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Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition

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Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition

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I. INTRODUCTION

When Google undertook the seemingly insurmountable task of digitizing all the world's books, it sought to create a universally searchable database that could potentially allow any user, anywhere in the world, to access those books. In today's technological age, this is a noble goal—nearly gone are the days when people expect to check out hard copies of books for their research, and most journal and newspaper articles can be obtained electronically. Geographic availability should not constrain one's ability to acquire useful information from books, and Google's project moves our global information culture closer to the ideal of universally accessible electronic information.

In pursuit of its goal, Google secured agreements with some of the world's largest libraries, including those of Stanford University and the University of Michigan. As it did so, Google began indiscriminately scanning as many books as it could get its hands on. Regardless of whether or not books were in the public domain, had expired copyrights, or were currently under copyright; the book digitization process moved forward with full force within Google's partner libraries through its Library Project.¹

As a result, Google ruffled more than a few feathers within the author and publisher community. Further exacerbating the problem was Google's unwillingness to productively negotiate with the authors or publishers—according to at least one publishing CEO, “[t]hey had a holier-than-thou attitude that hasn't done them any favors.”² Unsurprisingly, lawsuits followed. The first lawsuit was filed against Google by the Authors Guild in September 2005 claiming “massive copyright infringement,” and, in particular, expressing concern over Google's agreement with the University of Michigan to scan its library's approximately seven million volumes.³ The publishers—including McGraw-Hill, Pearson Education, Penguin, Simon & Schuster, and John Wiley & Sons—filed another infringement suit about a month later.⁴

In October 2008, the authors, publishers, and Google reached a preliminary settlement agreement to dispose of both lawsuits (the “Settlement”).⁵ After the Department of Justice (DOJ) criticized the Settlement on both procedural due process and antitrust grounds, however, it was revised and an Amended Settlement was submitted to the court in November 2009 (the “Amended Settlement”).⁶ The

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1. In Google's Library Project, Google partners with libraries to scan both public domain and in-copyright books. See *Perspectives: What's the Issue?*, GOOGLE BOOKS, <http://books.google.com/googlebooks/issue.html> (last visited Aug. 2, 2010).
 2. RANDALL STROSS, *PLANET GOOGLE: ONE COMPANY'S AUDACIOUS PLAN TO ORGANIZE EVERYTHING WE KNOW* 99 (2008).
 3. Class Action Complaint at 2, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-JES (S.D.N.Y. Sept. 20, 2005), available at <http://thepublicindex.org/docs/complaint/authors.pdf>.
 4. STROSS, *supra* note 2, at 100.
 5. Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-JES (S.D.N.Y. Oct. 28, 2008) [hereinafter Settlement Agreement], available at <http://thepublicindex.org/documents.responses>.
 6. Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009) [hereinafter Amended Settlement Agreement], available at http://thepublicindex.org/docs/amended_settlement/Amended-Settlement-Agreement.pdf; Statement of Interest of the United

Settlement seeks to balance the private interests of authors and publishers with the public interest. The Settlement serves the public interest—and, indeed, can be construed as pro-competitive—to the extent that it expands public accessibility of digitized books that had not previously existed in digital form.⁷ The Settlement also gives authors and publishers continued incentives to produce books by providing them with their deserved slices of the revenue pie when such books are digitized. While these public interests may be served by the Settlement to some degree, however, the Settlement continues to raise long-term anti-competitive concerns. Google’s spokesman has made claims to the contrary, arguing that “[t]he [Settlement] [A]greement was structured in a way specifically to encourage competition.”⁸ Allan Adler, the vice president for legal and government affairs for the Association of American Publishers (AAP), has made similar arguments, stating that antitrust objections to the Settlement will subside once “the confusion” about the Settlement is clarified.⁹ Yet, at least initially, neither Google nor the AAP provided thorough justifications explaining *why* the Settlement is pro-competitive.¹⁰ And, no matter how pro-competitive the Settlement is alleged to be by Google and others,¹¹ the Settlement can be vastly improved to further promote competition.

This article discusses four antitrust concerns that arise from the Settlement. The first concern—which is per se illegal under the Sherman Act—is the horizontal

States of America Regarding Proposed Class Settlement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Sept. 18, 2009) [hereinafter DOJ Statement], *available at* <http://www.justice.gov/atr/cases/ea250100/250180.pdf>. Please note that, I refer to both the original settlement (“Settlement”) and the Amended Settlement. In light of the changes to the Settlement, I use these terms interchangeably. When I use the term Amended Settlement, however, I do so to emphasize changes made to the original Settlement document.

7. Supporters of the Settlement Agreement, such as Einer Elhauge, argue that it is pro-competitive because it expands output for both out-of-copyright and in-copyright books (both claimed and unclaimed). *See* Einer Elhauge, *Why the Google Books Settlement is Procompetitive* (Harvard Law Sch. John M. Olin Center for Law, Econ. & Business Discussion Paper Series No. 646, 2009), *available at* http://lsr.nellco.org/harvard_olin/629.
8. Juan Carlos Perez, *Google Pushes Back in Tussle Over Book Search Settlement*, PCWORLD (Apr. 29, 2009), <http://www.pcworld.com/printable/article/id,164094/printable.html>.
9. *Id.*
10. *Cf.* Adam Smith, *Google Book Search Settlement Will Expand Access*, GOOGLE PUB. POLICY BLOG (Apr. 29, 2009, 10:30 AM), <http://googlepublicpolicy.blogspot.com/2009/04/google-book-search-settlement-will.html> (arguing that the Google Book Search settlement will expand access to books and questions about the settlement will be addressed at a later date). Shortly before the Settlement fairness hearing, Google filed a brief with the court explaining why it believes that the settlement is pro-competitive. *See* Brief of Google, Inc. In Support of Motion for Final Approval of Amended Settlement Agreement at 28–51, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Feb. 11, 2010) [hereinafter Google Brief]. Most of these arguments track the arguments made by Professor Einer Elhauge of Harvard. *See* Elhauge, *supra* note 7.
11. For example, both Google and Elhauge argue that the settlement expands output, and, but for the settlement, many digital books would be unavailable to consumers. *See* Google Brief, *supra* note 10; Elhauge, *supra* note 7.

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price-fixing¹² of orphan works¹³ that will be authorized by the Settlement. Second, the institutional subscription arrangement in the Settlement leaves the door open to predatory pricing schemes that create anti-competitive reliance interests.¹⁴ Third, the Settlement could exacerbate collective action problems faced by Google's potential competitors in the digitized book market, strengthening Google's monopoly position once the Settlement is formally approved. Finally, to the extent that the Google Book Search product can be integrated with other pre-existing Google features under the Settlement, it promotes anti-competitive tying¹⁵ that unjustly improves Google's monopoly position.¹⁶

The antitrust analysis in this article is conducted from a risk-averse perspective—the antitrust issues presented here pose different levels of concern, and some take priority over others. Although legal scholars have addressed some of these antitrust concerns,¹⁷ the overall scope of all of these antitrust risks has not been thoroughly discussed in a single examination. Additionally, this article explicitly presents a series of public interest principles that should guide the court and the DOJ as they work with Google, the Authors Guild, and the AAP in approving a final agreement. I argue that a rule of reason inquiry based on economic efficiency can and should be

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12. Horizontal price-fixing is defined as a conspiracy among a group of suppliers to agree on the prices that they charge. *See* ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 173 (2d ed. 2009).
 13. *See* U.S. COPYRIGHT OFFICE, *REPORT ON ORPHAN WORKS 1* (2006), *available at* <http://www.copyright.gov/orphan/orphan-report.pdf>. These works are sometimes referred to as unclaimed books, as these are books under copyright that have not been claimed by the copyright owner. *Id.*
 14. Predatory pricing schemes, as discussed in this context, are efforts in which low prices are charged initially to ensure that a firm may charge large monopoly prices later on as a result of a substantial lessening of competition. *See, e.g.*, BLAIR & KASERMAN, *supra* note 12, at 160 (discussing how the invalidity of predatory pricing schemes hinges on the possibility of recouping losses after initially charging a low price to entice consumers).
 15. “A tying arrangement exists when a seller of one product, *A*, requires its customers to purchase from it a second product, *B*, as well.” *Id.* at 391. In Part IV.D, I argue that Google has used Google Web Search as a tying product to promote Google Book Search as a tied product.
 16. *See infra* Part IV.D. Throughout this article, I will refer to Google Book Search by its full name and “GBS” interchangeably. Google Book Search, for example, is tied to Google Web Search. I contend that Google Book Search should not be able to attain a superior market position by sheer virtue of its connection to Google Web Search. Although Google indisputably earned its strong market position in the competitive search industry, this should not excessively limit potential competitors' ability to compete in book search. Google's ability to rank and control search results may have an impact on this competitive ability.
 17. *See, e.g.*, James Grimmelmann, *How To Fix the Google Book Search Settlement*, 12 J. INTERNET L. 1, 1 (Apr. 2009) (addressing antitrust concerns about the settlement's Most Favored Nation (MFN) clause and the possibility of cartel-like price-fixing); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* (Univ. of Chicago Law & Econ., Olin Working Paper No. 462, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387582 (discussing the orphan-works monopoly problem, the MFN clause, and antitrust immunity); Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Booksearch Settlement*, O'REILLY RADAR (Apr. 17, 2009, 1:35 AM), <http://radar.oreilly.com/print/35891.html> (highlighting monopoly concerns and the orphan works problem).

guided by these principles to some extent.¹⁸ Finally, I argue that the discussion of the antitrust issues of the Settlement should largely be framed in terms of a market for fully searchable, digitized books. Others, including Google, have failed to frame the market in this manner.¹⁹ Yet it is important that awareness of these antitrust concerns continues to increase. The opt-out period for the lawsuit has already ended.²⁰ The fairness hearing has already occurred,²¹ and approval of the Settlement is likely.²² While the DOJ has been engaged in an inquiry of the Settlement since April 2009²³—and has already issued statements expressing its concerns with both the original Settlement and the Amended Settlement²⁴—it has yet to complete this inquiry and may discover additional antitrust problems as time progresses.²⁵

This article therefore encourages continued DOJ oversight of the Settlement—both prior to and after its approval—so that it may be tailored and modified as necessary to represent the public interest as well as the interests of third parties who may wish to partake in book digitization moving forward. Although I speculate on the nature of the digital book market, the market for these books is still evolving, and so will a vision for what ideal competition should look like in that market.

A major theme of this article is that, when such significant public interests are implicated, the DOJ should assert its oversight authority in addressing any potential concerns of the Settlement. In his recent article arguing for a well-defined public interest standard in the regulation of broadband internet technology, Anthony Varona notes that “[t]he role of government in relation to the Internet now is largely a reactive

18. See Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement at 28, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sep. 8, 2009) [hereinafter *Open Book Alliance Memorandum*] (citing *In re Masters Mates & Pilots Pension Plan & IRAP Litigation*, 957 F.2d 1020, 1025–26 (2d Cir. 1992)), available at http://thepublicindex.org/docs/amended_settlement/Open_Book_Alliance.pdf.

19. See Google Brief, *supra* note 10, at 31–32 (implying that unclaimed, “orphan books” may not have significant value to consumers to the extent that they are out of print today). The real value to these out of print books, I argue, is their searchability and utility for consumptive research purposes; thus the fact that these books are out of print and individuals fail to purchase full copies of these books is irrelevant to the market competition inquiry.

20. The opt-out period for the Amended Settlement expired on January 28, 2010. Order Granting Preliminary Approval of Amended Settlement Agreement at 5, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Nov. 19, 2009).

21. The fairness hearing occurred on February 18, 2010. Transcript of Fairness Hearing, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Feb. 18, 2010) [hereinafter *Transcript of Fairness Hearing*], available at http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf.

