’s competitors. That might be a fair characterization if this were merely a private contract for widgetium (the crucial mineral input to widgets)—but copyrights are different.

The Copyright Act deals in exclusive rights. No one besides the copyright owner is allowed to hand out licenses. If this were widgetium, Google’s competitors could deal with alternative suppliers, but each copyright is its own miniature monopoly. It’s a tort and a crime to sell copies of a book without the copyright owner’s permission. That matters because many of those copyright owners have gone AWOL. These are the orphan owners, who can’t be found. There are a lot of them, too; estimates are that there are hundreds of thousands of orphan books.³ Since only the owner can grant permission and these owners can’t be found, there is no feasible, legal way for a Google competitor to sell copies of these books.⁴

Google, however, didn’t actually track down these orphan owners. As a class action, the settlement rests on the fiction that the class members consent to Google’s future actions. For orphan owners, the

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² See Mark Lemley, *An Antitrust Assessment of the Google Book Search Settlement*; David Balto, *The Earth is Not Flat: The Public Interest and the Google Book Search Settlement: A Reply to Grimmelmann*, ACSBLOG, Jul. 22, 2009, <http://www.acslaw.org/node/13812>; Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMP. L. & ECON. 411 (2009); Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, GLOBAL COMPETITION POLICY (Oct. 2009); Einer Elhauge, *Why The Google Books Settlement Is Procompetitive*, JOURNAL OF LEGAL ANALYSIS (forthcoming).

³ See, e.g., Michael Cairns, *580,388 Orphan Works – Give or Take*, PERSONA NON DATA, <http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html> (Sept. 9, 2009).

⁴ There are some infeasible ways: signed permission from every man, woman, and child alive should suffice.

fiction is a transparent lie. Google’s marketplace advantage for orphan books would come from the stroke of a District Judge’s pen, not from “superior product, business acumen, or historic accident.”⁵ Google’s legal advantage over its competitors is thus not external to the settlement, but inherent in it. Selectively lowering legal barriers for Google should receive as much scrutiny as selectively raising them for its competitors.

III. THE SETTLEMENT DOES NOT LICENSE COMPETITORS

Next, settlement advocates have argued that the settlement itself can provide a hypothetical Google competitor—let’s call it “Two-gle”—the copyright licenses it would need. At every turn, however, the settlement deliberately avoids such an arrangement.

The settlement is explicit that the only parties who directly receive licenses of any sort are Google (to scan books⁶ and sell access⁷) and its partner libraries.⁸ No one else is licensed by the settlement to do anything—not the users of Google’s new services, not even the Registry. Similarly, only Google and its partner libraries are released from liability for their actions pursuant to the settlement.⁹ Likewise, the settlement explicitly refuses to transfer any copyrights from orphan owners to entities potentially more willing to issue licenses.¹⁰

One tantalizingly obscure passage in the settlement has misled some of its academic proponents:

The Registry will be organized on a basis that allows the Registry, among other things, to ... to the extent permitted by law, license Rightsholders’ U.S. copyrights to third parties (in the case of unclaimed Books and Inserts, the Unclaimed Works Fiduciary may license to third parties the Copyright Interests of Rightsholders of unclaimed Books and Inserts to the extent permitted by law).¹¹

This passage is not a grant of power to the Registry or the UWF; it is a description of what the Registry’s corporate charter will “allow[]” it to do. I could charter a company tomorrow to trade in widgetium, but its charter alone would give it no property rights to any actual widgetium.

Nor does the phrase “to the extent permitted by law” give the Registry and UWF the power to hand out licenses. These are words of limitation, not of empowerment; they prevent the Registry from acting illegally. The notice sent to class members states that if the Registry “represents the interests of the Rightsholders” in “commercial arrangements” with “companies other than Google,” it will be “subject to the express approval of the Rightsholders of the Books involved.”¹² There’s no way to square that description with a settlement that authorizes the Registry to issue licenses for unclaimed works. Thus, on Day One, the Registry and UWF won’t be able issue licenses to Two-gle because they’ll have nothing to give.

