

THE ELEPHANTINE GOOGLE BOOKS SETTLEMENT

by JAMES GRIMMELMANN*

“[T]his case is a class action prompted by the elephantine mass of asbestos cases”¹

“It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind)”²

INTRODUCTION

The genius — some would say the evil genius — of the proposed Google Books settlement³ was the way it fused legal categories. In its opinion rejecting the settlement,⁴ the district court discussed class action,⁵ copyright,⁶ and antitrust issues,⁷ among others. But just as an elephant is not merely a trunk plus legs plus a tail, the settlement is more than the sum of the individual issues it raises. The numerous “issues” described by commentators⁸ and the court are really just different ways of describing a single, overriding issue of law and policy — a new way to concentrate an intellectual property industry. I propose to describe the elephant.

This essay will argue for the critical importance of seeing the settlement all at once, rather than as a list of independent legal issues. After a

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¹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

² John Godfrey Saxe, *The Blind Men and the Elephant*, in *THE OXFORD ILLUSTRATED BOOK OF AMERICAN CHILDREN’S POEMS* 24 (Donald Hall ed. 2001).

³ Amended Settlement Agreement [hereinafter ASA], *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136-DC (S.D.N.Y. filed Nov. 13, 2009), available at http://www.googlebooksettlement.com/r/view_settlement_agreement.

⁴ *Authors Guild v. Google, Inc.*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011).

⁵ *Id.* at 14-30.

⁶ *Id.* at 30-36, 40-45.

⁷ *Id.* at 36-38.

⁸ Including an actual group of blind men and women. See Comments of Disability Organizations of or for Print-Disabled Persons in Support of the Proposed Settlement, *Authors Guild*, No. 05 CV 8136-DC (S.D.N.Y. 2009) (arguing in favor of the settlement because of its provisions for access by the print-disabled). They were among the most perceptive commentators on the settlement; they fully appreciated its remarkable implications for access to books.

brief overview of the settlement and its history (Part I), it will describe some of the more significant issues raised by objectors to the settlement and discussed in the court's opinion, focusing on the trio of class action, copyright, and antitrust law (Part II). The purpose of this Part is not to criticize or defend the court's reasoning, but rather to show that the hunt to characterize the settlement has ranged far and wide across the legal landscape.

Truly pinning down the settlement, however, will require tracing the connections between these different legal areas. The essay will argue (Part III) that the central truth of the settlement was that it *used an opt-out class action to bind copyright owners (including the owners of orphan works) to future uses of their books by a single defendant*. This statement fuses class action, copyright, and antitrust concerns, as well as a few others. It shows that the settlement would have been, at heart, a vast concentration of power in Google's hands, for good or for ill. The settlement was a classcopytrustliphant, and we must strive to see it all at once, in its entirety, in all its majestic and terrifying glory.

I. BACKGROUND

This Part will provide the minimal necessary overview of the now-rejected settlement's history and terms.⁹ The settlement is large, complicated, and full of rabbit holes, any one of which could make for a full article in its own right. Therefore, this Part will discuss only those settlement provisions that are essential to the discussion that follows. The reader interested in a fuller account should consult Jonathan Band's authoritative *The Long and Winding Road to the Google Books Settlement*.¹⁰

A. The Lawsuit

In 2004, Google announced partnerships with major academic libraries to digitize the books in their collections. Google's employees, using specially designed machines, would take a photograph of each page in a book; Google computers would then analyze the images to recognize the words on that page. The goal was to create a searchable index of books, akin to Google's searchable index of web pages.

At first, the project included only books in the public domain, but it soon expanded to include books under copyright as well. Although

⁹ See The Public Index, <http://thepublicindex.org> (collecting documents related to the settlement) (last visited July 12, 2011).

¹⁰ Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227 (2009); see also JONATHAN BAND, A GUIDE FOR THE PERPLEXED PART IV (2011), available at <http://www.arl.org/bm~doc/guideiv-final-1.pdf> (updating discussion from *The Long and Winding Road* to reflect the settlement's rejection).

Google lets viewers view and download full PDF versions of the public-domain books, it displays only “snippets” from books under copyright — short sections of text around the term the user searched for. If the copyright owner agrees, Google will show more of the book; if the copyright owner objects, Google turns off even the snippets.

After some jousting in the public arena, copyright owners sued Google in late 2005. Three named authors and the Authors Guild, a professional association representing about 8,000 United States authors, were the first, giving the case the caption *Authors Guild, Inc. v. Google, Inc.* Five major publishers followed with their own suit shortly thereafter.¹¹ Importantly, the Authors Guild structured its lawsuit as a class action (on behalf of all copyright owners whose books were held by the University of Michigan library, Google’s first library partner).

The lawsuits attracted substantial public attention when filed,¹² but dropped off the radar during discovery. In 2006, however, after being prompted by the court to discuss settlement, the parties quickly hit on the general outlines of a deal that they could all agree to. The details of this “groundbreaking” settlement were complicated enough that it took another two years to hammer them all out. On October 28, 2008, the parties announced a proposed settlement and filed it with the court.¹³

B. *The Settlement’s Terms*

Many observers had thought that *Authors Guild, Inc. v. Google, Inc.* would turn on whether Google could establish a fair use defense for its scanning, indexing, and snippet display.¹⁴ The proposed settlement allowed both sides to claim victory on these issues. On the one hand, Google would have been allowed to continue scanning and indexing on much the same terms as before: the only significant use it agreed to give

¹¹ See *McGraw Cos., Inc. v. Google Inc.*, No. 05 CV 08881 (S.D.N.Y. complaint filed Oct. 19, 2005), available at <http://thepublicindex.org/docs/complaint/publishers.pdf>.

¹² See, e.g., Edward Wyatt, *Googling Literature: The Debate Goes Public*, N.Y. TIMES, Nov. 19, 2005, at B7 (describing “face[] off” between copyright owners and Google in debate held at New York Public Library).

¹³ See Notice of Motion for Preliminary Settlement Approval, *Authors Guild v. Google, Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. filed Oct. 28, 2008), available at <http://thepublicindex.org/docs/motions/approval/motion.pdf>.

¹⁴ For academic views on the fair use issue, see Band, *supra* note 10, at 236-60; see also Douglas Lichtman, *Copyright as Information Policy: Google Book Search from a Law and Economic Perspective*, in 9 INNOVATION POL’Y & THE ECONOMY 55-77 (Josh Lerner et al. eds., 2008); Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87 (2006).

up was snippet display for in-print books.¹⁵ On the other hand, Google would have paid for its past scans: \$60 for each book scanned before May 5, 2009.¹⁶

This much was relatively unsurprising. The more interesting — and controversial — parts of the settlement were the “Revenue Models” it authorized Google to offer to the public. The details are immensely complicated, and the version here is enormously simplified, but for present purposes, there were three Revenue Models of note:

Consumer Purchase: Google would have sold individual online e-books to users. For example, a reader might have paid \$7.99 to obtain perpetual access to a version of Randall Stross’s *Planet Google* stored on Google’s servers.¹⁷

Institutional Subscription: Google also would have sold all-you-can-eat access to its entire catalog of books. A library or university could have bought a year’s worth of access to every book in Google’s collection by all of its members or students.¹⁸ Presumably, this year’s worth of access would have cost rather more than \$7.99.

