Symposium: Collective Management of Copyright: Solution or Sacrifice?

Competition and the Collective Management of Copyright

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Discussions of the collective management of copyright tend to celebrate their subject. Much of the work collected in this volume focuses upon the significant economic value created by collective management organizations ("CMOs"), as well as the practical difficulties presented by any realistic effort to unlock that value. I have been assigned a different role to play. My task is to explain one downside of CMOs, namely the risk they pose to competition, and hence the limitations that antitrust law places upon their activities. These limits are familiar to many symposium participants. After all, two of the leading CMOs in the United States, ASCAP and BMI, have operated under an antitrust consent decree for the past sixty years.[1]

My focus is the United States experience with CMOs, and in particular, with performing rights organizations such as ASCAP, copyright collectives such as the Copyright Clearance Center ("CCC") and the proposed book registry to be created as part of the Google Books settlement. My remarks draw on earlier work by other scholars, such as Einer Elhauge, James Grimmelman, Glynn Lunney, Randy Picker and Pamela Samuelson, and the excellent book about CMOs edited by Daniel Gervais, as well as on my own previous writing about the antitrust issues raised by the Google Books settlement.[2] CMOs raise two distinct antitrust issues. First, the

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1. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 1950–1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (amended final judgment); United States v. Am. Soc'y of Composers, Authors & Publishers, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941) (consent decree). This discussion will focus on ASCAP, but the same arguments generally apply to BMI as well. *See* United States v. Broad. Music Inc., 1940–1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941) (consent decree).

2. *See, e.g.*, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 2d ed. 2010); Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010); James Grimmelmann, *How to Fix the Google Book Search Settlement*, J. INTERNET L., Apr. 2009, at 1; James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, COMPETITION POL'Y INT'L ANTITRUST J., Jan. 2010, at 2; C. Scott Hemphill, *Collusive and Exclusive Settlements of Intellectual Property Litigation*, 2010 COLUM. BUS. L. REV. 685; Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra*, at 339; Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, GLOBAL COMPETITION POL'Y:

decision to collectively price or bundle products raises concerns about horizontal price fixing among rights holders. Second, the structure and operation of a CMO may limit the ability of others to enter the CMO business itself. In this brief Essay, I sketch out how an antitrust enforcer might think about these two questions as well as offer some thoughts along the way about the persistent temptation faced by antitrust enforcers in such cases to get into the business of product design.

The first antitrust issue—the limitation of price competition among rights holders—is easy to spot. If a CMO is acting as a joint selling agent for rights holders, it may be subject to condemnation under § 1 of the Sherman Act.[3] The basic concern is that rights holders acting as a collective will charge a higher price to users, such as broadcasters, than they would if each right holder set its price independently. (In thinking about this, note that the price does not have to be positive. A right holder might give away or even pay for the broadcaster to use the work, in order to build demand for the work in other contexts.) This concern occupied the parties to the original 1941 ASCAP consent decree and has remained a central issue in its various revisions, including an amended final judgment in 1950, further changes in 1960 and the second amended final judgment in 2001.[4]

A law abiding CMO might consider several ways to avoid this problem. First, the CMO might be set up in such a way that each right holder sets its own price. In that case, the main job of the CMO is simply to collect the fees. That approach, which has been adopted by the CCC for the photocopying of certain printed works, sidesteps the antitrust issue altogether.[5]

Second, a CMO might try to set up a pricing scheme that mimics individual pricing. The proposed Google Books settlement offers a useful example. To greatly simplify, the settlement would resolve a copyright class action between Google and certain authors and publishers.[6] It sets up a licensing scheme for a variety of digital uses of the copyrighted works, including consumer purchases and bulk subscriptions for institutions. The settlement raises many fascinating questions, including the broad scope of the settlement compared to the relatively narrow scope of the underlying litigation, the settlement's ingenious conversion of copyright's usual "opt-in" to the "opt-out" of a class action and objections to the

THE ANTITRUST CHRON., Oct. 2009 (Release 2); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010).

3. 15 U.S.C. § 1 (2006).

