District Court Rejects the Google Books Settlement: A Missed Opportunity?

Gregory K. Leonard

As part of its "Google Library Project" initiated in 2004, Google entered into partnerships with libraries with the goal of scanning the libraries' books to create a searchable digital library.[1] A user could enter a search term and Google would display information about relevant books, including "snippets" of text that showed the context in which the search term was used.[2] In September 2005, several groups of copyright owners brought a class-action lawsuit against Google, alleging that the scanning of books under copyright, and the provision of snippets from those books, violated copyright law. Google responded that its actions constituted "fair use."

Instead of litigating, the parties focused primarily on settling the case, and in October 2008, Google and the plaintiffs announced a proposed settlement agreement.[3] Instead of being limited to the issues raised in plaintiffs' complaint (e.g., Google's scanning of books and showing snippets), the proposed settlement created a business framework that would allow Google to sell access to entire copyrighted works. Objections to the proposed settlement arose from many quarters, including copyright owners, the U.S. Department of Justice, and Google's competitors. In response to these objections, Google and the plaintiffs made certain revisions (but without changing the fundamental structure of the agreement) and produced the Amended Settlement Agreement (ASA).[4] The district court held a fairness hearing in February 2010. On March 22, 2011, the district court rejected the ASA.[5]

Antitrust practitioners—and especially economists—are trained to think about actions in terms of their effects on consumer welfare. From this perspective, it is hard to see how the court's rejection of the ASA is a positive development. As the court noted, "The digitization of books and the creation of a universal digital library would benefit many."[6] Principal among the many beneficiaries of the ASA would have been consumers who would have had access to works that will now not be available to them, at least for some significant period of time. There is no serious dispute that, without the ASA, neither Google nor any of its competitors will be able to offer a digital library service anytime soon.

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[1] http://books.google.com/googlebooks/library.html.

[2] *Id.*

[3] The original proposed settlement is at http://www.googlebooksettlement.com/r/view_settlement_agreement.

[4] The ASA is available at http://www.googlebooksettlement.com/r/view_settlement_agreement.

[5] *See* Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136, 2011 WL 986049 (S.D.N.Y. Mar. 22, 2011), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115.

[6] *Id.* at 1; *see also id.* at 3 ("The benefits of Google's book project are many.").

There are two specific benefits that the ASA and the resulting Google digital library service would have provided to consumers.[7] First, consumers would have gained ready online access to in-copyright out-of-print works that are now difficult to locate. Second, the ASA would have solved the "problem" of "orphan" works, so-called because the copyright owner is unknown or cannot be located. Such works are caught in a no-man's land. They cannot be reprinted or otherwise distributed because, by definition, the permission to do so cannot be obtained from the (absent) copyright owner. The ASA would have given Google permission to offer consumers digital access to such orphan works.[8]

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Copyright and Rule 23 Issues Prevail

Despite the court's recognition of the benefits the ASA would have created, the court ultimately was swayed by the opponents of the ASA. The opponents' arguments that seemed most central to the court's decision involved copyright issues and the administration of class actions under Rule 23 of the Federal Rules of Civil Procedure. With regard to copyright, the court was troubled by the fact that the ASA would have given Google the ability to sell access to certain copyrighted works without explicitly obtaining the permission of the copyright owners.[9] Rule 23 sets forth the conditions under which a case can be litigated or settled as a class action, with an emphasis on whether the interests of the named plaintiffs coincide with those of absent class members. The court concluded that a settlement that involved the release of claims "well beyond those presented in the case" was not allowable under Rule 23.[10] Interestingly, the court largely adopted the positions of the DOJ on the Rule 23 issue.[11] The concern seemed to be that the wider the scope of the settlement, the less likely that the interests of the class would be cohesive.

Related to the copyright issues, the court considered the "reaction of the class."[12] The court cited the objections to the ASA, which were "great in number," as well as "an extremely high number of class members—some 6800—[who] opted out."[13] However, given that there are apparently 174 million unique books,[14] the class is likely much larger. In consideration of the size of the class, the fraction of class members who objected to or opted out of the ASA is actually relatively small.[15] Nor would the objectors likely provide a valid random sample of all class members from which inferences about the entire class could be drawn, since it is precisely those who have stronger than average negative views about the settlement who would choose to object.[16] Never-

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[7] Consumers were not the only beneficiaries of the ASA. At least some copyright owners likely would have received more royalties (and perhaps recognition) than they would have otherwise. In addition, the digital preservation of books may be an "externality" that benefits society.