Preview Use: Google would have shown up to 20% of the pages of a book for free to Web users, while showing paid ads alongside the pages.¹⁹

All three of these uses would have generated revenue. Google would have kept 37% and passed 63% along to copyright owners, to be split between authors and publishers.²⁰ A new institution, to be called the Book Rights Registry, would actually have administered the handling of the money.²¹ The Registry would have cut checks to copyright owners who claimed their books, and held the money in escrow for owners who had not.²²

Copyright owners would have retained substantial ongoing control over these uses. They would have had a year and a half to tell Google not to scan their book at all; if Google had already scanned the book, it would delete the files.²³ At any point, a copyright owner could have moved her

¹⁵ ASA, *supra* note 3 §§ 3.1(a), 3.4.

¹⁶ *Id.* § 5.1(a).

¹⁷ *Id.* § 4.2.

¹⁸ *Id.* § 4.1.

¹⁹ *Id.* § 4.3.

²⁰ *Id.* § 4.5(a) (requiring Google to pay 70% of its revenues to copyright owners); § 1.86–87 (allowing Google to reduce the amount it pays copyright owners by 10% to pay its “operating costs”). After ten years, unclaimed funds would have been given to charity instead. *See id.* § 6.3(a)(i)(3).

²¹ *Id.* § 6.1.

²² *Id.* § 6.3.

²³ *Id.* § 3.5(a).

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book in or out of these various uses — deciding, for example, to start selling it, or to allow Preview access only.²⁴ In Consumer Purchase an owner could have chosen a price or delegated the pricing decision to Google.²⁵ The Registry would also have been responsible for negotiating with Google on the terms of possible new uses like print-on-demand and PDF download.²⁶

The settlement's defaults were also extremely important. Google would have promised not to display or sell in-print books unless and until the copyright owner individually authorized it to.²⁷ For out-of-print books, the default was exactly the opposite: Google would have sold copies through Consumer Purchase, included them in the Institutional Subscription, and allowed Previews.²⁸ The copyright owner of an out-of-print book could have told Google to turn off these uses, but by default they would have started on.

C. *Where Are We Now?*

The core terms of the settlement, described in the previous Section, remained substantially unchanged between the time the settlement was filed in October 2008²⁹ and the time the court rejected it in March 2011.³⁰ The two and a half years in between were hardly uneventful. Because the proposed settlement was a class-action settlement, its approval required notice to the class, an opt-out and objection period, and a fairness hearing.³¹ After District Judge John Sprizzo, who had been hearing the case, signed the scheduling order, he passed away in December 2008.³² The case was reassigned to District Judge Denny Chin.³³ The class-action no-

²⁴ *Id.* § 3.2(e)(i).

²⁵ *Id.* § 4.2(b).

²⁶ *Id.* § 4.7.

²⁷ *Id.* § 3.2(b).

²⁸ *Id.*

²⁹ Notice of Motion for Preliminary Settlement Approval, Authors Guild v. Google, Inc., No. 05 CV 8136-JES, (S.D.N.Y. filed Oct. 28, 2008), available at <http://thepublicindex.org/docs/motions/approval/motion.pdf>.

³⁰ Authors Guild v. Google, Inc., No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011).

³¹ FED. R. CIV. P. 23(e).

³² Bruce Weber, *Judge Sprizzo, 73, U.S. Judge, Dies*, N.Y. TIMES, Dec. 18, 2008, at B12.

³³ Notice of Reassignment, Authors Guild, No. 05 CV 8136 (S.D.N.Y. Jan. 1, 2009), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/70>. During the pendency of the case, Judge Chin was nominated for, confirmed to, and seated on the Second Circuit. He continues to sit by designation in the district court, presiding over *Authors Guild* and other cases.

tice program began in January 2009, with an opt-out/objection deadline in May and a fairness hearing in June.³⁴

After a relatively quiet winter and early spring, controversy around the settlement began to heat up as the May deadline approached. A group of authors led by John Steinbeck's literary estate was granted a four-month delay, pushing the opt-out/objection deadline back to September 4 and the fairness hearing to October 7.³⁵ This revised filing deadline more or less held, with hundreds of objections and letters supporting and opposing the settlement pouring in during late August and early September.³⁶

The most influential filing was a Statement of Interest offered by the United States on September 18.³⁷ It praised some aspects of the settlement, but expressed substantial skepticism about the settlement's class-action bona fides and antitrust implications.³⁸ In response, the parties to the settlement withdrew it,³⁹ promising to offer a revised version forthwith.⁴⁰ "Settlement 2.0" arrived on November 13, just before midnight;⁴¹ the accelerated re-notice schedule provided for objections and fresh opt-

³⁴ Order Granting Preliminary Settlement Approval, *Authors Guild*, No. 05-CV-8136-JES (S.D.N.Y. filed Nov. 17, 2008), available at http://thepublicindex.org/docs/motions/approval/order_granting_preliminary_approval.pdf.

³⁵ Letter from Andrew C. Devore to J. Chin (Apr. 24, 2009), available at <http://thepublicindex.org/docs/motions/approval/devore.pdf> (proposed extension dates); *Authors Guild*, No. 05 CV 8136 (DC) (S.D.N.Y. filed Apr. 24, 2009), available at http://thepublicindex.org/docs/motions/approval/order_allowing_extension.pdf (order granting extension).

³⁶ See The Public Index, Responses to the Settlement, <http://thepublicindex.org/documents/responses> (last visited July 12, 2011).

³⁷ Statement of Interest of the United States of America Regarding Proposed Class Settlement, [hereinafter Statement of Interest] *Authors Guild*, No. 5 CV 8136 (DC) (S.D.N.Y. filed Sept. 18, 2009), available at <http://thepublicindex.org/docs/letters/usa.pdf>.

³⁸ *Id.*

³⁹ Notice of Unopposed Motion to Adjourn Oct. 7, 2009 Final Fairness Hearing and Schedule Status Conference, *Authors Guild*, No. 5 CV 8136 (DC) (S.D.N.Y. filed Sept. 22, 2009), available at http://thepublicindex.org/docs/motions/hearing/adjourn_motion.pdf; Order Granting Unopposed Motion to Adjourn Oct. 7, 2009 Final Fairness Hearing and Denying Adjournment of Schedule Status Conference, *Authors Guild*, No. 5 CV 8136-DC (S.D.N.Y. filed Sept. 24, 2009), available at http://thepublicindex.org/docs/case_order/20090924.pdf.