22. Such hearings usually focus primarily on a settlement’s impact on the direct parties involved in the litigation, not on the broader consumers that may be affected by such settlements. See Picker, *supra* note 17, at 4–5.

23. See Miguel Helft, *Justice Department Opens Antitrust Inquiry Into Google Books Deal*, N.Y. TIMES, Apr. 28, 2009, <http://www.nytimes.com/2009/04/29/technology/internet/29google.html>.

24. See DOJ Statement, *supra* note 6, at 16.

25. See Transcript of Fairness Hearing, *supra* note 21, at 128 (stating that the antitrust investigation is ongoing).

one,” and that the federal government has maintained “a nonregulatory orientation toward the internet.”²⁶ Similarly, a lack of proactive intervention on the front-end forced reactive regulation during the BMI and ASCAP licensing controversies. This deferential, wait-and-see approach should not be taken in relation to a settlement of this importance. The Settlement’s failure to reduce barriers to entry should be as big of a concern as an affirmative creation of those barriers to entry.

If the DOJ fails to thoroughly and continually address the antitrust implications of the Settlement Agreement, public accessibility to digital books will be limited, innovative digital book solutions will be stunted, and the public will not have an adequate stake in the future of digital books. Meanwhile, Google will be able to maintain a relative monopoly in a market for fully searchable, digitized books with minimal threat to its market position. Google will be able to fix prices and be profitable, create its own innovative solutions for its platform to the possible exclusion of interested third party vendors’ innovations, and integrate Google Book Search into its other services (such as Google Web Search) in a manner that stifles competition. Given the seriousness of these risks, corrective regulation would be wasteful when there is an opportunity to correct potential legal harms before the full-scale implementation of the Settlement Agreement by modifying its terms. The expected costs of the Settlement—the potential future costs of antitrust problems multiplied by the likelihood of these problems occurring—are greater than the expected benefits of the Settlement in its current form.

This article proceeds in the following manner. Part II presents normative public interest principles. These principles are meant to guide the analysis in the rest of the article, and I discuss why these principles should be considered as the DOJ continues to pursue its antitrust inquiry. Part III then proposes a possible definition of the market for digitized books. Interestingly, no other discussion of this Settlement has attempted to define the relatively new market that Google is about to enter, and a market definition is crucial to any antitrust inquiry under the rule of reason because, depending on one’s framing of market definition, antitrust suspicions may vary substantially. Part IV then discusses each of the four antitrust concerns in further depth. Part V provides additional reasons—both doctrinal and normative—why the Settlement remains unreasonable and potentially anti-competitive in its current form. Part VI concludes by arguing that continued oversight and scrutiny of the Settlement will be necessary to promote access to knowledge, competition, and innovation in the emerging digital book market.

II. THE PUBLIC INTEREST PRINCIPLES AT STAKE

This discussion outlines the normative public interest principles that should govern analysis of the Google Book Search Settlement. A settlement agreement rarely affects the future of such large amounts of information and, if we fail to strictly scrutinize its implications early on, there is a risk that we will have to go back and repair a damaged system. While many of the antitrust concerns I discuss are

26. Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 7 (2009).

problematic independent of these public interest principles, it is crucial that the DOJ understands exactly what is at stake. The DOJ signaled the importance of public interest principles in its initial filing, up to and including the principle that any settlement modifications should promote broad access to knowledge.²⁷ An anti-competitive market for digitized books has the potential to undermine each of these principles, which now follow.

A. Information Should be Broadly Accessible

Given that virtually every person in the United States is able to check out and use hard copy books for free within public libraries, we operate in a society that is highly principled in providing access to knowledge. However, traditional print libraries do not adequately disseminate knowledge to all parts of the United States—some citizens live near libraries that have very minimal print resources, while others live near libraries that have hundreds of thousands—possibly millions—of volumes. Meanwhile, some may live substantially further from their libraries than others, or have disabilities that make it difficult for them to physically travel to a library.

We should view digitized books as a remedy for this unequal access to knowledge. And, although the Settlement will allow both people with disabilities and people who live in rural areas broader access to library materials than they have under the current system, it could do better.²⁸ Provisions are already in the Settlement to increase access to the disabled,²⁹ but the Settlement can do much better to facilitate access in rural regions. Remote access to the database through public libraries, for example, could be an invaluable resource to library patrons who may have a difficult time going to libraries in person. Yet, absent approval by Google and the Settlement-created Book Rights Registry,³⁰ public libraries, government, and K–12 schools will

27. See, e.g., DOJ Statement, *supra* note 6, at 2 (“As a threshold matter, the central difficulty that the Proposed Settlement seeks to overcome—the inaccessibility of many works due to the lack of clarity about copyright ownership and copyright status—is a matter of public, not merely private, concern.”). In addition,

Google has made clear in the past that it started this project on the premise that anyone, anywhere, anytime, should have the tools to explore the great works of history and culture. However the Proposed Settlement is modified by the parties, this approach should continue to be at its heart.

Id. at 26.

28. *Cf. id.*

In the Proposed Settlement, Google has committed to providing accessible formats and comparable user experience to individuals with print disabilities—and if these goals are not realized within five years of the agreement, Google will be required to locate an alternative provider who can accomplish these accommodations. Along with many in the disability community, the United States strongly supports such provisions.

Id.

29. Amended Settlement Agreement, *supra* note 6, §§ 1.114, 3.3(d), 7.2(b)(ii).

30. See Settlement Agreement, *supra* note 5, art. VI. The Book Rights Registry will be discussed throughout this paper. The Registry is a distinct entity from Google created by the settlement that is responsible for collecting the revenues that are to be distributed to authors and publishers per terms of the settlement. The Registry will have a board of directors comprised of representatives of both the authors and

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be denied from gaining remote access³¹ to the GBS database—even if such public institutions were willing to pay for it.³² Further, although the Settlement provides for a *free* public access service to the GBS database for public libraries, it only authorizes one free terminal *per building*.³³ Thus, from a practical standpoint, authentic public access to the GBS service would require libraries to purchase additional seat licenses.³⁴ If public libraries wanted to provide additional terminals, however, the level of accessibility would hinge on the institutional pricing structures that are faced by these institutions.

The public's interests in affordability and accessibility are best served by a competitive market. As noted by the government, "Google has made clear in the past that it started this project on the premise that anyone, anywhere, anytime should have the tools to explore the great works of history and culture."³⁵ If it truly stands by that principle, public institutions should not be priced out of the market, nor should they receive access to "disabled" versions of the GBS database.³⁶ In addition, the Settlement should not make it unfairly difficult for potential competitors to offer less expensive digitized books to public institutions than Google. Finally, the Settlement could be expanded to provide default public access to other entities, such as K–12 schools, that would greatly benefit from digital book accessibility.³⁷ Under the current settlement these schools do not even receive the single terminal that the public libraries get.

publishers, and it will have substantial power to make significant decisions relating to pricing and licensing of digitized books. The Registry is defined and discussed in Article VI of the Settlement. *Id.*

31. Remote access could be conferred, for example, through the use of virtual private networking.
32. Settlement Agreement, *supra* note 5, § 4.1(a)(iv)(3)–(5).
33. *Id.* § 4.8(a)(i)(3). The Amended Settlement, however, does allow for the possibility of more than one terminal to be authorized within public libraries. Amended Settlement Agreement, *supra* note 6, § 4.8(a)(i)(3). ("[T]he Registry may authorize one or more additional terminals in any Library Building under such further conditions at [sic] may establish, acting in its sole discretion and in furtherance of the interests of all rightsholders.")
34. If the settlement allowed for additional seat licenses, libraries could have additional terminals within the library where users could access the Google Book Search database. If only one "public access" seat license is provided, libraries would need to purchase additional seat licenses to increase accessibility.
35. DOJ Statement, *supra* note 6, at 26.
36. In a conversation with Frank Pasquale, Schering-Plough Professor in Healthcare Regulation and Enforcement at Seton Hall Law School and Visiting Professor of Law at Yale Law School, he noted that the Seton Hall Law Library has had to reduce its subscriptions to electronic services such as LexisNexis and Westlaw, and that smaller law schools may be forced into purchasing "disabled" versions of research databases that are of inferior quality to the standard offerings.
37. This may not be viewed as a problem the Settlement should solve. However, to the extent that the Settlement will raise barriers to entry into the digital book market (as I argue), this is a niche area of the market that may have been covered by digital book providers absent the Settlement. If we adhere to broad consumer and knowledge accessibility principles in our analysis of the Settlement, the competitive market we envision should provide access within these market segments.

B. The Public is Entitled to Highly-Innovative Book Digitization Solutions

Google has undertaken significant efforts in producing its digital book database; to the extent that Google has independently generated its own innovative solution, it should be entitled to its share of the market.³⁸ The Settlement should not, however, preclude or stifle potential innovations in the book digitization market. To the extent that the Settlement promotes monopolistic behavior and limits competition, it may stunt certain niche innovations and value-added services. While Google has created an innovative book-scanning method, for example, we cannot be sure that Google's optical character recognition (OCR) would produce more accurate texts than the next scanning innovation.³⁹ Furthermore, while the Google Search algorithms may be superior for web or other internet-based searches, they may not be superior for book searches and other companies may be in a better position to provide these resources. Finally, third parties may be able to provide digital book translation services more efficiently. While the Settlement will not preclude these innovations from being *created*, a large Google monopoly may provide disincentives for innovators to integrate their technologies into a digitized book search platform. In particular, if the Settlement codifies an unreasonable first mover advantage for Google, there may be significant barriers to entry that prevent competitors from providing these innovations. In this world, the market may be forced to settle for subpar scans, suboptimal search results, or poorly translated works.

Although the Settlement contemplates a "research corpus" of digitized books that can be used for non-consumptive research,⁴⁰ both Google and the Book Rights Registry have the power to restrict for-profit entities from undertaking this type of research using the research corpus.⁴¹ Whether or not Google should be forced to expand rights to research on the corpus is debatable. One can imagine, however, a scenario in which Google would be willing to provide a *slightly inferior* language translation service to customers to the exclusion of another translation service that would have been created through research on the corpus, but for Google's restrictions. Google may do this because it is interested in bolstering its innovative reputation in

38. *But see* Open Book Alliance Memorandum, *supra* note 18 (arguing that Google did not obtain its current market position entirely via its strong business acumen or innovative prowess, but rather by misrepresenting its true intentions in a manner that allowed it to obtain a head start in the book digitization market).

39. *See* Maureen Clements, *The Secret of Google's Book Scanning Machine Revealed*, NPR (Apr. 30, 2009, 10:31 AM), http://www.npr.org/blogs/library/2009/04/the_granting_of_patent_7508978.html?sc=fb&cc=fp.

40. Non-consumptive research is research that does not use the substantive content of scanned books in the GBS database to make research findings. Settlement Agreement, *supra* note 5, § 1.90. For example, researchers could use the GBS database to perform research on translation, indexing, and search functionality without drawing any conclusions based on the substantive content of the scanned text. The scanned texts are merely used to optimize the non-consumptive functionality of the GBS database. Consumptive research, on the other hand, would involve the explicit use of the substantive content of scanned books to draw conclusions. For example, one may want to use the content of scanned books discussing Abraham Lincoln to write a biographical report on him.

41. *See id.* § 1.121.