[8] Google would have paid royalties to a fund that, in turn, would have paid out the royalties to the copyright owners of orphaned works if those owners came forward or were otherwise identified.

[9] Opinion, *supra* note 5, at 31–35. This right only extended to out-of-print works; for an in-print work, Google would have needed to obtain permission before displaying the work. *Id.* at 10.

[10] *Id.* at 2.

[11] *See id.* at 21 (quoting Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, Author's Guild v. Google, Inc. (Feb. 4, 2010), *available at* http://www.justice.gov/atr/cases/authorsguild.htm).

[12] Opinion, *supra* note 5, at 18.

[13] *Id.* at 19.

[14] *Id.* at 3 n.1.

[15] *Id.* at 10–11 n.6.

[16] For this reason, caution is warranted in reaching the conclusion that "many authors of unclaimed works undoubtedly share similar concerns [as the objectors]." *Id.* at 34.

theless, the court was clearly troubled by the prospect of a single court case resolving the rights of many absent copyright owners, and the volume and passionate nature of the objections undoubtedly left a strong impression on the court.

Antitrust Issues

Antitrust issues seemed to play a lesser role in the court's decision than did the copyright and Rule 23 issues.[17] Nevertheless, the court did agree with ASA opponents that "the ASA would give Google a de facto monopoly over unclaimed works"[18] and "a significant advantage over competitors."[19] It is notable that these are complaints that were raised by Google's competitors.[20] However, an important question that was not addressed by Google's competitors or the court is whether having a product available to consumers, even assuming it were "monopolized," is better for consumers than having no product available at all.[21] The economics on this point is clear—in general, consumers are better off with a "monopolized" product than nothing.[22] Moreover, given that Google's competitors may well have proceeded with development of their own offerings by following the path that Google laid out, Google may not have been the only vendor of a digital library service for long in any event.[23]

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The court also included a reference to an ASA opponent's claim that "[t]he ASA would arguably give Google control over the search market."[24] However, since only a very small percentage of Internet searches likely pertain to unclaimed works now or in the future (such works are "unclaimed" for a reason), Google controlling the entire "search market" on the basis of a "de facto monopoly over [search related to] unclaimed works"[25] is an exceedingly unlikely outcome. It is even more so given the ease with which users can switch among search engines depending on their search target.

The Missed Opportunity

In reaching its opinion, the court took a cautious approach to the copyright and Rule 23 issues, and perhaps understandably so. Had the court approved the ASA, it might have been accused of judicial "activism"—rendering an opinion not justified by the underlying law with the purpose of

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[17] The court also cited issues related to privacy, foreign law, etc. *Id.* at 11–13.

[18] *Id.* at 36.

[19] *Id.* at 2.

[20] *Id.* at 36. The court notes that the DOJ and others also raised these complaints.

[21] One might reasonably have a concern about the welfare of any copyright owners that are involuntary participants because they did not know of the settlement. However, this concern is minimized because, under the ASA, a copyright owner could opt out at any time.

[22] *See* Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. Comp. L. & Econ. 411 (2009), *available at* http://econ-www.mit.edu/files/4418; Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, Antitrust Chron., Oct. 2009, *available at* http://www.law.harvard.edu/faculty/elhauge/pdf/Elhauge%20Framing%20the%20Issues%20in%20the%20Google%20Books%20Settlement%20CPI%20article.pdf; Einer Elhauge, Why the Google Books Settlement Is Procompetitive (Dec. 30, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028; Mark A. Lemley, An Antitrust Assessment of the Google Book Search Settlement (Working Paper July 8, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555; Gregory K. Leonard, *The Proposed Google Books Settlement: Copyright, Rule 23, and DOJ Section 2 Enforcement*, Antitrust, Summer 2010, at 26.

[23] *See* Leonard, *supra* note 22, at 29. Since Google's approach has not worked out, as mentioned above, no company is likely to offer a digital library service any time soon.

[24] Opinion, *supra* note 5, at 37.