⁴⁰ Transcript of Oct. 7, 2009 Schedule Status Conference, *Authors Guild*, No. 5 CV 8136 (DC) (S.D.N.Y. Oct. 7, 2009) available at http://thepublicindex.org/docs/case_order/Status%20Conference%20Transcript.pdf.

⁴¹ Notice of Motion for Preliminary Approval of Amended Settlement Agreement, *Authors Guild*, No. 5 CV 8136 (DC) (S.D.N.Y. Nov. 13, 2009), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/768/>.

outs to be filed by January 28, 2010, with a fairness hearing on February 18.⁴²

The most significant change from Settlement 1.0 to Settlement 2.0 was a narrowing of the settlement's geographic scope. Settlement 1.0 applied to all books that were the subject of a United States copyright interest — essentially, any book published anywhere in the world that Google managed to find a copy of and scan in the United States.⁴³ Settlement 2.0 applied only to books registered with the United States Copyright Office or published in the United Kingdom, Canada, or Australia.⁴⁴ Settlement 2.0 also created an Unclaimed Works Fiduciary to monitor the handling of unclaimed funds and to take a few ministerial actions on behalf of owners who didn't claim their books.⁴⁵

The filings this time were fewer in number — a few dozen fully briefed objections and a slightly larger number of less formal letters — but no less contentious.⁴⁶ The parties replied in a trio of memoranda that ran to some 350 pages, supported by thousands of pages of supporting affidavits.⁴⁷ The fairness hearing featured some twenty-six objectors and amici, plus responses from the parties, and a strong statement from the Department of Justice — now firmly in the “opposed” camp.⁴⁸ At the close of the hearing, Judge Chin took the case under advisement, offering no hint as to when he would rule.⁴⁹

In the end, it took a little over a year. The court's forty-eight page opinion, issued on March 22, 2011, was a broad rejection of the settlement.⁵⁰ Although it left the door open for a narrower revised settle-

⁴² Order Granting Preliminary Approval of Amended Settlement Agreement, *Authors Guild*, No. 5 CV 8136 (DC) (S.D.N.Y. Nov. 19, 2009), available at http://thepublicindex.org/docs/amended_settlement/order_granting_prelim_approval.pdf.

⁴³ Declaration of Michael J. Boni in Support of Plaintiffs' Motion for Preliminary Settlement Approval, Exhibit 1 § 1.16, at 3, *Authors Guild*, No. 05 Civ. 8136-JES (S.D.N.Y. filed Oct. 28, 2008), available at http://thepublicindex.org/docs/amended_settlement/Boni_declaration.pdf.

⁴⁴ ASA, *supra* note 3, § 1.19.

⁴⁵ *Id.* § 6.2(b)(iii).

⁴⁶ See The Public Index: The Amended Settlement and Responses, http://thepublicindex.org/documents/amended_settlement (last visited July 12, 2011).

⁴⁷ See *id.*

⁴⁸ Transcript of Fairness Hearing, *Authors Guild*, No. 05 Civ. 8136 (S.D.N.Y. Feb. 18, 2010), available at http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf.

⁴⁹ *Id.* at 166.

⁵⁰ *Authors Guild*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011).

ment,⁵¹ the opinion left little doubt that the court was deeply “troubled” by numerous basic features of the one before it.⁵²

II. CLASS ACTION, COPYRIGHT, ANTITRUST

The description above barely scratches the surface of a large and very complicated settlement. But it should be enough to give a sense of the multifarious legal issues the proposed *Authors Guild* settlement raised. This Part will sketch a few of the more prominent ones, with emphasis on the Big Three: class action, copyright, and antitrust. The question to keep in mind will be: Do these legal questions get at what is truly remarkable about this settlement?

A. Class Action

Although they are interesting and controversial,⁵³ we should leave aside the purely “procedural” class action issues, such as whether the class members were given adequate notice of the settlement, as required by Rule 23.⁵⁴ The district court thought they were,⁵⁵ and even if they weren’t, these sorts of defects are fixable. The parties could spend more money on better translations, wider mailings, and a more usable settlement website.

Similarly, we can pass quickly over the strenuous objections to particular economic provisions of the settlement, such as Google’s 37% share of the money and the relative split of revenues between publishers and authors.⁵⁶ Even if the objectors were right that Settlement 2.0 was financially unfair to some or all copyright owners,⁵⁷ it is possible to imagine a Settlement 3.0 that gets the numbers right. Additionally, the settlement was replete with opportunities for copyright owners to remove their books

⁵¹ *Id.* at 45-46.

⁵² *Id.* at 21.

⁵³ See, e.g., Objections of Harrassowitz, Media24, Studentlitteratur AB, Norstedts Förlagsgrupp AB, Norstedts Kartor AB, & Leopard Förlag AB to Proposed Settlement & Brief of Amici Curiae Börsenverein des Deutschen Buchhandels *et al.*, Authors Guild, No. 05 Civ. 8136-DC (ECF) (S.D.N.Y. filed Aug. 31, 2009) [hereinafter Harrassowitz Objections], available at <http://thepublicindex.org/docs/objections/harrassowitz.pdf>.

⁵⁴ FED. R. CIV. P. 23(c)(2)(B).

⁵⁵ *Authors Guild*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *19-20.

⁵⁶ See ASA, *supra* note 3, § 4.5(a).

⁵⁷ See, e.g., Objections of Arlo Guthrie, Julia Wright, Catherine Ryan Hyde, & Eugene Linden to Proposed Class Action Settlement Agreement, *Authors Guild*, No. 05 Civ. 8136 (DC) (S.D.N.Y. Sept. 2, 2009), available at <http://thepublicindex.org/docs/objections/guthrie.pdf>.

from the various revenue models at any point.⁵⁸ They would still have been bound by the settlement's terms,⁵⁹ so this option is something less than a true opt-out from the class action. Still, these "internal opt-outs" would have given copyright owners the ability to withdraw from many of the settlement's commercial programs, should they have proved unfair.

The more interesting and most fundamental class-action issues go to the question of future claims. The prototypical damages class action (under Rule 23(b)(3)) gives class members a cash payout in exchange for their release of claims against the defendant. Imagine a check for \$50, intended to cover the average cost to repair a defective gas grill. The *Authors Guild* settlement, however, would have required plaintiff class members to give up not only their *past* claims against Google for the books it had scanned, but also their *future* claims against Google for all the uses it would have made of those scans when it sold copies of them.⁶⁰

In a damages class action, the only thing class members have at stake is their claim for damages. Even if their lawsuit is mismanaged or compromised too cheaply, nothing worse will happen to them. Their harms are over and done with; the lawsuit is only a dispute about compensation. When future claims are on the table, though, class members face the risk that a bad settlement could expose them to future harms as well.