The Registry and UWF could eventually become licensing agents, but not under circumstances that will be much consolation to Two-gle. The Registry can act on behalf of the owners of *claimed* works (with their “express approval”),¹³ but that won’t help Two-gle obtain a license to *unclaimed* orphan works. As for

⁵ United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

⁶ Amended Settlement § 3.1(a)

⁷ Amended Settlement § 2.2

⁸ Amended Settlement § 7.1 (giving libraries a right to enter into standardized agreements with the Registry); attachments B-1, B-2, & B-3 (specifying form of these agreements). Sections 2(a) of attachments B-1 and B-2 are the operative licenses. The settlement and Google’s scanning agreements put strict limits on how libraries may use their digital copies.

⁹ Amended Settlement § 10.2(a).

¹⁰ Amended Settlement § 3.1(a).

¹¹ Amended Settlement § 6.2(b)(i).

¹² Notice of Class Action Settlement 10.

¹³ Amended Settlement § 2.4.

the UWF, the intent here is that if Congress wanted to allow third-party licenses for unclaimed works, the UWF would be ready to play that role. As the *New York Times* explained, paraphrasing settlement architect Richard Sarnoff, “The [UWF], with Congressional approval, can grant licenses to other companies who also want to sell these books.”¹⁴ (emphasis added). This argument—that the settlement might be useful to Congress—proves both too much and too little. On the one hand, if the settlement will be defective without Congressional action, then Congress’s past inaction is a poor argument for doing this deal judicially rather than legislatively. On the other, Congress hardly needs the settlement’s assistance to create an orphan works fiduciary capable of granting licenses to others; it could just create one from scratch.

Don’t just take my word for it that the settlement doesn’t empower the Registry to issue orphan works licenses. Ask its drafters. They “represented to the United States that they believe the Registry would lack the power and ability to license copyrighted books without the consent of the copyright owner.”¹⁵ If they fundamentally misunderstood their own settlement’s legal effects or lied to the Department of Justice about them, they have bigger problems than whether the settlement is approved or not.

Professor Elhauge argues that if the Registry cannot legally license third parties even though it can act “to the extent permitted by law,” then the parties have “done all [they] legally could”¹⁶ to promote nonexclusivity. This argument rests on an equivocation. As used in the settlement, “to the extent permitted by law” means that once the structures established by the settlement are in place, the Registry and UWF may do anything legally permissible to issue licenses. As Elhauge uses the phrase, it refers instead to what would have been legally permissible for the parties to have included in a hypothetical, more expansive class action settlement. These aren’t the same. Perhaps true nonexclusivity would be impossible under Rule 23—but the parties haven’t attempted to find out.

IV. GOOGLE COMPETITORS CANNOT EASILY OBTAIN THEIR OWN CLASS-ACTION SETTLEMENTS

Settlement proponents have also argued that Google competitors could obtain their own class-action settlements on the same terms as Google’s. It’s possible that lightning could strike twice. After all, who could have predicted the *Authors Guild* settlement? But a Two-gle settlement would be harder to negotiate and harder to win approval for.

The *Authors Guild* settlement depends on choices made by copyright owners. The plaintiffs chose to sue to stop Google’s scanning, chose to sue in a broad class action, chose to settle rather than go to trial, and chose to settle on terms that authorized selling full books. Take away even one of these freely made choices, and there would have been no “groundbreaking settlement.”

Two-gle couldn’t replicate the *Authors Guild* settlement without the active cooperation of authors and publishers. Just imagine the legal gyrations it would take to obtain a settlement over their objections. To get the case into court, Two-gle would need to bring a declaratory judgment action—and even that would require copyright owners to “cooperate” by making ominous enough noises to make the case justiciable. Turning it into a class action is even harder, because in a declaratory judgment action, it would be a defendant-side class, which raises thorny civil procedure issues. (Who, for example, would serve as representative defendants, or pay for their lawyers?) And when it comes time to talk settlement, there’s no way to guarantee Two-gle that the copyright owners would settle—let alone on specified terms—without fatally undermining the freedom to make litigation decisions on which the adversary system depends. Two-gle’s only plausible litigation strategy would be to cross its fingers and pray.