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the book search market. By preventing competitors from producing niche innovations to the book search platform, Google could create the false impression that it is the better innovator in the book search field than it actually is, thus further improving its monopoly position. If Google had driven prior innovations in the book search market, some may argue that Google may be entitled to that power.⁴² Google is not entitled, however, to a settlement that stifles competition so much so that third parties are significantly limited in their abilities to produce profitable innovations that could benefit the public, the authors, and the publishers.⁴³

C. The Public's Role in Shaping the Future of Digital Information

The terms of the Settlement will set the stage for the ways in which the public will be able to access digital books. Given that Google will be the primary provider of digitized books when the Settlement is approved, Google and the Book Rights Registry will—at least initially—have extensive authority over how the information in digitized books is distributed and priced. Meanwhile, because of the probable lack of competition in the digitized book market after the Settlement's effective date, consumers will have little ability to express their preferences through the market. Thus, assuming that few entities are in the market for digitized books, the public should have some say in how digitized books are distributed and priced—either through the Book Rights Registry or some other institution. Because the Settlement also contemplates the censorship of certain books within the database, the public should understand how the Settlement may limit their ability to access certain digitized books. Therefore, the public should have a stake in efforts to find digital book providers for those works. If the anti-competitive effects of the Settlement Agreement are substantially reduced, however, institutional measures will be less necessary, because a settlement agreement that promotes free competition from the outset may require less long-term regulation.

III. A MARKET FOR FULLY SEARCHABLE, DIGITIZED BOOKS

Before applying these three principles to an antitrust analysis, however, it is important to define the relevant market in which Google Book Search operates. To commit an antitrust violation, a defendant must possess a dominant share of the

42. One possible counter-argument is that due to the initial risk Google took in creating the GBS database and the corresponding gains in efficiency that have resulted from its success, some future efficiency losses may be acceptable.

43. A Google monopoly could create dynamic incentives for larger companies to try to obtain the entire book digitization and search markets, but to the extent that such a market relies on the licensing of the entire corpus of digitized books (including orphan works), the Settlement will not provide opportunities to license the full store of books that Google will be offering. Some, such as Einer Elhauge, argue that a competitor could always seek the class action mechanism to obtain a similar deal. *See* Elhauge, *supra* note 7. But this would not only be an inefficient way to obtain a pro-competitive outcome, it would also validate Google's, the Authors', and the Publishers' failure to admit that they were contemplating a business deal that would open up millions of copyrighted works to digitization. *See* DOJ Statement, *supra* note 6 and accompanying text.

relevant market and it must be shown that there are significant barriers to entry into that market.⁴⁴ As I discuss in forthcoming sections, Google currently has a dominant share of the *relevant market* and the Settlement will only reinforce that share. Before that analysis is possible, however, the *relevant market* must be defined. This Part argues that the *relevant market* should be defined as the market for *fully searchable, digitized books*. I argue that Google currently has few, if any, competitors in this distinct market,⁴⁵ but that a number of companies have the ability to enter this market in the coming years.

A. Defining Google Book Search Products

The instrumental point in constructing a definition of the relevant market is that “the relevant market should not be a set of products, which ‘resemble’ each other on the basis of some characteristics but rather the set of products . . . that exercise some competitive constraint on each other.”⁴⁶ Products that exercise competitive constraints on one another, for all intents and purposes, are products that are viewed by consumers as substitutes for one another. Thus, to the extent that we can find products that are substitutes for Google’s offerings of digital books within its book search platform, the market is so defined. However, this substitutability is not purely determined by consumers from the demand side of the market.⁴⁷ Competitors that do not currently offer a substitutable product may nevertheless have the ability to compete in the market if they possess the supply-side ability to switch production rapidly.⁴⁸ Judge Posner has discussed the importance of the substitutability analysis in market definitions, and has criticized the DOJ for its failure to consider substitutes in production in its guidelines for determining market definitions.⁴⁹

It is important to distinguish between the different “products” that are implicated within the GBS Settlement. Consumers can exercise three distinct levels of purchasing power when they use GBS. At the lowest level (search), consumers perform a search using GBS to obtain book results that are relevant to various searches or queries. Although consumers do not directly pay money for these search queries, they effectively purchase these searches by supporting the advertisers who

44. *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

45. The closest competitor at this time (based on my market definition) is the Open Content Alliance’s (OCA) Internet Archive. However, the Internet Archive does not provide full-text searchability of its digitized books. The OCA is also not a for-profit competitor of Google, and it does not digitize copyrighted works itself, instead it provides a space, the Internet Archive, where contributed digitized materials are stored. See *About: What is Open Content Alliance?*, OPEN CONTENT ALLIANCE, <http://www.opencontentalliance.org/about/> (last visited Oct. 14, 2010); INTERNET ARCHIVE, <http://www.archive.org/> (last visited Oct. 14, 2010).

46. MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 102 (2004).

47. *Id.* at 103.

48. *Id.*

49. See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 131–32 (1976).

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pay Google to be featured in a “sponsored links” section on the right side of the book search results page.⁵⁰ At the next level (single purchase), individual consumers can purchase the rights to unfettered access to individual digital copies of books using the consumer purchase option.⁵¹ Finally, institutions can purchase access to broader collections of digitized books through an institutional purchase option (institutional subscriptions).⁵²

The unifying theme of these three purchasing options is that they result from Google’s ability to provide books that are not only digitized, but also searchable. The value Google is providing is via (1) its creation of a large digitized book universe that previously did not exist, and (2) broad search functionality within this universe. Google is thus providing consumers with fully searchable, digitized versions of books. Although the GBS platform will likely improve readership of books through full-text downloads and print on demand options,⁵³ the primary benefit of this functionality is that it will allow its consumers to perform consumptive research—both for academic and personal purposes—using books.⁵⁴

B. Potential Substitutes for Google Book Search Products: A Demand Side Analysis

There are currently no direct substitutes for fully searchable, digitized books on the demand side of the market. The demand side of the market is comprised of products that are currently available for consumers to purchase. There are at least two reasons that current offerings are not effective substitutes for GBS products. First, printed books are only a substitute for GBS products to the extent that consumers can productively use Google’s consumer purchase option to read the full texts of books. It is doubtful that full-text readability will be the primary motivation for consumers to purchase digitized books as, under the Settlement, consumers who purchase books are not able to print out the full texts of books with a single print command.⁵⁵ In addition, although contemplated, the initial rollout of GBS will not allow for full PDF downloads of copyrighted books.⁵⁶ Thus, offline access to full-text copies of these books may not be possible. Admittedly, some may want to read the full-text of books online, but I would not predict that this will be a primary use

50. For example, this occurs when a customer clicks through to Amazon.com to purchase a full-text version of a book. Note that the click to Amazon.com from the Google Book Search functions in the market for fully searchable, digitized books. The purchase of the full-text book functions in the market for printed books, which is a distinct market.

51. See Settlement Agreement, *supra* note 5, § 4.2(a).

52. *Id.* §§ 1.74, 4.1(a)(i).

53. To the extent that the relevant market is a market for readers of entire book texts.

54. Note the distinction from non-consumptive research, discussed earlier, which is not concerned with an understanding of the substantive subject-matter content of books. See *supra* note 40 and accompanying text.

55. Settlement Agreement, *supra* note 5, § 4.2(a) (“[U]ser will not be able to select a page range that is greater than twenty (20) pages with one print command for printing.”).

56. The option for file downloads of PDF books is an “additional revenue model” that may be agreed to by Google and the Registry. Amended Settlement Agreement, *supra* note 6, § 4.7(b).

of GBS.⁵⁷ Print books, therefore, serve distinct purposes and are not very strong substitutes for GBS.

The second reason that printed books are not perfect substitutes for Google Books is more obvious—printed books almost completely lack search functionality. Although some printed books are indexed, most printed books are extremely difficult to search manually. When scholars use GBS for consumptive research purposes, they are looking for specific information on a topic of interest. Once they locate the needed information, it is somewhat realistic to predict that they will then go ahead and purchase the printed version of the book. This may once again lead one to believe that printed books could be construed as substitutes for GBS. However, this only illustrates that, in these cases, a search on Google Book Search is a *precondition* for the purchase of the printed books. When a consumer searches for a given book and proceeds to purchase that book from a sponsored retailer, the consumer is still “purchasing” a Google Book Search product (the “search” product).⁵⁸ In the case of substitute goods, purchase of one of the goods necessarily leads to non-purchase of the other good. Although some degree of competition can be inferred in these instances (to the extent that someone may be induced to purchase a printed book via a book search instead of a digital book through the consumer purchase option), Google is able to maintain its market dominance in the market for fully searchable, digitized books whether or not printed books are purchased subsequently.

The publishers of printed books, meanwhile, would not be considered strong competitors on the supply side of the equation primarily because they lack the ability to develop search algorithms. In addition, they have entered into this licensing agreement with Google, indicating that they do not deem the digitization of books to be an efficient undertaking from their standpoint. The publishers of these printed books lack the capability to develop search algorithms—this is why they were willing to vertically integrate with Google in the first place. Thus, it is reasonable to conclude that printed books should not be included in a market definition for GBS products.

C. Potential Substitutes for Google Books Search Products: A Supply Side Analysis

The supply side of the market is comprised of those producers in the marketplace who, while not producing the equivalent of GBS products right now, may have the production capacity to create analogous products in the future. From this side of the

57. This is more likely the case for digital, as opposed to digitized, books, which are stored on devices such as the Kindle or the Android. The market for readership of full-text readable books is distinguished from this analysis of a market for fully searchable, digitized books. Given current market conditions, I would argue that the market for full-text readable books is far more competitive. *See, e.g., infra* note 59 and accompanying text.

58. I must make one caveat here. One may infer pure substitutability where a user searches using GBS, locates a book, and then runs to the bookstore to purchase the printed book. Nevertheless, as previously discussed, every search on GBS supports Google's profitability to some extent. *See supra* note 50 and accompanying text. Usage rates of the GBS services are likely to play a role in Google's advertising revenue, which means bare GBS searches themselves are a form of purchasing power on the “search” level of purchasing power. *See supra* note 50 and accompanying text.

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market, the substitutability question becomes more difficult when we consider whether products like Amazon's Kindle and Sony's eReader should be included in the market definition.⁵⁹ The Kindle offers digitized books on a portable hardware platform.⁶⁰ Its purpose is primarily to enable its consumers to read books on a portable electronic device. Consumers can realize the benefits of storing several books on one small hardware device rather than face the burden of carrying several printed books. And, although the Kindle is searchable, consumers have to purchase and download books to their Kindle before they can search that book's full-text, whereas with GBS one can always search the full-text of *all books* in the GBS corpus regardless of past book purchases. Therefore, even though these books are presented in a digital form, the Kindle is not a strong substitute for the GBS product in its current form because it does not afford consumers with the broad consumptive research functionality of GBS.

A supply-side analysis of these products, however, indicates that Amazon, Sony, and other providers of digital book products could be viable competitors in a GBS digital book market in the future—i.e., a market for fully searchable, digitized books. Another viable competitor in this market may soon be Apple, which has recently launched its new iPad.⁶¹ Amazon is familiar with the basic tenets of search technology—it currently provides a searchable full-text database of some of its books on its website through its “Search Inside the Book” feature⁶²—and could easily integrate such features into the Kindle or other products. If Amazon were to undertake initiatives to improve its search technology and digitize more books, it could be an entrant to the GBS market—but it can only be a *viable* entrant to this market if it is able to achieve broad copyright licenses to digitize books.⁶³ For these reasons, among others, Amazon filed a brief expressing its continuing concerns that the Settlement is anti-competitive.⁶⁴

Other competitors on the supply side of the market for fully searchable, digitized books include current journal publishers and legal book publishers such as Westlaw and LexisNexis. Although these groups do not currently have a store of mainstream

59. The Amazon Kindle and Sony eReader are both portable reading devices that allow one to download and display full texts of books on an electronic platform. See *Kindle Store*, AMAZON, http://www.amazon.com/dp/B002Y27P3M/?tag=googhydr-20&hvadid=6105831667&ref=pd_sl_c3c2rm11h_b (last visited Oct. 11, 2010); see *Reader*, READERSTORE, <http://ebookstore.sony.com/reader/> (last visited Oct. 11, 2010).