At first glance, the settlement appears to run afoul of Supreme Court precedents, established in asbestos cases, expressing grave skepticism about future claims.⁶¹ But the issue is hardly clear-cut. Courts have sometimes entered class-action settlements that require plaintiffs to release future claims against the defendant.⁶² The parties here pointed to settlements in trespass⁶³ and nuisance⁶⁴ cases in which the plaintiffs were ultimately compensated for transferring an easement to the defendant. A

⁵⁸ ASA, *supra* note 3, § 3.5.

⁵⁹ *Id.* § 10.2.

⁶⁰ *Id.*

⁶¹ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁶² See Brief of Google Inc. in Support of Motion for Final Approval of Amended Settlement Agreement at 8-14, *Authors Guild*, No. 05 Civ. 8136 (DC) (S.D.N.Y. filed Feb. 11, 2010) [hereinafter Google Brief in Support], available at http://thepublicindex.org/docs/amended_settlement/google_final_aproval_support.pdf; Plaintiffs' Supplemental Memorandum Responding to Specific Objections at 45-51, *Authors Guild*, No. 05 Civ. 8136 (DC) (S.D.N.Y. Feb. 11, 2010), available at http://thepublicindex.org/docs/amended_settlement/Supplemental_memorandum_of_law.pdf.

⁶³ *Uhl v. Thoroughbred Tech. & Telecommc'ns., Inc.*, 309 F.3d 978 (7th Cir. 2002).

⁶⁴ *Alvarado v. Memphis-Shelby Cnty. Airport Auth.*, Nos. 99-5159, 99-5162, 2000 WL 1182446 (6th Cir. Aug. 15, 2000).

challenge to the *Authors Guild* settlement on future-claims grounds, then, must either repudiate these cases or distinguish them.

Perhaps remarkably, the court's opinion does neither. The Second Circuit deals with future-claims questions in class actions by allowing the release of claims not part of the original lawsuit only if they and the claims sued on are based on an "identical factual predicate."⁶⁵ Here, the settlement's opponents claimed that the "factual predicate" to the lawsuit was Google's scanning and display of snippets, *not* the sale of whole books.⁶⁶ The settlement's proponents countered that the "factual predicate" was Google's infringement in making digital uses of complete books, basically the same thing as the settlement would have allowed.⁶⁷ The court accepted the objectors' characterization, but without any detailed discussion of the cases the parties cited as precedent.⁶⁸

This is an important, subtle question, with enormous implications for the future class actions. But it is *subtle* — surely there is something more going on with this settlement than the exact language of the original complaints. The court's opinion seems to share this intuition (albeit without explaining it). The subtext is that the Rule 23 issues in the settlement were so readily apparent that one need not resort to a careful reading of caselaw. That may be, but if so, the reason cannot be found entirely within class-action law.

B. Copyright

We see the same pattern repeated when we look at the copyright issues. The most widely repeated copyright objection was that the settlement would have impermissibly imposed an "opt-out" system on copyright owners. The Constitution,⁶⁹ the Copyright Act,⁷⁰ and international copyright treaties⁷¹ all emphasize the "exclusive" rights of authors. Once an

⁶⁵ See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005).

⁶⁶ See, e.g., Objections of Microsoft Corp. to Proposed Amended Settlement & Certification of Proposed Settlement Class & Sub-class at 13-15, *Authors Guild*, No. 05 Civ. 8136 (DC) (S.D.N.Y. filed Jan. 28, 2010) [hereinafter Microsoft Objections], available at http://thepublicindex.org/docs/amended_settlement/Microsoft_Objection.pdf.

⁶⁷ Google Brief in Support, *supra* note 62, at 24-28.

⁶⁸ *Authors Guild*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *24-27

⁶⁹ U.S. CONST. art. I, § 8, cl. 8.

⁷⁰ 17 U.S.C. § 106 (2006).

⁷¹ See, e.g., Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention] available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

author has created a copyrightable work, she alone can authorize its use — or refuse permission.⁷² In this sense, copyright is an “opt-in” regime. Unless the author affirmatively opts in to allow a use, no one else is allowed to engage in it.

The settlement, however, would have imposed an “opt-out” system on copyright owners. This is most apparent for out-of-print books. There, unless a copyright owner objected, Google would have been allowed to sell complete copies of the book both to individuals and as part of its subscription service.⁷³ The copyright owner could have objected at any time, but unless and until she did, Google would have been allowed to engage in these uses. That is an opt-out rule, not an opt-in. In the words of no less than the Register of Copyrights herself, the settlement would thus have “flip[ped] copyright on its head.”⁷⁴

Matters in the courtroom were not quite so black-and-white, however. Even though it was offered doctrinal theories it could have used to hold that “opt-in only” was a binding rule of copyright law, the court twice ducked the question:

In any event, I need not decide the precise question of whether the ASA would in fact violate § 201(e); the notion that a court-approved settlement agreement can release the copyright interests of individual rights owners who have not voluntarily consented to transfer is a troubling one. . . .⁷⁵

Many foreign objectors express concern as to whether the ASA would violate international law, including the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. . . . In any event, I need not decide whether the ASA would violate international law. In light of all the circumstances, it is significant that foreign authors, publishers, and, indeed, nations would raise the issue.⁷⁶

The court’s hesitation was understandable. There are precedents for exceptions to an “opt-in only” principle. United States law authorizes certain nonprofit public performances unless the copyright owner opts out by serving a notice of objection.⁷⁷ Many national collecting societies re-

⁷² 17 U.S.C. § 201(a) (2008) (vesting initial ownership of copyright in a work’s author).

⁷³ See *supra* text accompanying note 28.

⁷⁴ *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 64 (2009) (testimony of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

⁷⁵ *Authors Guild v. Google, Inc.*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *32.

⁷⁶ *Id.* at 42-43.

⁷⁷ 17 U.S.C. § 110(4) (2006).

present copyright owners on an opt-out basis.⁷⁸ International copyright law recognizes an entire category of “exceptions and limitations” to exclusive rights.⁷⁹

“Opt-in only” might be better described as a general principle that is operationalized in the texts of specific legislation and treaties. Those specific instantiations of the principle, however, come with their own definitions and qualifications. Once you start arguing about these details, you have arguably left the realm of really fundamental analysis. Should how we think about the *Authors Guild* settlement depend on the exact way that the Berne Convention uses the term “formality”⁸⁰ or on the legislative history of Section 201(e) of the Copyright Act?⁸¹ The court’s opinion thus again shares the sense that there is something important to the settlement that cannot entirely be captured by a close reading of the caselaw.

The second-most prominent copyright issue raised by the settlement concerns so-called “orphan works.”⁸² Many works are under copyright but have owners who cannot be found. Would-be users, in turn, cannot find an owner to ask permission for their uses, leaving the works to languish, unused. The absentee owners lose, too, since their works are yielding neither royalties nor exposure. This is a known problem in copyright law, going well beyond just books.⁸³

The settlement would have made orphan books — which are, almost by definition, currently out of print — available again. Since the owner cannot be found, she would also have been unlikely to pull the “opt-out” lever on her book in the settlement. The result would have been that Google would sell full copies of it online. These books thus would have gone from being mostly unavailable to being widely available. What is more, the owner would have been accruing revenues from these sales. When she showed up to claim her book, she would also have received a

⁷⁸ See Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience - It's a Hybrid but Is It a Volvo or a Lemon?*, 33 COLUM. J.L. & ARTS 471 (2010).