[25] *Id.* at 36.

achieving a significant change in some aspect of society. But did the court miss an opportunity to provide the significant benefits to consumers that it recognized would have resulted from the ASA? Controversial "activist" legal rulings are hardly unknown, and some have led to societal changes that were later widely viewed as positive.[26] It is interesting to consider a more adventurous approach to the copyright and Rule 23 issues that the court could have taken.[27]

For example, one of the primary copyright concerns was that the ASA would give Google the right to sell access to certain works without the explicit permission of the copyright owners, and that "[a] copyright owner's right to exclude others from using his property is fundamental and beyond dispute."[28] As I have previously written, it is not unheard of for the rights of intellectual property owners to be abridged "in the public interest."[29] In patent cases, courts have declined to issue permanent injunctions against infringers after a finding of infringement, thereby denying the patent owner the "right to exclude." For example, in the case of a medical product, an injunction might be denied because public health would be put at risk. With the ASA's opt-out provision, which allowed any copyright owner to explicitly forbid Google from selling access to its copyrighted work at any time, the ASA seemingly imposes a substantially milder abridgment of rights than a patent owner's loss of the right to exclude. The ASA would not have given Google the absolute right to sell access to copyrighted works. It was simply a question of where the burden for obtaining/denying permission would rest.[30] The "public interest" motivation for this mild abridgment of rights is quite strong given, again, that the ASA would "benefit many."

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As another example, one of the primary Rule 23 concerns was that the ASA released Google from claims beyond the scope of the plaintiffs' complaint. However, the justification for the class action mechanism provided under Rule 23 is efficiency. The ASA provided an efficient means, and to date the only means, by which to clear the obstacles that stand in the way of a relatively complete digital library service being offered to consumers.[31] So, why wouldn't the very efficiency logic that underlies Rule 23 also have supported approval of the ASA, particularly given the substantial benefits that the ASA would have conferred on consumers?

Another potential justification for the ASA under Rule 23 was that a settlement with scope greater than that of the plaintiffs' complaint was necessary for the parties to reach agreement at all. The plaintiffs complained about Google's scanning of books. There was no way for Google to compensate plaintiffs for such scanning as part of a settlement unless the settlement also provided Google a means by which to profit from the scanning (i.e., through the sale of access to the works). The courts' strong interest in encouraging settlements would argue for allowing a wider ranging settlement in this case.[32]

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[26] *Brown v. Board of Education* is a good example.

[27] Of course, such an approach may not have survived on appeal.

[28] Opinion, *supra* note 5, at 32.

[29] Leonard, *supra* note 22, at 27.

[30] Opinion, *supra* note 5, at 32–34. Moreover, it is important to keep in mind that the ASA called for all class members to be compensated by Google for the use of their copyrighted works. Thus, an author's complaint referred to by the court that the copyrighted works would be "handed to Google free of charge" is not accurate. *Id.* at 34 (citing Letter from Margaret Jane Ross to Court 2 (Jan. 20, 2010)).

[31] Leonard, *supra* note 22, at 27–29.

[32] On the other hand, the court may have been troubled by Google appearing to have benefited from the complained of conduct. *See* Opinion, *supra* note 5, at 26–27 ("The ASA would grant Google control over the digital commercialization of millions of books . . . . even though Google engaged in wholesale, blatant copying."). Of course, whether the "wholesale, blatant copying" was in fact fair use had not yet been determined.

What Now?

There would seem to be little reason for either side to move forward with the litigation. The issue to be litigated would be limited to the question of whether Google's copying of works and displaying of snippets was "fair use" under copyright law. From the plaintiffs' perspective, this would by no means be an easy case to win. The class had yet to be certified (other than for settlement purposes), Google had a strong fair use argument, and damages might be limited due to increased sales of copyrighted works resulting from the alleged infringement. From Google's perspective, there was substantial exposure given the number of works scanned and the prospect of at least statutory damages following a finding of copyright infringement.

Thus, a revised settlement seems likely. The question is how wide-ranging a revised settlement will be. An "opt-in" version of the existing ASA would appear to be potentially acceptable to the court.[33] However, Google may stand to gain little from an opt-in ASA as compared to simply making a unilateral offer to copyright owners. Therefore, the parties may negotiate a scaled-back revised settlement that addresses only the specific claims in the complaint, i.e., Google's scanning of works and provision of snippets. Under any imaginable revised settlement, Google's (or its competitors') ability to offer a digital library service will be forestalled for at least a significant period of time to the detriment of consumers.

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With the court's rejection of the ASA, the rights of copyright owners have trumped the interests of consumers. While the court may have had a firm basis in copyright and class action law for its decision, consumers will be denied access to a digital library service. The issue will now probably head to Congress. Many ASA opponents had argued that Congress, rather than the court system, is the appropriate venue for deciding whether there should be any substantial change in copyright protection, e.g., for unclaimed works. However, if patent reform is any indication, this process could take a long time to reach a conclusion and the resolution may be less than satisfactory. While it would have required a somewhat bold approach, the court could have avoided these problems by approving the ASA. It was a missed opportunity from the point of view of consumers. ●

[33] *Id.* at 46.