60. See AMAZON, *supra* note 59.

61. See Ben Elowitz, *The Top Ten Reasons the Apple iPad Will Put the Amazon Kindle Out of Business*, WASHINGTON POST, Jan. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802947.html>.

62. *Search Inside the Book*, AMAZON, <http://www.amazon.com/Search-Inside-Book-Books/b?ie=UTF8&node=10197021> (last visited Sept. 2, 2010).

63. To be a viable competitor in the consumptive research market (the market for fully searchable, digitized books), however, one must have a broad range of searchable materials. Thus, the degree of competitive constraints that Amazon, Sony, and other possible competitors may place on Google is limited by copyright licensing restrictions.

64. Objection of Amazon.com, Inc. to Proposed Amended Settlement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Jan. 27, 2010) [hereinafter Amazon Objection], available at http://thepublicindex.org/docs/amended_settlement/amazon.pdf.

digital books, they do have the capacity to digitize (e.g., Westlaw scans and digitizes Federal and State Reporters, and journal companies create full text scans of their articles). Moreover, Westlaw and LexisNexis have been in the search business for a long time—they have developed search algorithms for consumptive research that, arguably, may be superior to Google's search algorithm.⁶⁵ Consequently, these companies are foreseeable entrants into the market for GBS.

Finally, search companies like Yahoo and Microsoft are potential entrants into this market. Their relevance to the GBS market is similar to Westlaw's and LexisNexis's relevance in that these companies have also created search algorithms (i.e., through the creation of internet search engines, and could potentially begin their own initiatives to scan and digitize books). Microsoft, in fact, has already attempted a book digitization project, but this project has since been suspended because (1) it, unlike Google, did not choose to risk lawsuits through unauthorized scans of in-copyright books and (2) it chose to refocus its efforts on pursuits it considered to be more profitable.⁶⁶ Nevertheless, Microsoft could still be a relevant player in the GBS market.

Libraries themselves are foreseeable competitors to GBS as well. Librarians have a unique understanding of indexing and searching within the library context; they are the ones who design the searchable card catalogs that help us locate printed books of relevance in our libraries. And, notwithstanding the fact that most libraries lack the technological infrastructure to digitally scan books on a large scale, these entities are in the best position to create these scans because they already have physical copies of books at their disposal.⁶⁷

From this analysis, the appropriate market definition for GBS is a market for fully searchable, digitized books. In their current form, books are generally used for two purposes—casual reading and consumptive research. In the past, consumptive research was limited by the capacity of indexed card catalogs and library databases: never before has an entity managed to digitize the full texts of books while providing search functionality in such a large, comprehensive database. Although some consumers may use GBS for casual reading, I predict that the vast majority of consumers will use GBS for consumptive research. To the extent that GBS is used as a research tool, current products will not impose competitive constraints on GBS. Google, by virtue of its pre-settlement adoption of the Google Books corpus, already

65. In the consumptive research context, Westlaw and LexisNexis may have superior search algorithms, for example, because their products allow one to search using more specialized connectors (for example, searching for terms that occur within X words of one another).

66. See Andrea L. Foster, *Microsoft's Book-Search Project Has a Surprise Ending*, THE CHRONICLE OF HIGHER EDUC. (June 6, 2008), <http://chronicle.com/article/Microsoft-s-Book-Search/2820>; Satya Nadella, *Book Search Winding Down*, BING BLOG (May 23, 2008, 2:45 AM), <http://www.bing.com/toolbox/blogs/search/archive/2008/05/23/book-search-winding-down.aspx>.

67. Libraries could, for example, obtain scanners from the DIY book scanner project. See Priya Ganapati, *DIY Book Scanners Turn Your Books Into Bytes*, WIRED: GADGET LAB BLOG (Dec. 11 2009, 7:42 PM), <http://www.wired.com/gadgetlab/2009/12/diy-book-scanner/>.

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has a significant share of this market, and not the 0% share that it currently asserts.⁶⁸ Given that several potential competitors to Google could enter this market in the coming years, we must scrutinize the Settlement's ability to foreclose competition and prevent entry by these competitors.

IV. OVERVIEW OF THE SETTLEMENT'S ANTI-COMPETITIVE EFFECTS

In addressing the considerations made by the DOJ when choosing whether to intervene in a particular licensing agreement, I consulted the *Antitrust Guidelines for the Licensing of Intellectual Property* (the "Guidelines"), which was jointly issued by the FTC and the DOJ in April, 1995.⁶⁹ While these *Guidelines* do not have the binding force of law, the agencies are unlikely to challenge a license agreement that complies with them, and courts often cite the *Guidelines* as persuasive authority on the antitrust legality of intellectual property licenses.⁷⁰

When determining the antitrust implications of a settlement, the main inquiry by the DOJ examines the extent to which a particular restraint has anti-competitive effects on the relevant market.⁷¹ According to the *Guidelines*, restraints in a licensing arrangement may harm competition if the overall effect is that the arrangement:

1. Facilitates market division or price-fixing,
2. Facilitates coordination to increase price or reduce output, or
3. Forecloses access to, or significantly raises the price of an important input in a relevant market.⁷²

By strengthening barriers to entry in the book digitization market and promoting a monopoly, I contend that the Settlement may facilitate all three of these competitive harms due to its extensive grant of market power to Google. In addition, the Settlement directly incorporates horizontal price-fixing across all authors and publishers involved in the Settlement, which is of particular concern with respect to orphan works that will be sold under the terms of the Settlement. The following subsections address each of the anti-competitive antitrust concerns in detail.

A. Horizontal Price-Fixing: Orphan Works and the Consumer Purchase Option

The most striking antitrust issue of the Settlement regards the ability to horizontally fix the prices of orphan (i.e., unclaimed) works as a result of the Settlement. Under current law, orphan works with existing copyrights—those for

68. Google Brief, *supra* note 10, at 31.

69. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995) [hereinafter GUIDELINES].

70. Adam Hemlock & Jennifer Wu, *U.S. Antitrust Implications of Patent Licensing*, 52 FED. LAWYER 39, 41 (June 2005).

71. GUIDELINES, *supra* note 69, § 3.1.

72. *Id.*

which the current copyright owner is unable to be located—are still bound by copyright protection.⁷³ Individuals who attempt to reproduce or use an orphan work are therefore subject to lawsuits by the copyright owner should he or she reemerge and assert his or her rights. However, Google will not be subject to these risks under the terms of the Settlement because the orphan works' copyright owners will be bound by the Settlement.⁷⁴ According to the final summary notice distributed to rightsholders on the Google Settlement's website, the Settlement "include[s] in-copyright written works, such as novels, textbooks, dissertations, and other writings, that were published or distributed in hard copy format on or before January 5, 2009."⁷⁵ Because the opt-out date of the Settlement has passed, the authors of these unclaimed orphan works have already opted-in to the Settlement's terms.⁷⁶ Thus, Google will be the only company able to sell these orphan works without fear of copyright infringement liability because it is the only company that would have court-granted immunity from such infringement claims once the settlement is approved.

The pricing of orphan works under the Settlement represents a form of horizontal price-fixing.⁷⁷ Under the Settlement, there are two options for the pricing of a book that is individually purchased—a specified price or a settlement-controlled price.⁷⁸ Although a copyright owner can provide a specified price for each work, the orphan copyright owners are not available to name these prices for orphan works. Thus, *all* orphan works will be subject to the Settlement's default settlement controlled price.⁷⁹ Google sets the default price using a pricing algorithm, and Google only has to

73. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), *available at* <http://www.copyright.gov/orphan/orphan-report.pdf> ("Even where the user has made a reasonably diligent effort to find the owner . . . the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.")

74. This is because the class bound by the settlement, by default, includes all in-copyright books published prior to January 5, 2009. *Notice Documents: Original Summary Notice*, GOOGLE BOOK SETTLEMENT, [hereinafter Google Settlement Notice], http://www.googlebooksettlement.com/t/view_summary_notice (last visited Sept. 14, 2010).

75. *Id.* A rightsholder is any owner of a digitized book (or insert) who *has not chosen to opt out of the settlement by September 4, 2009*. Because few, if any, parties opt out of settlements with opt-in defaults, rightsholders are likely to constitute a substantial portion of all authors. However, once bound by the terms of the settlement, the rightsholders must still claim their copyright rights through a registration process to receive their share of the revenue pie from the GBS services. After this registration process, the copyright owner is then designated as a registered rightsholder.

76. On the other hand, if the class action lawsuit required the class members to affirmatively opt in to the settlement, the orphan works issue would not be a problem. As Randal Picker states, "the change in default positions is everything" for the orphan work rightsholders. Picker, *supra* note 17, at 3.

77. Horizontal price-fixing occurs when competitors in a marketplace (in this case, individual authors and publishers) agree to set prices across an entire industry or marketplace. BLAIR & KASERMAN, *supra* note 12, at 173.

78. Settlement Agreement, *supra* note 5, § 4.2(b)(i).

79. *See id.* § 4.2(b)(iii).

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demonstrate to the Registry that the algorithm is “reasonable” in order to use it.⁸⁰ Because this algorithm will determine the price of each orphan work bound by the Settlement, it constitutes a form of horizontal price-fixing by the authors and publishers who control the Registry.⁸¹ As the DOJ noted in its filing, courts have held joint price-setting mechanisms and formulas to be per se illegal.⁸² And, despite the creation of an “unclaimed works fiduciary” under the Amended Settlement Agreement, it is unclear how independent this entity will be from the authors and publishers who may potentially control prices.⁸³ Thus, the creation of this entity may not fully constrain the authors’ and publishers’ ability to set default pricing schemes.

There is also a general concern about the default price setting formula that is agreed to by the authors and publishers. In response to the DOJ’s first filing, the Amended Settlement Agreement clarified this formula. In particular, it indicated that the price setting formula would be designed “to operate in a manner that simulates how an individual Book would be priced by a rightsholder of that Book acting in a manner to optimize revenues in respect of such Book *in a competitive market . . .*”⁸⁴ As the Open Book Alliance noted in its objection to the Amended Settlement Agreement, however, the industry-wide pricing formula is illegal no matter how it is crafted.⁸⁵ *Socony-Vacuum Oil Co.* stands for the proposition that prices are fixed even when “the prices paid or charged are to be set at a certain level or ascending or descending scales, [or] if they are to be uniform, or if by various formulae they are related to the market prices.”⁸⁶ Additionally, although the Registry has the right to verify the accuracy of the algorithm with third-party experts,⁸⁷ Google explicitly disclaims any obligation to have its algorithm verified by experts other than those chosen by the Registry.⁸⁸ Thus, if the formula is designed in an anti-competitive fashion that benefits most rightsholders with monopoly profits, there

80. *Id.* § 4.2(c)(ii)(2)–(4). The Registry only represents the Authors and Publishers. It is not clear that the authors and publishers would adequately represent the interests of the orphan works’ copyright owners.

81. Although the prices are dependent on a seemingly independent algorithm, horizontal competitors have agreed to fix prices according to the terms of that algorithm.

82. See DOJ Statement, *supra* note 6, at 21; *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 134–35 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 198–99, 222–23 (1940).

83. See Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 20, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Feb. 4, 2010) [hereinafter DOJ ASA Statement], available at <http://www.justice.gov/atr/cases/f255000/255012.pdf>.

84. Amended Settlement Agreement, *supra* note 6, § 4.2(c)(ii)(2) (emphasis added).

85. Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement at 7, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010) [hereinafter Open Book Alliance Supplemental Memorandum], available at http://thepublicindex.org/docs/amended_settlement/Open_Book_Alliance.pdf.