⁷⁹ See, e.g., Berne Convention, *supra* note 71, art. 9.2.

⁸⁰ Berne Convention, *supra* note 71, art. 5.2, at 6; cf. Harrassowitz Objections, *supra* note 53, at 17-21.

⁸¹ 17 U.S.C. § 201(e) (2006); cf. Objection of Amazon.com, Inc., to Proposed Settlement at 32-34, *Authors Guild, Inc. v. Google Inc.*, No. 05 Civ. 8136-DC (S.D.N.Y. filed Sept 1, 2009), available at <http://thepublicindex.org/docs/letters/amazon.pdf>.

⁸² See, e.g., Brief of Amicus Curiae Public Knowledge in Opposition to the Proposed Settlement, *Authors Guild*, No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 8, 2009), available at <http://thepublicindex.org/docs/letters/pk.pdf>.

⁸³ COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 55 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

check for her share of the money — giving her an incentive to come forward.

So far, then, the orphan works point sounds like an argument for the settlement, rather than the basis of an objection to it.⁸⁴ To the extent that there is an “orphan works objection” purely within copyright law, it would go something like this: The orphan works problem is so big and so far-reaching that it is inherently legislative. Solving it will require balancing the interests of authors, publishers, libraries, readers, and others; that kind of political compromise is a job for Congress. In the court’s words:

The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties. Indeed, the Supreme Court has held that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”⁸⁵

This is an important policy point about institutions and copyright law, but it is not exactly a legal argument against the settlement.⁸⁶ The Copyright Act nowhere mentions “orphan works”; a court must apply existing law to decide the case before it.⁸⁷ “Don’t step on Congress’s toes,” is at most a prudential argument — one that could hardly prevail over Con-

⁸⁴ Google in particular made this point heavily. See Google Brief in Support, *supra* note 49, at 1-2, 66-67. It also recruited nonprofit and academic allies who admired this aspect of the settlement. Letter from Gregory Crane, Editor in Chief, Perseus Project, to Denny Chin, Judge, S.D.N.Y. (Aug. 7, 2009), available at <http://thepublicindex.org/docs/letters/crane.pdf>; letter from Kenneth L. Frazier, Director, General Library System, Univ. of Wisconsin, to Denny Chin, Judge, S.D.N.Y. (Aug. 27, 2009), available at <http://thepublicindex.org/docs/letters/wisconsin.pdf>. And for many public-interest observers of the settlement, its effect on orphan works weighed heavily in their considerations, tipping some of them into supporting the deal, despite other misgivings. See, e.g., Brief Amicus Curiae of the Center for Democracy & Technology in Support of Approval of the Settlement & Protection of Reader Privacy, *Authors Guild*, No. 05 Civ. 8136 (S.D.N.Y. Sept. 4, 2009) [hereinafter CDT Brief], available at http://thepublicindex.org/docs/letters/cdt_amicus.pdf; Letter from Jonathan Band to Denny Chin, Judge, S.D.N.Y. (Sept. 3, 2009), available at <http://thepublicindex.org/docs/letters/ALA%20complete.pdf>.

⁸⁵ *Authors Guild*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *23 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003)).

⁸⁶ One amicus brief that focused on the orphan issue ultimately recommended only that the court proceed with great caution, rather than recommending approval or rejection on this basis. Brief of Amicus Curiae Institute for Information Law and Policy [hereinafter IILP] at 1, 25, *Authors Guild*, No. 05 Civ. 8136 (DC) (S.D.N.Y. filed Sept. 3, 2009), available at <http://thepublicindex.org/docs/letters/nyls-iilp.pdf>.

⁸⁷ Google Brief in Support, *supra* note 62, at 5-7.

gress's explicit directions as reflected in the United States Code. At any rate, Congress has certainly not forbidden the courts from ever touching orphan works in any way, shape, or form. Thus, while the settlement's effects on orphan works are perhaps central to its appeal, they are not — at least on their own — also central to the legal concerns it raises.

C. *Antitrust*

The third substantial body of law clearly implicated by the settlement is antitrust. Both Consumer Purchase and the Institutional Subscription would have given Google the power to set prices on behalf of a large group of copyright owners, who normally compete with each other in the market for readers. Such arrangements raise antitrust eyebrows.⁸⁸ Consider the two programs in turn.

To sell an individual e-book in Consumer Purchase, Google needs to set a price. One option under the settlement would have been a Specified Price, chosen by a copyright owner.⁸⁹ This approach has to be fine for antitrust purposes. Half.com is not a cartel even though thousands of sellers all use it to sell their books. But the settlement also would have allowed for a Settlement Controlled Price, set by Google, using an algorithm it would have developed for this purpose.⁹⁰ That's "algorithm," singular. This fact ordinarily rings antitrust alarm bells: the famous *Socony-Vacuum* case forbade agreements to use a common "formula" to set prices.⁹¹ While the copyright owner could have chosen whether to use the Settlement Controlled Price,⁹² it would have been the default, and applied unless the copyright owner took action to set a price.⁹³

This sounds damning, save for one very important fact. Google would have been specifically directed to design an algorithm that will price each book as though in a competitive market: i.e., to "maximize revenues for the Rightsholder for such Book and without regard to changes to the price of any other Book."⁹⁴ This is arguably the anti-formula: a price-fixing scheme designed *not* to distort the natural workings of the market.⁹⁵ If Google acted in good faith in designing the algorithm, and if the algorithm

⁸⁸ Randal C. Picker, *The Google Book Search Settlement: A New Orphan Works Monopoly?* 15-17 (Univ. of Chicago John M. Olin Law & Econ., Working Paper No. 462, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387582#.

⁸⁹ See ASA, *supra* note 3 § 4.2(b)(i)(1).

⁹⁰ *Id.* § 4.2(b)(i)(2).

⁹¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940).

⁹² See ASA, *supra* note 3 § 4.2(b)(i).

⁹³ *Id.* § 4.2(b)(iii).

⁹⁴ *Id.* §§ 4.2(b)(i)(2), 4.2(c)(ii)(2).

⁹⁵ Einer Elhauge, *Why the Google Books Settlement is Procompetitive*, 2 J. LEGAL ANAL. 1 (2010); Yuan Ji, *Why the Google Book Search Settlement*

worked as intended, then Settlement Controlled Pricing could have avoided the cardinal economic sin of antitrust: collectively raising prices above the level they would be at under true competition. This is not necessarily an unlikely prospect. Who else would be in a better position to find smart prices than Google, with its enormous treasure-houses of data?

