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A Reading On Antitrust Issues With Google Books

Law360, New York (July 31, 2009) -- Much has been written recently about the U.S. Department of Justice Antitrust Division's investigation of a proposed settlement of copyright infringement lawsuits in which book authors and publishers sued Google Inc. for its efforts to digitize books for online searching and reading.

Google should be applauded for its ambitious efforts to digitize books. By creating an enormous digital library of online books, Google's efforts could transform research, vastly improve access to out of print works and reduce costs for individuals, schools, libraries and other organizations that may no longer have to purchase and store books in hard copy.

The proposed settlement would allow Google to market its growing database of online books. For these reasons, consumers stand to benefit greatly from the settlement. However, the settlement as currently structured raises competitive concerns that the DOJ will need to address.

First, the proposed settlement provides for collective price setting among potentially competing copyright owners for consumer purchases of online books and could facilitate collusion through the creation of a Book Rights Registry ("BRR"), which represents participating copyright owners.

While copyright owners are free to set the prices of their books individually, they may instead designate Google to set the price using an algorithm designed to find the "optimal price" for each book that will "maximize revenue" for each copyright holder.

The settlement provides that initially about 80 percent of the digital books subject to algorithm pricing will sell for \$9.99 or less, while 5 percent will sell for \$29.99. While this does not sound oppressive, we simply do not know whether competitive pricing among copyright holders would lead to lower overall prices.

Moreover, these figures may be renegotiated and the parties have little apparent incentive to keep prices low. More to the point, the Department of Justice will have to determine whether this collective price setting is justified by legitimate pro-competitive benefits that would offset the risks of supracompetitive prices.

To be sure, some form of default pricing system is necessary for “orphan works” — because by definition the copyright holder is not known or locatable — but the price for those works should be set low because few “orphan” copyright holders are likely to come forward to collect any fees (which will be held for five years by the BRR).

Second, the settlement may also lead to unnecessarily high prices for the subscription service to the entire digital library that Google will sell to libraries, schools and other institutions, although at least here the pricing formula specifies that realizing “broad access to the books by the public” is one of its goals (the other being the “realization of revenue at market rates”) and separate pricing by copyright holders is not feasible.

Moreover, Google’s incentive to increase the number of users of its subscription service in order to increase its advertising revenue may help keep prices in line. Under the proposed settlement, the BRR also has discretion to negotiate with Google the copyright prices for future products or revenue models.

As an organization that divides revenues between, and sets rates for, competing copyright owners, the BRR could be used as a mechanism to fix prices and other competitively sensitive terms on behalf of the copyright owners.

The best way to protect against supracompetitive pricing is to ensure that the settlement creates no barriers to entry to a competing provider. However, the settlement may create disincentives for book authors and publishers to license their copyrights through the BRR to any potential competitor of Google that seeks to create a competing database of online books.

Authors and publishers will share in any monopoly rents from the subscription service (indeed will receive close to two thirds of the revenue), as well as revenues from search ads, and may be reluctant to create a competitor to Google that would drive prices down.

Moreover, the settlement may give Google a de facto monopoly over the rights to digitize and display “orphan works” published prior to Jan. 5, 2009. “Orphan works” have no known or locatable copyright owner with whom a Google competitor can negotiate a license.

Because orphan works could number in the millions (Google claims otherwise), any relatively complete database of online books would likely need to include orphan works.

Google is in a position to obtain rights over these orphan works only because the proposed class of copyright owners that sued Google purports to include orphan work

owners and, if the settlement is approved, will bind all orphan work owners going forward.

A Google competitor would not have this type of certainty. While a competitor could theoretically follow the same path as Google, the uncertainty of litigation with orphan work copyright holders (including what settlement terms they would agree to) may deter entry.

The problem is exacerbated by the settlement's most-favored-nation clause, which, under some circumstances, requires the BRR to give Google any better terms copyright holders offer a competitor in a licensing deal that includes orphan works.

Although we take no position on how these concerns should ultimately be addressed, we believe that the DOJ is ideally suited to weigh beneficial aspects of the proposed settlement against potential harms and we strongly support the agency's consideration of the settlement and possible intervention.

The DOJ can use its investigative powers to analyze the settlement, taking into consideration the various stakeholders who have voiced concern about the settlement, including Microsoft, the Internet Archive and numerous academics. Further, the DOJ's perspective will reflect the interests of the public as a whole and not just the interests of an individual party or stakeholder.

The DOJ also has experience in related matters involving the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI").

Similar to the BRR's responsibilities on behalf of book copyright owners, ASCAP and BMI pool the rights of music copyright owners and negotiate licensing terms with industry stakeholders that want to play the copyrighted works.

The difficulty of stakeholders negotiating with every music copyright holder makes collective licensing through ASCAP and BMI a highly useful mechanism that vastly increases access to music, but also carries anti-competitive risks that mirror those presented by the Google Books settlement.

The DOJ has addressed these risks through a series of consent decrees with ASCAP and BMI that have been in effect since 1941. The consent decrees have imposed various obligations on ASCAP and BMI, which the DOJ has updated several times in response to changing technologies and concerns.

The decrees provide for DOJ monitoring, including, for example, a requirement that certain changes to the formulas and rules ASCAP uses to allocate revenues to members be filed with or approved by the DOJ. Similar such monitoring of the Google Books settlement and of the copyright owners represented by the BRR may be appropriate here.

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