86. *Socony-Vacuum Oil Co.*, 310 U.S. at 222.

87. Amended Settlement Agreement, *supra* note 6, § 4.2(c)(ii)(3).

88. *Id.*

would be few incentives and little accountability to ensure that the formula truly does simulate prices in a competitive market.

Although the DOJ is not opposed to Google's unilateral use of a pricing algorithm, it is concerned that authors and publishers are agreeing to this algorithm.⁸⁹ This distinction is important because, while it may possibly be true that Google does not intend to use the settlement to restrict sources of searchable, digital libraries, it is possible that, by agreeing to this settlement (and its corresponding pricing formulae), the authors and publishers may intend to limit sources of digital libraries moving forward (e.g., by restricting licensing).⁹⁰ Because the authors and publishers will wield power on the Registry that will set the terms for both pricing and future licensing of in-copyright books,⁹¹ the settlement does not foreclose the possibility that they will carry out this intention.

The DOJ's concerns are unsurprising given the long history of horizontal price-fixing's per se illegality under Section 1 of the Sherman Act.⁹² When competing doctors attempted to fix prices for various medical services in *Maricopa*, for example, the Supreme Court determined that that was per se illegal.⁹³ The court in *Maricopa* distinguished the price-fixing in that case from *BMI*, which had ruled that horizontal price-fixing could be legal when it was a "necessary consequence" of the creation of a blanket license that authorized broad uses of musical compositions.⁹⁴ However, *BMI* does not apply to the Consumer Purchases of orphan books offered under the Google Book Settlement because, beyond offering integrated products, "Google will also act as a joint sales agent, offering each rightsholder's books for individual sale."⁹⁵ The DOJ further distinguished *BMI* from the Settlement because rightsholders negotiate separately with BMI for their respective slices of the revenue pie.⁹⁶ The Settlement

89. DOJ ASA Statement, *supra* note 83, at 19.

90. Cf. GARY REBACK, *FREE THE MARKET: WHY ONLY GOVERNMENT CAN KEEP THE MARKETPLACE COMPETITIVE* 30 (2009) (discussing Bork's argument that price-fixing should be unlawful when parties undertake an action where they intend to restrict output, even when such actions are taken in conjunction with a contract integration).

91. See Amended Settlement Agreement, *supra* note 6, § 6.2(b)(i)–(ii). The unclaimed works fiduciary prevents them from controlling the licensure of those books, but, as stated, it is not clear how independent that entity will actually be from the authors and publishers in practice. The authors and publishers can control the licensing terms of any claimed books within the GBS corpus.

92. See ABA SECTION OF ANTITRUST LAW, *INTELLECTUAL PROPERTY AND ANTITRUST HANDBOOK* (2007) [hereinafter *HANDBOOK*]; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98 (1927).

93. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 353–56 (1982).

94. *Id.* at 355–56; *Broad. Music, Inc. v. Columbia Broad., Inc. (BMI)*, 441 U.S. 1 (1979).

95. See DOJ Statement, *supra* note 6, at 31–32. Note that "consumer purchases" refers to Google's contemplated service in which it will allow individual users to purchase full-text access to books, subject to copy-and-paste and printing limitations. See Amended Settlement Agreement, *supra* note 6, §§ 1.35, 4.2(a). "Institutional Subscriptions" is a contemplated service in which universities, corporations, libraries, and other institutions can purchase access to the full texts of all digitized books (or subsets of the book databases) for a subscription fee. See Amended Settlement Agreement, *supra* note 6, § 4.1.

96. See DOJ Statement, *supra* note 6, at 32.

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does not ensure that such bilateral negotiations occur with *all* rightsholders despite the fact that, the Settlement leaves the door open for separate negotiations with *some* rightsholders, for example, through Google's Partner Program.⁹⁷ Overall, then, *BMI* should not be read to apply to the price-fixing of individual orphan works under the Consumer Purchase option that is proposed in the Settlement.⁹⁸

When there is no redeeming virtue to price-fixing, the Supreme Court is not deferential to price-fixing arrangements even when the fixed prices appear reasonable. This was the case in *Catalano, Inc. v. Target Stores, Inc.*,⁹⁹ in which an agreement between competitor beer distributors to fix credit terms to wholesalers represented “[a] horizontal agreement to fix prices [that was] the archetypal example of such a practice. It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.”¹⁰⁰ This further underscores the fact that, even if the price-setting algorithm sets hypothetically competitive prices, there is still an antitrust problem. Several months after my initial draft of this article, the DOJ emphasized that “features of the Settlement bear an uncomfortably close resemblance” to the types of price-fixing violations held illegal in *Maricopa Country* and *Catalano*.¹⁰¹

In Google's defense, the Settlement will make many books available for sale that would have not otherwise been available. And promoting availability of these books is in the public's best interest. However, absent legislation from Congress that authorizes others to promote and sell these orphan works, the Settlement remains a court-sanctioned monopoly with respect to orphan works. As the founder of the Internet Archive, Brewster Kahle—who is opposed to the Settlement—recently stated, “[w]e need to focus on legislation to address works that are in copyright limbo.”¹⁰²

Such legislation is foreseeable. Orphan works legislation proposed in 2008 would have allowed “good-faith [consumers] of copyrighted content to move forward in cases where they wish to license a use but cannot locate the copyright owner after a diligent search.”¹⁰³ This legislation would enable identification of orphan works to become

97. See Amended Settlement Agreement, *supra* note 6, § 17.9 (“Google may already have, and may in the future enter into, separate agreements directly with individual members of the Amended Settlement Class regarding their Books, e.g., through the Google Partner Program.”).

98. See *BMI*, 441 U.S. 1 (1979).

99. 446 U.S. 643 (1980).

100. *Id.* at 647.

101. See DOJ Statement, *supra* note 6, at 17. *But see* Google Brief, *supra* note 10, at 40 (noting that horizontal competitors agreed to horizontal price-fixing in ways that lacked precompetitive justifications). Besides noting concerns about the pricing algorithm, the DOJ also noted concerns about the standard revenue split of 63%-37% (the industry-wide revenue-sharing formula) as a potential price-fixing problem. DOJ Statement, *supra* note 6, at 19–22.

102. Brewster Kahle, *A Book Grab By Google*, WASH. POST, May 19, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051802637.html. Brewster Kahle is the founder of the Internet Archive. *Id.*

103. Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFFICE (Sept. 25, 2008), <http://www.copyright.gov/orphan>.

transparent and allow more agencies, including the Open Content Alliance, to obtain licenses to scan orphan works. The lawyers negotiating the Settlement obviously knew of this possibility, as they added a clause to the Settlement that allows Google to take advantage of any future legislative changes that allow the use of uniform works to the extent that competitors are using such legislation to impact Google.¹⁰⁴ Thus, Google will never be placed at a competitive disadvantage by subsequent orphan works legislation. If orphan works legislation passes, it is also possible—but not guaranteed—that the unclaimed works fiduciary proposed by the Settlement would license orphan works to other competing book digitizers.¹⁰⁵ In that case, many of the anti-competitive concerns surrounding orphan books could be defrayed.

In the absence of orphan works legislation, however, Google will be able to reap a significant first-mover advantage despite its failure to earn such a market position by sheer virtue of superior business acumen or skill. First, to the extent that Google achieves market position via anti-competitive tying,¹⁰⁶ it has not fairly demonstrated its superior ability in the book search field.¹⁰⁷ Second, to the extent that Google obtained its agreement and first mover advantage via willful misdirection¹⁰⁸—i.e., collusive misrepresentation of its intentions to the exclusion of possible competition—Google should not be rewarded.

Meanwhile, the Settlement could provide more detail on efforts that will be undertaken to track down the copyright owners of the orphan works. Whereas the proposed federal legislation would force potential licensees to perform a “diligent search” prior to licensing orphan works,¹⁰⁹ the original Settlement did not stipulate any procedure that the Registry or Google must follow to track down those authors. The Amended Settlement has been improved somewhat, as it now requires that the Registry “will, from its inception, use commercially reasonable efforts to locate rightsholders of books and inserts.”¹¹⁰ However, it is not clear what these reasonable efforts will be or how Google can be held accountable for them.¹¹¹

104. Settlement Agreement, *supra* note 5, § 3.8(b).

105. See Amended Settlement Agreement, *supra* note 6, § 6.2(b)(i) (authorizing the unclaimed works fiduciary to license orphan works “to the extent permitted by law”).

106. See discussion *infra* Part IV.D.

107. Although Google’s business acumen has allowed it to achieve its prowess in the search field, I argue that book search results should not be tied to web search results unless consumers opt in.

108. See Open Book Alliance Memorandum, *supra* note 18; see also Open Book Alliance Supplemental Memorandum, *supra* note 85.

109. Peters, *supra* note 103.

110. Amended Settlement Agreement, *supra* note 6, § 6.1(c).

111. A major concern arising from the original Settlement was that profits held in trust for orphan works’ copyright owners could have been redistributed back to both the Registry and the known rightsholders (authors and publishers) if funds allocated for the orphan works’ copyright owners are not claimed within five years. See Settlement Agreement, *supra* note 5, § 6.3(a). As a result, authors and publishers could have had a *disincentive* to locate the current copyright owners of orphan works. To the extent such disincentives exist in the Settlement—thereby preventing proactive searching for the orphan works’ copyright owners—the Settlement is needlessly encouraging price-fixing. Even if one argues that price-fixing for orphan

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As a final reflection in this area, it is important to remember that, outside of the few isolated, independent book stores that may have copies of orphan works, Google will have no competitors in this market once the Settlement is agreed to. And, if the market is framed as the market for fully searchable, digitized books, Google has no competitors. Given that horizontal price-fixing is per se illegal under the Sherman Act, and Google has yet to pledge that its pricing algorithm will be transparent to the public,¹¹² the DOJ has a profound interest to intervene. We have no idea how Google will choose to price orphan works, or how actively Google and the Registry will be working to track down those copyright owners, notwithstanding the “reasonable efforts” provision in the Amended Settlement. If the DOJ becomes more involved, they can work with Google and the Registry to set a minimum standard for tracking down these copyright owners.

There are several ways to improve the Settlement that address the anti-competitive effects of price-fixing for orphan works. First, the Settlement should be modified to provide explicit mechanisms for third-party licensure of orphan works through the Registry. While this appears to be a possibility under the Settlement, it is not guaranteed and, absent legislation that allows third parties to begin using orphan works, third parties need to be able—or at least theoretically able—to compete with Google on an equal footing immediately. In addition, the Settlement needs to be modified to provide incentives for locating the rightsholders of orphan works. For example, Google, the Authors, or the Publishers could be provided with a royalty for each rightsholder that is located from the pot of unclaimed funds—this royalty should be large enough to provide an incentive to search, but small enough such that unclaimed funds are ultimately reserved for the rightsholders who are entitled to them.

B. Institutional Subscriptions, Predatory Pricing, and Blanket Licensing

Another potential risk of the Settlement is that it could encourage predatory pricing. This is particularly true for the Settlement’s institutional subscription component. The issue was first flagged by Robert Darnton, Director of the Harvard University Library, who argues that although “Google may choose to be generous in its pricing . . . it could also employ a strategy comparable to the one that proved to be so effective in pushing up the price of scholarly journals: first, entice subscribers with low initial rates, and then, once they are hooked, ratchet up the rates as high as the traffic

works is deemed to be a “necessary consequence” of the Settlement, the Settlement should not actively promote it. Although it is unrealistic—and probably impossible—to require Google to track down all owners of orphan works copyrights, the Settlement should at least require diligent searches for these authors if it allows Google, the Authors, and the Publishers to reap monopoly profits from these works. Luckily, however, this redistributive provision was removed—unclaimed profits derived from orphan works will be redistributed to countries for the purpose of providing these funds to literacy-based charities. *See* Amended Settlement Agreement, *supra* note 6, § 6.3(a)(i)(3).