Of course, the fact that the algorithm might be *economically* harmless need not make it *legally* harmless. Moreover, the algorithm's secrecy raises its own concerns. What if Google gets the prices wrong? Would Google be tempted to cheat and raise prices collectively? Would the Registry have the right incentives to monitor Google's adherence to the settlement? Would copyright owners have incentives to make the scheme stick if Google did raise prices? These are legitimate questions about a novel and untried scheme — but if the only question about the algorithm is whether it would have worked in practice, then we are not quite in the heartland of antitrust trouble we seemed to start out in.⁹⁶

Turning to the Institutional Subscription, the coordination is in a sense even more explicit than with the individual purchases. Google would have set a single price that applied to everyone's books.⁹⁷ Indeed, the Registry, which would have spoken for all the copyright owners in the settlement programs, would have explicitly participated in setting that price.⁹⁸ Once again, it seems that the settlement would actually have required coordinated price-fixing by competitors.

Once again, however, things are not quite as they seem. This system — a single price for a blanket license to a large collection of copyrighted works — is substantially equivalent to the system used by so-called “performance rights organizations” (PROs) like BMI and ASCAP to sell licenses to the public performance rights for musical works. Their prototypical client is a coffee shop that plays CDs over its speaker system all day: by purchasing licenses from the PROs, it engages in one-stop shopping to make those hundreds of daily public performances legal.

The PROs have faced antitrust scrutiny — and passed. When BMI was sued on a theory that its blanket license was a price-fixing scheme, the Supreme Court heard the case and blessed the arrangement, citing the efficiencies of one-stop-shopping and the nonexclusively of the relevant contracts.⁹⁹ This, of course, is not the end of the matter. Scholars have challenged the economic reasoning behind the Supreme Court's deci-

Should Be Approved: A Response to Antitrust Concerns and Suggestions for Regulation, 21 ALB. J. SCI. & TECH. 231 (2011).

⁹⁶ See generally Elhauge, *supra* note 95 (extensively discussing incentives under the settlement and likely outcomes).

⁹⁷ See ASA, *supra* note 3 § 4.1(a)(ii).

⁹⁸ *Id.*

⁹⁹ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-21 (1979).

sion.¹⁰⁰ Moreover, the *Authors Guild* settlement conspicuously lacked a consent decree comparable to the one under which BMI lives — and the Supreme Court pointed to the consent decree as one of its reasons for blessing BMI's programs.¹⁰¹ One could readily imagine a principled antitrust case against the Institutional Subscription that distinguishes *BMI* or seeks to overturn it. But that case is tentative and uncertain and depends on complicated issues in both antitrust economics and antitrust law. Whatever makes this settlement great or horrifying, it is surely not the presence or absence of district court review of subscription pricing.

Yet again, the court's actual opinion in *Authors Guild* steers well clear of detailed legal analysis on these questions. At three pages of twelve-point double-spaced Courier, its discussion of antitrust issues is substantially shorter than this Section.¹⁰² It cites a single case and gives almost no economic analysis. For a third time, the court's opinion suggests dissatisfaction with the ability of standard doctrinal categories to make sense of the settlement.

III. THE CLASSCOPYTRUSTLIPHANT

These separate analyses — class actions, copyright, and antitrust — are all onto something important about the settlement. But on their own, they seem to raise only incremental concerns. Even when summed, these three analyses make the settlement seem like no big deal. It happens to be a controversial, hundred-million-dollar no-big-deal, but the legal questions seem neither novel nor dramatic.

This impression is an illusion. The settlement *was* a big deal, and it raised unprecedented legal questions of fundamental importance. To understand why, we need to integrate the perspectives of class action, copyright, and antitrust law. Putting them together shows how groundbreaking the proposed settlement really was — and allows us to ask the really hard questions about it.

A. All of the Above

In a sentence: The settlement used an opt-out class action to bind copyright owners (including the owners of orphan works) to future uses of their books by a single defendant.

¹⁰⁰ See Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION LAW & ECON. 541, 571-76 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=547802.

¹⁰¹ *Broad. Music*, 441 U.S. at 23-24.

¹⁰² *Authors Guild v. Google, Inc.*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *36-38.

That was the heart of the settlement. It didn't break down neatly into a class action issue, a copyright issue, and an antitrust issue. Instead, it raised a *single* issue of law and policy, one that touched on all three areas. Class action law recognizes its trunk; copyright its legs; antitrust its tail. But an elephant is not a trunk plus legs plus a tail; it is a single animal. So here: The settlement was a classcopytrustliphant. To see it in all its glory, we must trace the connections:

1. . . . *The settlement used an opt-out class action to bind copyright owners.* The settlement would have resolved a class action, yes — but it was a *copyright* class action. This fact sets up an immediate tension between the opt-out world of class-actions and the opt-in world of copyright. It also provides one of the strongest responses to the “opt-in only” argument against the settlement. Of course a class action will be in tension with the opt-in logic of copyright; its whole point is collective adjudication. If it were opt-in, it wouldn't be a class action. By choosing to allow class actions, the United States has already made a trans-substantive choice that opt-in rights, copyright included, must sometimes yield.

But this point also works in reverse. To the extent that copyright is an exclusive opt-in right protected by a property rule, the law has made a deliberate choice to prize not just the economic value of the work but also the copyright owner's autonomy to choose which uses to allow. A class action's opt-out logic undermines that choice. This is not to say that class actions cannot deal in copyrights, only that when they do, the stakes are higher.

2. . . . *(including the owners of orphan works . . .)*. One subclass of copyright owners is of special importance to the settlement: orphan owners. On the one hand, they provide the biggest policy justification for the settlement. The impossibility of obtaining permissions from un-findable owners would have doomed any purely voluntary attempt to build a comprehensive index; it is also responsible for the unavailability of many of these books. To the extent that the settlement would have “solved” the orphan works problem for books, it would have done so because it imposed an opt-out class action on their owners. The use of a class action was a game-changer; it broke free of the opt-in logic that keeps these books out of circulation.

But this fact should also give us pause. Orphan copyright owners, by definition, cannot be found. If there is one class of copyright owners we would expect not to opt out of a proposed settlement or to show up at the fairness hearing, it would be orphan owners. As in a Zen koan, the orphan owner whose voice

can be heard in court is not the true orphan owner. (That is why several amicus filers recommended that the court appoint separate counsel to represent the interests of an orphan “subclass.”¹⁰³) The opt-out class action would have helped break the orphan works logjam, but it was also uniquely dangerous precisely because the case deals with orphan works.

For this reason, the internal opt-outs in the settlement were almost certainly essential, and so was the Unclaimed Works Fiduciary. The orphan works debate reminds us that many copyright owners are unlikely to identify themselves any time soon. As of the opt-out deadline, only about a million books had been claimed (out of some twelve million scanned).¹⁰⁴ Would the Unclaimed Works Fiduciary have sufficient powers to protect the interests of copyright owners who have yet to claim their books? Would they have sufficient internal opt-out rights to protect their interests once they do? These questions of class-action fairness cannot be answered without a close look at the copyright-policy issues pointed out by the orphan works debate.