¹⁴ Brad Stone & Miguel Helft, *Terms of Digital Book Deal With Google Revised*, N.Y. TIMES, Nov. 13, 2009, at B2.

¹⁵ Statement of Interest of the United States of America Regarding Proposed Class Settlement (filed Sept. 18, 2009).

¹⁶ *Id.* at 11.

Professor Elhauge argues,

Rivals could simply engage in copying efforts similar to Google If no class action were brought against the copying rivals, then the rivals would be even better off because they would be able to offer the same books as Google without incurring the same royalty costs.

But that characterization overlooks the difference between Google's pre- and post-settlement activities. So far, Google has only scanned books, indexed them, and displayed short "snippets" of their contents—a far cry from selling whole books. If Two-gle merely scanned and indexed books, it wouldn't actually be competing with Google's post-settlement programs. In order to compete in that market without benefit of class-action settlement, Two-gle would need to actually sell books—thereby exposing itself to much more severe copyright risks than Google has ever had to face.

Some pro-settlement commentators, recognizing that the important choices are out of Two-gle's hands, have argued that copyright owners would be eager to settle on similar terms. I'm not so sure. The Registry's parents at the Authors Guild and Association of American Publishers could well fear that a second settlement would cause Google and Two-gle to drive retail prices down as they compete with each other for market share. On the other hand, if a different group of plaintiffs wanted to settle with Two-gle in order to compete with the existing Registry, we can expect the Registry and its allies to fight back. The result would be a race to the courthouse and a bitter struggle over class certification, negotiating authority, and control over the litigation. The *Authors Guild* settlement, as bitterly contested as it has been, managed to avoid some of this intra-class warfare because the plaintiffs stole a march on other copyright owners when they negotiated in secret for years and presented the results as a *fait accompli*.

This leads us into the challenges Two-gle would face in winning approval for an already negotiated settlement. Of course, it would inherit all of the procedural challenges facing the current settlement: the court's arguable lack of Article III and personal jurisdiction over many class members; the representativeness of the named plaintiffs; and the settlement's release of future claims without a factual nexus to Google's past conduct. And even the *Authors Guild* settlement itself wouldn't necessarily be precedential in the Two-gle case. Another judge, especially one sitting in another circuit, and armed with the discretion district judges enjoy in deciding whether to approve class-action settlements, could well decide to disregard whatever Judge Chin says.

A Two-gle settlement would also need to surmount some new and difficult hurdles of its own. For one, it would be open to challenge on collusiveness grounds. The *Authors Guild* lawsuit was genuinely adversarial when filed,¹⁷ the parties did significant pretrial work, and litigation remains a real possibility if the settlement falls through. But since a structured Two-gle settlement would be the goal *ab initio*, it would be difficult to negotiate one without calling into question the adequacy of the class representation or the existence of an Article III case or controversy. Unless Two-gle's settlement differed from Google's in some material points, it might be hard to say that it was actually negotiated at arms' length.

V. CONCLUSION

The proposed Google Books settlement is exclusive as to orphan works. This exclusivity may or may not be an antitrust problem. It's possible to argue—though I think incorrectly—that making Google the exclusive seller of unclaimed out-of-print books is automatically superior to having no one selling them.

¹⁷ To the point that Paul Aiken of the Authors Guild told the *New York Times* that an opt-out system for securing copyright owners' permissions "turned longstanding precedents in copyright law upside down." Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, NEW YORK TIMES, Sept. 21, 2005.

It's also possible to argue that none of the actual settlement programs pose a threat of supra-competitive pricing. Here, I still disagree, though with somewhat less certainty. But as we examine the settlement's effects and implications, we shouldn't kid ourselves that it's nonexclusive. For good or for ill, it gives Google a unique privilege to sell orphan books.