112. The Settlement explicitly states that Google is not required to disclose confidential information relating to the algorithm. *See* Amended Settlement Agreement, *supra* note 6, § 4.2(c)(ii)(3).

will bear.”¹¹³ The president of the Association of College and Research Libraries (ACRL), Erika Linke, recently expressed her concern that “the cost of an institutional subscription may skyrocket . . .” under the Settlement.¹¹⁴ The consumers of digital books in libraries—faculty, students, and library patrons—are not price sensitive and therefore Google and others could easily take advantage of such a pricing strategy.¹¹⁵ According to one study, “[t]he current publishing environment is a monopoly-like marketplace increasingly dominated by large commercial conglomerates.”¹¹⁶

The Settlement explicitly opens the door for this sort of pricing strategy. Under the Settlement, “the initial Pricing Strategy will also include a discount from the List Prices that will be offered for a limited period of time to subscribers.”¹¹⁷ While potentially noble in its intention, this initial plan could merely be a mechanism for the baiting scheme described by Darnton.¹¹⁸ Once consumers at libraries, schools, and other institutions begin realizing the benefits of institutional subscriptions, they are likely to place additional pressure on subscribing institutions to maintain their subscriptions, regardless of any potential price increases by Google or the Registry. Once consumers are comfortable with using a particular search system for digitized books, they begin to rely on that system and are less likely to be interested in potential competitors who may offer equivalent services. This happens frequently in the university context; even when librarians attempt to cancel institutional subscriptions that may be underutilized or increasingly difficult to afford; publishers are often “moved into the driver’s seat” due to the “political realities in the university” that make it difficult to cancel large bundles of titles from a particular publisher.¹¹⁹ These reliance interests would create an artificial barrier to entry by potential competitors and allow Google to maintain a monopoly position.

Google could engage in a predatory pricing scheme that violates the Sherman Act if it sets its institutional subscription prices extraordinarily low at the outset and recoups its losses by charging higher prices later. In the antitrust context, predatory pricing generally takes this form. According to Judge Easterbrook in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, the legality of this behavior hinges on whether or not the entity accused of predatory pricing is in a position to eventually recoup its

113. Robert Darnton, *Google & the Future of Books*, N.Y. REV. BOOKS (Feb. 12, 2009), <http://www.nybooks.com/articles/archives/2009/feb/12/google-the-future-of-books/>.

114. Press Release, Ass’n of Research Libraries, Library Assistants Ask Judge To Assert Vigorous Oversight of Proposed Google Book Search Settlement (May 4, 2009), *available at* <http://www.arl.org/bm~doc/google-book-search-pr-4may09.pdf>.

115. See Open Book Alliance Memorandum, *supra* note 18, at 9.

116. Nancy Kranich, *Scholarly Publications Hold Universities Hostage: Monopoly on Journals Causes Prices to Soar*, FAIR: FAIRNESS & ACCURACY IN REPORTING (Jan./Feb. 1999), <http://www.fair.org/index.php?page=3784>.

117. Settlement Agreement, *supra* note 5, § 4.1(a)(vi)(2).

118. See Darnton, *supra* note 113.

119. See *id.*

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losses.¹²⁰ In particular, “if there can be no ‘later’ in which recoupment could occur, then the consumer is an unambiguous beneficiary even if the current price is less than the cost of production.”¹²¹ In those instances, the pricing schemes do not justify antitrust inquiries¹²² because an attempt to recoup losses by significantly raising prices would be easily undercut by a competitor in a competitive market.

However, there is a reasonably strong argument that Google will be able to recoup its losses once the Settlement is agreed to. As of now, Google is the primary digitizer of books that will attempt to sell its books for profit. The Open Content Alliance, which has digitized the next largest stock of books, is a non-profit that only digitizes public domain works. Even if one assumes that the Amazon Kindle or analogous products are part of the same market of fully searchable, digitized books,¹²³ it is unlikely that those entities would have the capacity to sell institutional subscriptions that would rival Google’s collection within the next couple of years. Thus, a scenario in which Google offered very cheap institutional subscriptions initially—further discouraging potential competitors from entering the market—is foreseeable because the market currently has little competition, and Google can have reasonable confidence in its ability to raise its prices later to recover losses. And, Google can partake in this behavior without demonstrating that it legitimately has a superior product relative to its potential competitors. Although the courts have been skeptical of many predatory pricing strategies,¹²⁴ the use of such a “pre-commitment predation strategy”—where a party strategically undercuts a competitor to gain market share and monopoly profits later—may make sense economically to a company that is motivated to earn profits.¹²⁵ Professor Bork is quite skeptical of this form of predation, arguing that a predator can only be successful if it “has greatly disproportionate reserves or is able to inflict disproportionate losses.”¹²⁶ But even he may concede that predation is theoretically possible in the GBS context because the GBS products that are being sold by Google have an approximate marginal cost of zero, allowing it to charge cheap prices while possible competitors struggle to recoup the massive startup costs necessary to enter the book digitization field.¹²⁷

120. 881 F.2d 1396, 1401 (7th Cir. 1989).

121. *Id.*

122. *See, e.g.,* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).

123. Per the earlier analysis, I argue that the market for digitized, searchable books is distinct from a market for books that are in a digital form that are used on a manufacturer’s platform.

124. *See, e.g.,* Brooke Group Ltd. v. Brown & Williamson Tobacco Inc., 509 U.S. 209 (1993); *A.A. Poultry Farms*, 881 F.2d at 1396.

125. CHARLES J. GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* 447 (4th ed. 2009).

126. ROBERT H. BORK, *THE ANTITRUST PARADOX* 147 (1993).

127. In particular, the costs of scanning the books and creating a competing digital book database.

Because the predatory pricing concern is purely speculative, this is only an issue in the Settlement to the extent that the Settlement does not foreclose Google (and the Registry's) ability to partake in such behavior. Following Google's well-known motto of "don't be evil," Google may very well price institutional subscriptions in a way that serves the public interest and encourages competitive entry in that particular area. Still, both Google and the Registry will have little public accountability under the Settlement once the pricing strategies are agreed upon. All modifications in pricing must be agreed upon by both Google and the Registry, and only arbitrators are allowed to resolve disputes between *those entities*.¹²⁸ There is no mechanism for public accountability on pricing strategies—neither the libraries nor government entities are given any regulatory authority over the agency.¹²⁹

In its most recent brief, Google explained that it has signed agreements with its library partners, such as the University of Michigan, that allows those partners to challenge whether the institutional subscription price meets the "broad access" objectives espoused in the Settlement.¹³⁰ This provision promotes the public interest principles I endorse in this article. But it only ensures that *certain* parties outside of the Registry have an opportunity to challenge predatory pricing schemes. The University of Michigan made significant concessions in its negotiations for this deal. In particular, it will have little, if any, reason to challenge predatory pricing schemes given that it has a twenty-five year waiver on institutional subscription fees.¹³¹ This raises the question: Why is the right to challenge institutional pricing schemes through arbitration available only to certain libraries and is not available to all libraries or to the public in general?

Despite these potential issues with the rules governing the pricing of institutional subscriptions, blanket licensing of digitized books through institutional subscriptions is unlikely to be construed as per se illegal under the Sherman Act. This is because *BMI* squares more directly with institutional subscriptions than it does with consumer purchases. In *BMI*, the Supreme Court ruled that blanket licensing of composed music to television stations was "not a naked [restraint] of trade with no purpose except stifling of competition, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."¹³² The Court determined that blanket licensing was a necessary end in achieving efficiency.¹³³ When blanket licenses are offered as a means to an efficient outcome, those licenses

128. Settlement Agreement, *supra* note 5, § 4.1(a)(vi)(4).

129. See Amended Settlement Agreement, *supra* note 6, § 4.1 (making no reference to any entity other than Google and the Registry setting pricing mechanisms).

130. Google Brief, *supra* note 10, at 48.

131. Miguel Helft, *Google Book-Scanning Pact to Give Libraries Input on Price*, N.Y. TIMES, May 20, 2009, www.nytimes.com/2009/05/21/technology/companies/21google.html. Because the University of Michigan will not have to pay institutional subscription fees itself, it is less likely that it will express concern when institutional subscription rates are unreasonably high.

132. *BMI*, 441 U.S. 1, 20 (1979) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

133. See *id.* at 21.

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are permissible even if there are realistic alternatives (such as individual licenses) to the blanket licensing, whether or not those alternatives are implemented.¹³⁴

Nevertheless, if narrower licensing alternatives are shown to be more efficient than broader blanket licenses in the book digitization context, an adamant insistence by Google or the Registry to provide broad blanket licenses could raise antitrust concerns. As Judge Winter indicated in his concurring opinion in *Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers*, injury to consumers could be possible if alternative licensing arrangements are “impeded by agreement among composers or producers or by some other artificial barrier.”¹³⁵ And, although the majority in *BMI* ruled that the bulk licensing in that case was not per se unlawful, Justice Stevens noted in dissent that “[t]he ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is ‘reasonable’ for the access they are getting, may well be far higher than what they would choose to spend for music in a competitive system.”¹³⁶ Despite television stations’ requests for more limited use authorizations for the music at issue in the case, ASCAP and BMI strictly adhered to a policy in which they only offered blanket and per-program licenses of the *entire repertoire of music*.¹³⁷

Although such broad licensing was deemed efficient and within the *rule of reason* by the courts in *BMI*, *ASCAP*, and other cases, the efficiency inquiry in this case differs in several respects. Unlike the for-profit media corporations that were affected by *ASCAP* and *BMI*, many of the institutions in the market for institutional subscriptions are non-profit libraries, schools, and local government entities. Thus, many of these entities are not likely to have significant resources and the Settlement may not set up terms that allow them to fairly obtain or utilize the GBS corpus. Even assuming that the licensing arrangement contemplated by the Settlement is acceptable under *BMI*, as some have argued,¹³⁸ the limited ability of certain public entities to obtain access to digital materials—due to their limited resources—may be a relevant consideration under antitrust doctrine. As noted, the DOJ has signaled the importance of access to knowledge principles in its initial assessment of the Settlement.¹³⁹ Court precedent, furthermore, has indicated that courts may consider the interests of third-

134. See, e.g., *Buffalo Broad. Co. v. Am. Soc’y of Composers, Authors & Publishers (ASCAP)*, 744 F.2d 917 (2d Cir. 1984).

135. *Id.* at 934 (Winter, J., concurring).

136. *BMI*, 441 U.S. at 31–32 (Stevens, J., dissenting).

137. *Id.* at 27–28.

138. See Elhauge, *supra* note 7, at 51–52 (arguing that, like the licensing arrangement held to withstand antitrust scrutiny in *BMI*, Elhauge argues that the GBS Settlement is precompetitive because it lowers transaction costs of negotiating with millions of rightsholders while creating a new product (the institutional subscription) that would have been impossible to create absent the settlement); see also Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement at 23–25, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sep. 8, 2009) [hereinafter Professors’ Brief], available at http://thepublicindex.org/docs/letters/antitrust_prof.pdf (arguing that the settlement compares favorably to *BMI*).

139. See *supra* note 28 and accompanying text.

parties to the settlement as well as the interests of those involved in evaluating class settlements.¹⁴⁰ Courts should thus consider moving towards a regime that is increasingly mindful of the broader public interest in its antitrust assessments.