3. . . . *to future uses of their books* As discussed above, class actions that release future claims pose special dangers. Future *copyright* claims are particularly interesting, and delicate. In one sense, a copyright is nothing but an indeterminate set of future claims. The owner of tangible property almost always has a privilege to use as well as the right to exclude; the owner of a copyright has only the right to exclude.¹⁰⁵ The real-property future-use cases transferred only an intangible exclusionary interest, leaving the owners’ substantial privileges to use largely intact. But to compromise a copyright owner’s right to sue is to compromise everything.

The copyright perspective also sheds new light on the question of whether the claims released in the settlement stemmed from the “identical factual predicate” as the original lawsuit. In one sense, yes, both involved claims of copyright infringement for Google’s use of digitized books. However, there is a world of

¹⁰³ See Brief of Amicus Curiae IILP, *supra* note 86.

¹⁰⁴ Declaration of Daniel Clancy in Support of Motion for Final Approval of Amended Settlement Agreement, *Authors Guild*, No. 05 CV 8136 (DC) (S.D.N.Y. filed Feb. 11, 2010) available at http://thepublicindex.org/docs/amended_settlement/dan_clancy_declaration.pdf.

¹⁰⁵ In Hohfeldian terminology, a tangible property owner has both privileges (to use) and claim-rights (to exclude); the owner of a copyright has only claim-rights. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

difference between the claims the copyright owners could have asserted against Google (which were subject to a strong, albeit debatable, fair use defense¹⁰⁶) and the claims that would have been released under the settlement (many of which are subject to no plausible fair use defense and would obviously be infringing if undertaken without the settlement's protection). By keeping book sales as future uses, Google avoided numerous copyright risks associated with those sales — a fact that ought to enter into the question of whether it is proper for a class action settlement to authorize such sales.¹⁰⁷

4. . . . *by a single defendant.* And so we come to the antitrust angle. In Part II.C, we saw that the antitrust objections to the settlement were surprisingly indeterminate. The explanation for this fact is that if there is a compelling antitrust issue here, it has to do more with the manner of creating these programs than with the programs themselves. If the Institutional Subscription appeared on our doorstep one day, fully formed, it would be hard to say we ought to chase it away. Nevertheless, we might have a very different attitude toward the mad scientists whose unnatural experiments with class action law created it.

In particular, this was a settlement explicitly structured to be exclusive. True, it was formally nonexclusive — nothing in it would have prohibited copyright owners from licensing anyone else to sell their books.¹⁰⁸ But in a world with orphan works, formal nonexclusivity will often be practically worthless. Google would have had a good-to-go license; its competitors will have no one to turn to.¹⁰⁹ The Department of Justice asked the parties to consider extending the licenses in the settlement to others; they declined.¹¹⁰ (One possible reason: providing releases to non-defendant third-parties might cause the settlement to run afoul of . . . wait for it . . . class action law's limits on released claims.)

Thus: class action law plus a known copyright issue together yield exclusivity, normally antitrust's domain.

¹⁰⁶ See, e.g., Sag, *supra* note 14.

¹⁰⁷ James Grimmelmann, *When the Unprecedented Becomes Precedent: Class Actions in a Google Book Search World*, Aug. 4, 2009, <http://james.grimmelmann.net/essays/UnprecedentedPrecedent>.

¹⁰⁸ See James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, CPI ANTITRUST J. (2010), available at http://works.bepress.com/james_grimmelmann/26.

¹⁰⁹ *Authors Guild*, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011), at *36 (“The ASA would give Google a de facto monopoly over unclaimed works.”).

¹¹⁰ See Statement of Interest, *supra* note 37.

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One counter to this view might be that others wishing to compete with Google could obtain similar settlements of their own.¹¹¹ Whether this possibility is serious enough to count in the antitrust analysis depends on both class-action and copyright law. The class action would need to face the same kinds of justiciability, procedural, and fairness concerns as the present one (plus the added difficulty of potentially being based on a collusive lawsuit). Furthermore, whether copyright owners would be interested in negotiating a deal (or should be presumed to be interested by a court, given copyright's opt-in logic) depends on economic issues at the intersection of copyright and antitrust law: what are the incentives of sellers in a differentiated market with various intermediary business models? Such "me-too settlements" are highly unlikely; the procedural bars are serious and the plaintiffs in the present suit would have an incentive to fight similar settlements for others.¹¹²

Thus, taking the settlement's practical exclusivity as a given, the real antitrust question becomes whether we should consider it problematic. This is subtly different from the paradigm case of exclusionary behavior that raises the entry barriers faced by competitors. Instead, Google would have been using the legal system to selectively lower entry barriers for Google and no one else. Randal Picker has analogized the situation to the acquisition of a government-granted franchise.¹¹³ Indeed, this would have been a very unusual franchise, one granted not by a legislature but by a court.¹¹⁴

Some commentators have praised the settlement because it would have raised the availability of books to consumers.¹¹⁵ For books that are out of print, the market would have seen an increase in the number of

¹¹¹ See David Balto, *The Earth Is Not Flat: The Public Interest and the Google Book Settlement: A Reply to Grimmelmann*, American Constitution Society, <http://www.acslaw.org/node/13812> (Jul. 22, 2009, 15:39 EST); but see James Grimmelmann, *The Google Book Search Settlement: Questions Remain*, American Constitution Society, <http://www.acslaw.org/node/13837> (July 28, 2009, 14:49 EST).

¹¹² See Grimmelmann, *supra* note 108.

¹¹³ Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement (2009)* (Univ. of Chicago Law & Econ., Olin Working Paper No. 493), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499482.

¹¹⁴ Picker also raised the possibility that the settlement, because it was entered by a court, could be categorically immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. Picker, *supra* note 88. The parties specifically waived *Noerr-Pennington* in Settlement 2.0, but note again the antitrust/class-action connection. See ASA, *supra* note 3, attachment M at 7.

¹¹⁵ Letter from Lateef Mtima, Professor of Law and Dir., and Steven D. Jamar, Professor of Law and Assoc. Dir., Inst. of Intellectual Prop. & Social Justice, Howard University School of Law, to Denny Chin, Judge, S.D.N.Y.

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competitors (one rather than zero), normally a good thing in antitrust law. Things may look rather different when copyright is part of the picture. Copyright cares about more than just increasing the supply of books that already exist; it also cares about authors' incentives to create new books. The effect of the settlement on future incentives would have depended not just on what it would have done to the future claims of current book copyright owners (a copyright question) but also the extent to which future creators would have thought themselves sufficiently similarly situated to the plaintiffs here that a future settlement in another case might affect *them* (a class-action question). This "antitrust" question turns out to depend crucially on both copyright and class-action issues.¹¹⁶

B. Concentrated Power

Is the Google Books settlement primarily about class actions, copyright, antitrust, or other issues? All of the above. The central truth of the settlement is that it would have used a class action to gather together scattered copyrights. This concentrating effect touches on deep-seated concerns all across the law. Antitrust law, of course, owes its birth (and its name) to late nineteenth-century fears of the enormous power of the "trusts," and continues to scrutinize combinations, agreements, mergers, market share and other manifestations of concentrated economic power.¹¹⁷ But it is hardly the only area of law with similar worries.