4. United States v. Am. Soc'y of Composers, Authors & Publishers, 2001–2002 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. 2001); United States v. Am. Soc'y of Composers, Authors & Publishers, 1960 Trade Cas. (CCH) ¶ 69,612 (S.D.N.Y. 1960); United States v. Am. Soc'y of Composers, Authors & Publishers, 1950–1951 Trade Cas. (CCH) ¶ 62,595; United States v. Am. Soc'y of Composers, Authors & Publishers, 1940–1943 Trade Cas. (CCH) ¶ 56,104, at 403.

5. The CCC:

> allows copyright owners to register their works with the CCC and to set their own terms and prices on which photocopying will be allowed. Once the terms are set by the copyright owners, the CCC makes those terms known to potential copiers and arranges for the collection of the appropriate licensing fees.

Lunney, *supra* note 2, at 341.

6. For a more detailed (but still compressed) discussion, see Hemphill, *supra* note 2, at 689–91.

settlement based on class representation, privacy, treaty obligations and alterations to the author-publisher bargain. Discussing those questions, however, would take us too far afield. I'm here just to talk about antitrust.

One antitrust objection that has been made to the settlement is that it would restrict price competition among rights holders. For example, the original settlement agreement provided for a single entity to set a profit-maximizing price for a wide range of digital works, using an algorithm to be designed by Google.[7] To some outside observers, that method raised a significant risk of cartelization.[8] Likely in response to these concerns, the parties revised the agreement to change the algorithm. Under the new algorithm—again, still to be written—the price for individual works will be set individually.[9] At this stage, it is not entirely clear how the algorithm will work. But for present purposes, the important point is that this change can be understood as an effort to mimic what the CCC is doing. It is a change that makes the situation look a bit less like a cartel and a bit more like a mere mechanism to collect fees in a ministerial fashion.

ASCAP has adopted a third strategy, which is for the CMO to embed its collective pricing within the provision of a substantial consumer benefit. That embeddedness, in turn, encourages a simultaneous consideration of the bitter and the sweet, of the collective pricing on one hand and this benefit on the other. Concretely, ASCAP offers the copyrights as a bundle, in the form of a blanket license. Blanket licenses can confer a powerful benefit upon consumers. Users need not decide in advance which songs to play and avoid costly individual negotiations with a very large number of rights holders. When a collectively priced good brings such significant advantages, we cannot condemn it as an antitrust violation merely by virtue of its collective nature. Instead, we must think about the arrangement in detail under a rule of reason.

The ASCAP consent decree does not condemn the blanket license outright. Instead, the approach has been to insist that the bundle must be broken down into smaller increments that are then made available to customers who don't need the full blanket license. As a limited early step, the original 1941 decree required ASCAP to allow rights holders to negotiate individually with users.[10] Over time, the decree has become more aggressive by requiring ASCAP to offer per-program licenses.[11] Moreover, the court has insisted not only that these smaller bundles are formally available, but also that they are priced in a manner that offers a genuine choice to the full blanket license.[12] In doing so, the court has gotten increasingly

7. Settlement Agreement, art. 4.2(b), Authors Guild v. Google Inc., 93 U.S.P.Q.2d 1159 (S.D.N.Y. 2009) (No. 05 CV 8136 (DC)).

8. *See, e.g.*, Statement of Interest of the United States Regarding Proposed Class Settlement at 17, *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)) [hereinafter United States Initial Brief].

9. Amended Settlement Agreement art. 4.2(b), *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)).

10. United States v. Am. Soc'y of Composers, Authors & Publishers, 1940–1943 Trade Cas. (CCH) ¶ 56,104, at 404–05 (S.D.N.Y. 1941).

11. United States v. Am. Soc'y of Composers, Authors & Publishers, 2001–2002 Trade Cas. (CCH) ¶ 73,474, at 91,961 (S.D.N.Y. 2001).

12. *Id.*

involved in product design, a job that is at some remove from antitrust's core goal of limiting horizontal arrangements in the first place.

This type of involvement has some important limits. After all, antitrust recognizes that firms—particularly innovative firms—have significant latitude in their ability to arrange their own affairs. As the Supreme Court explained in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[13] Now, *Trinko* was not about a CMO, but rather, a monopolist that had refused to deal with a rival.[14] Where, as here, the restrictions are the result of a web of contracts between independent entities, the *Trinko* argument might not fully apply. Nevertheless, the Court's opinion is one signal among many that antitrust courts are properly reluctant to get too involved in the decision making of innovative firms.