Many non-profit and government institutions may be interested in securing relatively narrow licensing arrangements. For example, a medical school library may only be interested in licensing GBS for a market basket of medical books. Thus, the efficiency of institutional subscriptions will hinge on the manner in which they are partitioned across disciplines and sub-fields. Finally, institutional subscription arrangements between schools, libraries, and the Registry will impact the public interest much more than arrangements between CBS and ASCAP to license music. While our ability to read, access, and attain knowledge has a fairly strong connection to our survival, our interest in obtaining licensed music is important but is much less determinative of our long-term success and well-being.

The Settlement addresses some of these key differences in several respects when it discusses institutional pricing. For example, the Settlement states that institutional subscription pricing bands “may vary across broad categories of institutions.”¹⁴¹ The Settlement also allows the Registry to establish different prices for corporations, schools, government, higher education, and other agreed upon entities. Moreover, the Settlement also allows Google to identify institutional subscriptions “for a small number of discipline-based collections of Books that Google would offer as an alternative”¹⁴² Thus, if Google and the Registry function in the public interest by pricing reasonably and dividing subscriptions into smaller collections that serve the interests of various institutions, the Settlement could allow Google to provide institutional subscriptions in an economically fair and efficient manner that would be affordable for a wide-range of institutions.

However, these provisions by no means guarantee that the public interest will be served. The fact that Google *may* set different prices for institutions with different levels of need does not guarantee that Google *will* set those different prices. Even if Google wanted to charge reasonable prices, there is also no guarantee that the Registry would necessarily agree with every proposal Google makes—the Registry is just as much a potential monopolist as Google. The provision that allows Google to divvy up institutional subscriptions into smaller discipline-based chunks has no enforcement mechanism, and we cannot be sure that Google will actually provide those options.¹⁴³

Another disconcerting clause in the Settlement requires that Google design the pricing structure of the smaller versions of the institutional subscriptions in a way that provides incentives to purchase full subscriptions.¹⁴⁴ This particular clause could result

140. *E.g.*, *Masters Mates & Pilots Pension Plan & IRAP Litig. v. Franklin Riley*, 957 F.2d 1020, 1025–27 (2d Cir. 1992).

141. Settlement Agreement, *supra* note 5, § 4.1(a)(iv).

142. *Id.* § 4.1(a)(v).

143. *See id.*

144. *Id.* (“To provide an incentive for institutions to subscribe to the entire Institutional Subscription Database, Google shall design the pricing of the different versions of the Institutional Subscription such

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in pricing schemes that result in relatively inefficient cost structures. Assume for simplicity that an institutional subscription for the full GBS database costs a flat \$1 million per year (for a particular institution). Google could then choose to charge \$500,000 per year for the institutional subscription that only covered medical books. While these books would comprise far less than fifty percent of all books in the GBS database (let us assume that medical books comprise ten percent of the entire database), the terms of the Settlement would not only allow—but encourage—such a pricing scheme to encourage a medical school library to purchase a full subscription when it is unlikely to need access to many of the other books. A more reasonable price would be closer to \$100,000 since this is proportional to the cost of the entire set of books. Thus, given our public interest goals of information accessibility and public transparency, a better settlement would place some proactive limits on such pricing schemes. If, as Google claims, the Settlement truly is pro-competitive, initial regulations governing the Settlement Agreement can be loosened once competitors are freely able to enter the market. Until that point, however, consumers need some form of protection.

Beyond these concerns, public libraries or universities could be priced out of broad institutional licenses based on the pricing model contemplated by the Settlement, which is based on the number of full-time equivalents (FTE) at each institution.¹⁴⁵ In the context of online journal and database subscriptions, FTE is often assessed as the number of persons in an organization (the number of students and faculty in an educational organization), regardless of their patterns of use.¹⁴⁶ At a recent talk, the New York Public Library's (NYPL) director of Digital Strategy, Josh Greenberg, emphasized that one of the major challenges public libraries face in accessing library technology is the existence of FTE pricing.¹⁴⁷ The NYPL, for example, cannot provide remote access to JSTOR because its FTE pricing is prohibitive.¹⁴⁸ In addition, FTE pricing has been disproportionately burdensome on European universities in the past because these universities do not record their student data in FTE.¹⁴⁹

that the price for access to the entire Institutional Subscription Database will be less than the sum of the prices for access to the discipline-based collections.”).

145. *Id.* § 4.1(a). Full-time-equivalent is a figure that represents a person who works full-time at an institution. *Id.* § 4.1(a)(iii). The FTE calculation serves as a proxy for the number of employees who are at a workplace at any given time. For example, if a workplace has three full time workers and two half time workers, that workplace would have an FTE of 4 ($3 \times 1 + 2 \times 0.5 = 4$). This would more accurately illustrate the amount of use of a particular computer terminal than adding up the number of employees directly (5).

146. *See, e.g., Opt-in Access to New Journals*, WILEY ONLINE LIBRARY, <http://olabout.wiley.com/WileyCDA/Section/id-406102.html> (last visited October 4, 2010) (noting that FTE calculation is based on the number of students and faculty, excluding staff).

147. Josh Greenberg, Dir. of Digital Strategy, N.Y. Pub. Library, Remarks at The Future of the Library, INFO. SOC'Y PROJECT YALE LAW SCH. (April 4, 2009), <http://yaleisp.org/2009/04/panel-1-the-future-of-the-library/>.

148. *Id.*

149. *See* Lluís Anglada & Nuria Comellas, *What's Fair? Pricing Models in the Electronic Era*, 23 LIBR. MGMT., no. 4/5, 2002 at 227, 231.

The universal use of FTE as a pricing model for GBS could be construed as a distinct form of price-fixing that is neither an accurate nor fair gauge of the true value of the product.¹⁵⁰ Should the NYPL be charged for all nine million of NYC's residents when it licenses JSTOR or Google Books, or should it more appropriately be charged based on usage patterns? Although the Settlement does indicate that the FTE pricing can vary across institutional types,¹⁵¹ it is not clear that the pricing will be set in a way that conforms with access to knowledge or antitrust principles. This is yet another provision that could be more narrowly tailored. Again, the Settlement leaves consumers in the dark.

Another pricing option that could provide a better balance between affordability and accessibility is the simultaneous user-pricing model. Under this model, libraries such as the NYPL could use data on actual usage patterns—from both in-library and remote use—to gauge how many consumers will access the GBS database at any given time. Although estimates above or below actual usage patterns are possible under such a scheme—and these miscalculations will inevitably create some inefficiencies—subscription terms can be set at short enough durations to provide libraries with some flexibility to dynamically adjust their prices.¹⁵² One possible compromise to minimize inefficiencies would be to start with a conservative number of simultaneous users and include a sliding scale in the license that can be automatically upgraded to the maximum number given by the institution based on usage patterns.¹⁵³ Such a model would be much more commensurate with the value of the services being provided by GBS.

The efficiency gains from blanket licenses cannot be denied. As Professor Richard Epstein notes, however, “[a]ll license types may not be created equal, and it could be possible to impose restrictions on the different license types in ways that do little to compromise the efficiency gains from coordination, while reducing the potential for monopoly rents.”¹⁵⁴ Although some licensing improvements have been made in the *ASCAP* context, the DOJ still laments after over sixty years of government regulation:

[N]otwithstanding the AFJ's requirement that ASCAP offer broadcasters a genuine economic choice between the per-program and blanket license, ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully

150. Although FTE pricing is a generally acceptable form of pricing, I argue that it is less than optimal from a consumer welfare standpoint. I would not necessarily contend that FTE pricing constitutes a form of per se illegal price-fixing, but that it may present antitrust concerns in areas where consumer considerations may be substantial, such as this one. This is certainly more of a normative than a legal position, but the consumer implications in this Settlement are unprecedented (at least in my view).

151. Settlement Agreement, *supra* note 5, § 4.1(a)(iv).

152. See Anne E. McKee, *Consortial Licensing Issues: One Consortium's Viewpoint*, 42 J. LIBR. ADMIN. 129, 135 (2005).

153. *Id.*

154. RICHARD A. EPSTEIN, *ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE* 32 (2007).

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dissuading users from attempting to take advantage of competitive alternatives to the blanket license.¹⁵⁵

Litigation over FTE licensing requirements, discipline-based collection pricing, and other components of GBS's pricing model is a distinct long-term possibility if the Settlement is approved in its current form.

Thus, price-fixing loopholes that may affect accessibility and affordability should be continually addressed by the DOJ and other interested parties both before and after the district court formally certifies the Settlement.¹⁵⁶ Although the opportunity to fix prices for institutional subscriptions is not per se unlawful based on current precedent,¹⁵⁷ we currently have an opportunity to ensure that the Settlement is acceptable under a rule of reason analysis by modifying the Settlement to (1) limit price increases for institutional subscriptions in a manner that prevents predatory pricing schemes; (2) constrain incentive pricing for discipline-based collections by guaranteeing that these collections are priced in rough proportion to their representation in the larger GBS database; and (3) clearly define FTE pricing under the Settlement and provide libraries with the option to use a simultaneous user-pricing model. A fourth, more normative consideration would guarantee that Google and the Registry agree to different price levels for institutions that genuinely reflect these institutions' abilities to pay for services.¹⁵⁸ Competition law may turn a blind eye to this fourth proposal, but such a change would serve our public values.

C. Barriers to Entry: Collective Action Problems¹⁵⁹

The Settlement will not alleviate significant barriers to entry for potential competitors who desire to enter the book digitization market. By neither affirming nor denying the validity of Google's actions under copyright law, the Settlement will create a presumption that book digitization of copyrighted works is illegal under

155. Memorandum of the United States in Support of the Joint Motion to Enter a Second Amended Final Judgment at 28, *United States v. Am. Soc'y of Composers, Authors and Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (No. 41-1395).

156. The judge on the case is Judge Denny Chin. *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. 2009).

157. *See, e.g., BMI*, 441 U.S. 1 (1979) (holding that blanket licensing is not per se unlawful).

158. Google has shown some signs that it may be willing to negotiate separate deals with different institutions. For example, the University of Michigan has negotiated an amended deal with Google that will allow it to access the full institutional subscription database for free over the next twenty-five years. After the twenty-five years pass, the amended agreement provides the University with a discount that is proportional to the number of books Google is allowed to scan from the University's library. *See Amendment to Cooperative Agreement, Regents of the University of Michigan and Google, Inc.*, (May 19, 2009), *available at* <http://www.lib.umich.edu/mdp/Amendment-to-Cooperative-Agreement.pdf>.

159. Barriers to Entry, as discussed in this paper, refer to barriers to enter the market for fully searchable, digitized books—this includes full-scale digitized book databases as well as small innovative solutions that could be applied to that market. I acknowledge that any potential competitor could attain individual licenses for digitized books if it were able to negotiate with individual copyright owners—and possibly the Registry—to obtain such licenses. Collective action problems arise in contexts where it is difficult to get a wide range of individuals representing different interest to agree on a common arrangement.

existing copyright law. The high litigation costs of any copyright challenge faced by a potential book digitizer would be a significant deterrent—this Settlement alone will cost Google \$125 million.¹⁶⁰ And that number does not include litigation costs. Thus, notwithstanding the potential validity of future fair use challenges, potential competitors moving forward with book digitization will do so knowing that they will need to obtain full licensure of copyrighted works before implementing their book digitization plans. However, this would be expensive. Well over 20,000 publishers are bound by the GBS Settlement, along with the millions of authors who wrote works published by them.¹⁶¹ Beyond the sheer costs of licensure, obtaining separate agreements with each author and publisher who has published a book will impose significant transaction costs on any potential competitor.