Class action law frets about protecting large and diffuse classes against more powerful defendants. To give the class members a fighting chance in the courtroom, the law lets them join together under the banner of a single champion: class counsel. But having concentrated so much power in class counsel's hands, class action law must also protect the class from its own lawyers.¹¹⁸ This tension between safety in numbers and a single point of failure animates all of class-action law.

Meanwhile, copyright law also struggles with the danger of concentrated power. Modern Anglo-American copyright law was born with the 1709 Statute of Anne, a deliberate choice for creative and economic decentralization and a rejection of the concentrated power of the Stationers'

(Sept. 7, 2009) [hereinafter IIP SJ Letter] *available at* http://thepublicindex.org/docs/letters/Inst_IP_Social_Justice.pdf; *see* Elhauge *supra* note 95.

¹¹⁶ *But see* IIP SJ Letter, *supra* note 115 (arguing that increased availability of the works themselves furthers the goals of copyright); *see also* Brief of Amicus Curiae IILP *supra* note 86.

¹¹⁷ *See* RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 200 (1996).

¹¹⁸ *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1279 (1996).

Guild.¹¹⁹ But this decentralization also creates anti-commons problems (orphan works being only one example), which copyright worldwide often tries to solve with centralized institutions: registries, compulsory licenses, and collecting societies.

Indeed, it is noteworthy how many of the other objections to the settlement — not just the Big Three — were driven by this concentration of power. Take, for example, the fear that Google could choose to censor its collection of digitized books.¹²⁰ This fear would have receded if Google were a small distributor of a few books, competing vigorously with thousands of others. It is the possibility that Google could have become the only source for millions of books that gave this concern its urgency.¹²¹ The same could be said about privacy: watching how I read one book is moderately creepy, but watching how I read all my books is profoundly unnerving.¹²²

Even the dry, detailed questions — such whether 37%/63% was a fair revenue split or how many class notices were mailed—took on a special urgency because the class was so large and the settlement so far-reaching in its effects. One of the most telling filings came from a coalition of visual artists led by the American Society of Media Photographers, which objected to the exclusion of pictorial works from the settlement and also to the settlement's fairness.¹²³ At first, this pair of objections sounds logically inconsistent: if the settlement was as bad a deal as the photographers claimed, they should have been happy to be excluded. But their objection makes more sense if one also accepts their premise that the settlement would have so profoundly defined the terms on which digitized out-of-print books would be made available that it would have, as a practical matter, also defined the deal visual artists would receive when their day

¹¹⁹ See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

¹²⁰ See, e.g., General Library System letter *supra* note 84; See also ASA, *supra* note 3 § 3.7(e). (explaining that whether those provisions go far enough is, like so much else with this settlement, controversial).

¹²¹ See PATTERSON, *supra* note 119 (describing a long reflected concern of copyright law: the Stationers' Guild was also an instrument of royal press censorship through the "licensing" system, so that eliminating their monopoly privileges also helped cut printing free of government control); ADRIAN JOHNS, *THE NATURE OF THE BOOK* 230-48 (University of Chicago Press, 1998).

¹²² See Privacy Authors and Publishers' Objection to Proposed Settlement, *The Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136-DC (S.D.N.Y. Sept. 8, 2009) available at http://thepublicindex.org/docs/letters/privacy_authors.pdf; see also CDT Brief, *supra* note 69.

¹²³ See Objections of Class Members The American Society of Media Photographers, Inc., et al., *Authors Guild*, No. 05 CV 8136-DC (S.D.N.Y. filed Sept. 2, 2009), available at <http://thepublicindex.org/docs/letters/asmp.pdf>.

came. They understood that the *Authors Guild* settlement would have all but preempted the field.

CONCLUSION

A possible response to the orphan works dilemma would be to say that we really do care about copyrights, even those held by owners who are hard to find. On this view, orphan owners aren't dead to the world, only sleeping, and it is our duty to them to safeguard their rights against the day of their return. If having no sellers of a given work is the price we must pay for taking copyrights seriously, then so be it: that's what it means to take rights seriously. If so, then the *Authors Guild* settlement was obviously wrongful; it used a class-action shell game to misappropriate copyrights away from their rightful owners.

Another possible response would be to say that the costs of trying to reunite orphan works with their parents far outweigh the social benefits of doing so. On this view, orphan works — long out of print and producing no value for owners who will never be found — are casualties of copyright's excessively long term. It is our duty to fix copyright law and move them into the public domain, or at least make them broadly available on generous and straightforward terms. If the occasional copyright owner who just nipped down to the corner for a quick pint loses out, then so be it: that's a small price to pay for a copyright system that works. If so, then the *Authors Guild* settlement was troubling because it wrapped books up in endless, needless layers of red tape, DRM, and legal restrictions.

Both of these views — that there should be no sellers of unclaimed works and that there should be any number — make simple, intuitive sense. One need not find them equally convincing to appreciate the philosophies behind them and the intellectual rigor that has gone into articulating them. They correspond, very roughly, to objections that the settlement went too far or didn't go far enough. At times it has seemed that the settlement was simply caught between the Scylla of overprotecting copyrights and the Charybdis of providing too much access, the twin poles of copyright policy since time immemorial. No compromise, no matter how elegant, could ever satisfy both camps.

From the perspective of concentrated power, however, the actual proposed *Authors Guild* settlement, elegant though it was, might actually have been *worse* than either extreme. A world with no sellers of orphan books and a world where anyone can sell them are both still primarily decentralized. The settlement, however, would have created *one* seller of orphan books, pulling together all of the necessary rights into a single company's hands. This "compromise" between authors' rights and the

public's access to books just so happened to hand Google a dominant position selling older books.¹²⁴

Ultimately, like every other question of concentrated power in the information society, the *Authors Guild* settlement is also a question about the role of the state. The settlement was a form of collective copyright management, giving Google the right to sell books unless and until their copyright owners objected. The class-action settlement would have used the coercive power of the state to create and enforce its provisions. But unlike other state-sponsored experiments in information centralization, which at least were established through democratic processes and subject to public oversight, the Google-Registry complex would have been the result of a process instigated by a handful of private parties on terms worked out in two years of strictly confidential negotiations. Creating an elephant *ex nihilo* was a remarkable feat — but the settlement was a wild and dangerous beast.

¹²⁴ Cf. Molly Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 618-61 (2010) (discussing “consolidating power” of proposed settlement).