And, indeed, some efforts to disaggregate the bundle through antitrust law have failed. For example, the most famous CMO antitrust case is an action brought by CBS, in which the broadcaster argued that not only should it be permitted to negotiate directly with rights holders, but in addition, the CMO must lend a helping hand, by itself making available a license to individual songs.[15] The Supreme Court, in a classic statement of the rule of reason, rejected that request and in effect refused to impose an additional obligation of complete unbundling.[16]

So far, we have focused on competition between rights holders, but there is a second dimension of competitive significance, namely competition among the CMOs themselves. Now, the whole idea of CMO competition may seem paradoxical to some. After all, in many jurisdictions, there is only one CMO responsible for a particular type of copyrighted work, and one might well imagine that in some markets, at least, multiple providers might be inefficient.[17] The importance of competition in the provision of distribution services has recently come to the fore in the context of the Google Books settlement.

The basic concern that has been expressed is that the settlement agreement gives Google a kind of de facto exclusivity over the digital distribution of books, particularly of orphan works. Let us assume for purposes of this discussion that such de facto exclusivity as to orphan works would confer market power upon Google. That is a controversial assumption because this is an unproven market. The Justice Department, which has filed objections to both the original settlement and the revised ("amended") settlement, worries that Google gets a benefit in the settlement that possible later entrants—Amazon, let's say, or Microsoft—cannot easily replicate. As the brief explains:

13. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415–16 (2004).

14. *Id.* at 401–05.

15. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 18 (1979).

16. *Id.* at 23–24.

17. *See generally* Daniel Gervais, *Introduction* to COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 2 (summarizing different CMO regimes in various countries).

> Google's competitors are unlikely to be able to obtain comparable rights independently. They would face the same problems—identifying and negotiating with millions of unknown individual rightsholders—that Google is seeking to surmount through the Settlement Proposal. Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement.[18]

In other words, a firm like Amazon might find it hard, perhaps impossible, to repeat this unusual sequence of events that resulted in a settlement.

This view misses something significant from an antitrust perspective. It leaves out the fact that Google made substantial investments, and undertook substantial risk, to create, in coordination with other parties, this new and innovative good. Absent this settlement, there would be no access to orphan works (at least for now). To be sure, this alchemy of settlement might be difficult for others to repeat, but that alone is not a sufficient basis for antitrust liability. Unless it can be shown that Google's actions raised the costs of rivals, there is no antitrust violation.

That claim, then, seems like a stretch as a matter of antitrust policy. And it is worth noting in this connection that the scope of the district court's review of the settlement is not an antitrust analysis to begin with. The review is an evaluation of the settlement of a class action, in which the underlying suit is not itself about antitrust. At first glance, it might seem as though the district judge has ample authority to evaluate the settlement on antitrust grounds. After all, he is bound to determine whether the settlement is "fair, reasonable, and adequate," in the language of the relevant Federal Rule of Civil Procedure, a phrase that sounds very broad.[19] But in fact, the point of that rule is to make sure that the settlement is fair, reasonable and adequate *for class members*, not for consumers. And although there are statements in some cases that call for the court to pay attention to the public interest or the rights of third parties, upon closer examination, those cases stop well short of injecting an antitrust analysis that serves to vindicate the interests of nonparties.[20]

Let me conclude with a final thought about the scope of antitrust liability amidst technological change. I have described one limitation of antitrust analyses of CMOs, which is that a blanket license may create a consumer benefit that would otherwise not exist, and which in turn provides some breathing space for collective pricing. When ASCAP first opened for business, these bundles were convenient and efficient, and the alternative of individualized, on-the-fly negotiations must have seemed hopelessly cost prohibitive.

Today, I wonder if that is still the case. That is, the technology for disaggregation and individualized pricing is much more readily available than it once was, certainly at the time of the original 1941 decree and even as recently as the 2001 second amended final judgment. That raises the question of whether the

18. United States Initial Brief, *supra* note 8, at 23–24.
19. FED. R. CIV. P. 23(e)(2).
20. For a further analysis, see Hemphill, *supra* note 2, at 699–702.

procompetitive argument for blanket prices, which was so important to the Supreme Court in its antitrust evaluation of ASCAP, might be less powerful today, and if so, whether a future court might be less forgiving about the unavailability of a la carte pricing.