Some may say, however, that Google's possible competitors are not foreclosed from achieving a similar settlement. In particular, supporters of the Settlement have emphasized that the transaction costs of obtaining a new deal with Authors and Publishers have been reduced by Google's efforts to obtain licensure using the class action mechanism.¹⁶² While this may be true, it would be highly wasteful to incur additional litigation costs through another lawsuit. And the DOJ agrees.¹⁶³ A GBS competitor's ability to successfully pursue litigation efforts does not represent a measure of one's superiority in the market for digital books, and to the extent that the settlement establishes a context where a competitor must litigate to establish an equal footing with Google, artificial barriers to entry remain.¹⁶⁴

Further, there is a legitimate question of whether or not potential competitors were collusively excluded from the bargaining table when Google made its deal with Authors and Publishers. Gary Reback, an antitrust lawyer known for his involvement in the *Microsoft* case,¹⁶⁵ explains that Google acted by willful misdirection and a *fait accompli*—while Google asserted that it was creating GBS as a mere digital card catalog, it denied consumers and Google's competitors seats at the bargaining table over a twenty-nine month period.¹⁶⁶ Thus, while Microsoft was operating a book scanning program that comported with copyright law in good faith, Google was

160. See Press Release, Google, Inc., Google, Authors, Publishers, and Google Reach Landmark Settlement: Copyright Accord Would Make Millions More Books Available Online (Oct. 28, 2008), (on file with author), available at http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html.

161. See *id.*

162. See Professors' Brief, *supra* note 138, at 22–23.

163. DOJ ASA Statement, *supra* note 83, at 25 (“The suggestion that a competitor should follow Google's lead by copying books *en masse* without permission in the hope of prompting a class action suit to be settled on terms comparable to the ASA [Amended Settlement Agreement] is poor public policy and not something the antitrust laws require a competitor to do.”).

164. Admittedly, a normative question remains: What is a “reasonable” or appropriate “barrier to entry?” As Professor Bork has said, some barriers are natural and others are artificial. In my view, litigation and settlement efforts are disconnected from the sorts of business efficiencies that should be encouraged by antitrust laws. For a discussion of this distinction, see BORK, *supra* note 126, at 321.

165. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

166. See Open Book Alliance Memorandum, *supra* note 18.

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secretly negotiating its special deal.¹⁶⁷ As Amazon reasonably notes in its objection to the Amended Settlement, moreover, competitors could have come up with the same database as Google over the course of the Settlement negotiations, but they have not indiscriminately scanned books or created the same products because doing so “[would have been] illegal, not because of lack of innovation by competitors in the marketplace.”¹⁶⁸ If these alleged facts are true, there is a reasonable argument that the barriers for obtaining similar terms as Google should be significantly lowered if, for example, the DOJ forces the parties to agree to the Settlement with the condition that similar terms will be offered to competitors. Even if competitors are offered the exact same terms the day after the Settlement is approved, these competitors would still have to develop their own technologies to allow consumers to view and search digital books. Thus, such a condition would not unreasonably impact Google’s ability to compete.

The Settlement, meanwhile, removes virtually all collective action problems that would be faced by Google in negotiating terms to use copyrighted works in its database due to the broad scope of the class. All books published prior to January 2009 will be covered by the Settlement (with the exception of those authors who chose to opt-out out of the Settlement). The Settlement then creates the Book Rights Registry—a non-profit entity—which disburses the revenues that are entitled to the Authors and Publishers and assumes the responsibilities of price-setting. This would not be a problem if the Settlement did not confer unfair advantages to Google. Although the Settlement contains a non-exclusivity clause,¹⁶⁹ for example, the overall state of affairs promotes a *de facto* exclusivity for Google.¹⁷⁰ As would be suggested by my market definition, the DOJ notes that the Settlement would allow “Google, and no other entity, to compete in a marketplace that the parties seek to create.”¹⁷¹ In the post-settlement world—no competitor will be in a comparable market position in the market for fully searchable, digital books.

Although the digitized books may hypothetically be licensed through the Registry or some other entity under the Settlement,¹⁷² the Settlement guarantees third party licensing in only two narrow circumstances. First, there is an additional contemplated rightsholder services provider that can be solicited by the Registry if Google fails to implement both consumer purchases and institutional subscriptions within five years of the Settlement Agreement.¹⁷³ Second, the Settlement allows the

167. *See id.* at 19–20.

168. Amazon Objection, *supra* note 64, at 11 (emphasis added).

169. This fact has been stressed by the camp that believes the settlement is pro-competitive. *E.g.*, Elhauge, *supra* note 7, at 7 (“Because every right that the settlement gives Google to digitize, display, or sell books is expressly non-exclusive, the settlement in no way increases the barriers to entry imposed by these costs.”).

170. *See* DOJ ASA Statement, *supra* note 83, at 21–23.

171. *Id.* at 21.

172. Settlement Agreement, *supra* note 5, § 2.4.

173. *Id.* § 3.7(c).

Registry to solicit a third party competitor if Google fails to provide a set of “Required Library Services,” described below.

In the first circumstance, the Settlement also allows the Registry to solicit a third party to offer consumer purchases and institutional subscriptions if Google does not provide the Authors and Publishers with “replacement monetization opportunities” within one year of discontinuing the services.¹⁷⁴ This clause allows a third party entrant to the market only if (1) Google chooses not to compete, or (2) Google is so derelict in its basic duties under the Settlement that the Registry is forced to find another, more suitable, competitor.

Under the Settlement there is also a possibility that, prior to the stipulated five-year period within which Google must implement consumer purchases and institutional subscriptions, Google could choose to forego providing the services and prevent any additional competitor from entering the market through a bargain with the Registry.¹⁷⁵ For example, if Google determined two years from the Settlement Agreement that the GBS services were no longer a major priority for them (but possibly something they may want to get involved with later), they could choose to continue to provide “replacement monetization opportunities” from the second to the fifth year after the Settlement was formally certified.¹⁷⁶ But this would prevent the Registry from soliciting a third party service provider until the fifth year. In the meantime, the Authors and Publishers may be content with the funds they receive from Google, despite the fact that the services would not be provided for the intervening three years and competitors could be denied from formally entering the market. Under the Settlement, Google could then re-enter the market within the fifth year and maintain its superior market position.¹⁷⁷ The fact that “replacement monetization opportunities” are even contemplated by the Settlement illustrates that the Settlement is as much about profitability as it is about ensuring that a digitized book database is universally accessible. Neither the three-year hiatus of services nor the reemerging monopoly scenario is in the public interest. Yet both are possible under the Settlement.

The second context in which the Settlement allows the Registry to solicit a third party competitor is when Google fails to provide a set of “Required Library Services.”¹⁷⁸ These required library services are meant to ensure that the vast majority of digitized books are searchable for research purposes in libraries—the requirement, in fact, requires that at least eighty-five percent of library scans be searchable online

174. *Id.* § 3.7(c).

175. *Id.* §§ 3.7(c), 4.7.

176. *Id.* § 3.7(a) (defined as opportunities comparable to Contemplated Rightsholder Services, which are services provided by Google that allow a user limited or full online access for a fee).

177. This scenario is admittedly unlikely, but possible, and therefore should be acknowledged.

178. Settlement Agreement, *supra* note 5, § 7.2(c)(ii). Beyond the settlement’s requirements to provide for-profit services such as institutional subscriptions and consumer purchase opportunities, the required library services requirement requires Google to guarantee the searchability of at least 85% of books through the use of an online database along with corresponding links to libraries for each book in the database. *Id.* § 7.2(c)(i).

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through Google products and services.¹⁷⁹ Such services are vital to the public interest goals of the Settlement. Thus, the Settlement provides that, if Google fails to provide the Required Library Services requirement, the Registry “may seek to engage one or more third parties to provide any or all of the Required Library Services.”¹⁸⁰ However, such a third party provider can only be solicited if Google fails to uphold its part of the bargain. Based on Google’s significant interest in the GBS product, this would be highly unlikely.

In theory, a potential Google competitor could create its own book rights registry to mitigate its collective action problems. However, Richard Sarnoff, Chairman of the Association of American Publishers, has admitted that the structure of the Registry would be “tough to replicate for [Google’s] competitors.”¹⁸¹ Furthermore, the creation of multiple registries may create other collective action problems while limiting the efficiency advantages that such entities attempt to mitigate.¹⁸² The existence of one registry, however, will only serve the public interest if it can be a clearinghouse for all who wish to enter the book digitization market. It should negotiate on behalf of all publishers and authors whenever a potential Google competitor wants to enter the market, not simply when Google fails to hold up its end of the bargain with respect to the Settlement. It should also charge reasonable prices.

As currently drafted, the prevailing interest in these settlement clauses is not to *ensure* competition. First, the Settlement does not provide incentives to secure a competitor to Google. To maximize opportunities for competition under the Settlement, the Settlement would, again, *guarantee* that third party service providers could and would be sought after in multiple circumstances, not just those where Google fails to perform. As far as the Authors and Publishers are concerned, as long as *some entity* is distributing digitized books—possibly at monopoly or inflated prices—there may not be incentives to locate additional providers. Although the Registry may license to third parties, this is still not guaranteed by the Amended Settlement.

In response to concerns that competitors such as Amazon, Barnes and Noble, and others would not be able to sell orphan works in the Google Books corpus should the Settlement be approved, a reseller provision was added to the Amended Settlement Agreement.¹⁸³ This provision allows Google’s competitors to sell books—including

179. *Id.* § 7.2(e)(i).

180. *Id.* § 7.2(e)(ii).

181. Timothy B. Lee, *Publisher Speculates About Amazon/Google E-Book “Duopoly,”* ARS TECHNICA, (Feb. 23, 2009, 7:10 AM), <http://arstechnica.com/tech-policy/news/2009/02/publisher-speculates-about-amazongoogle-e-book-duopoly.ars>.

182. The creation of multiple registries, for example, would force the owner of a digital book corpus to negotiate with several different registries to offer all of their books. Beyond forcing entities like Google to negotiate with multiple parties, this may be somewhat inefficient because each registry may also have distinct negotiation policies and procedures.

183. *See* Amended Settlement Agreement, *supra* note 6, § 4.5(b)(v)(2) (“To the extent that Google makes Books available through Consumer Purchases pursuant to this Amended Settlement Agreement, Google will allow resellers to sell access to such Books to their end users.”).

orphan books—that appear in the GBS database.¹⁸⁴ However, this provision does not promote competition or lower barriers to entry for two reasons. First, it solely applies to books purchased under the Consumer Purchase model.¹⁸⁵ It therefore does not allow resellers to compete over institutional subscriptions, for example. More importantly, the reseller clause could actually *undermine* competition because Google continues to host the digital copies of books that are sold under this provision.¹⁸⁶ Thus, it merely enlists potential competitors as agents of Google while Google continues to reap a share—albeit a smaller one—of the profits. As the Open Book Alliance notes, “forcing all of the new vendors to depend on a single source, Google, for many of the digital books they intend to offer is the surest way to retard what are otherwise boundless prospects” for innovation in the digital book industry.¹⁸⁷

Thus, given these uncertainties and the potentially damaging limitations on competitors’ rights to freely enter the book digitization market, one of the recommendations of this analysis is to fine-tune the Settlement to unambiguously allow the Registry to engage additional providers who could potentially provide book digitization services. This would alleviate concerns (1) that there could be gaps in service provisions, and (2) that there could be long-term monopolistic control of the market for fully searchable, digitized books. In addition, the Settlement should guarantee that some entity is always providing book digitization services in the event Google chooses to abdicate its role as a service provider. Whether the authority should revert to the government or another private entity is unclear, but the Settlement should not allow “replacement monetization opportunities” in lieu of the GBS service. Another consideration would be to require compulsory licensing of Google’s entire corpus of digital books to competitors—this would reduce barriers to entry into the market while allowing competitors to quickly gain an equal footing in relation to Google once the Settlement is approved.¹⁸⁸ Such a provision, however, must ensure that Google receives appropriate compensation for its scanning efforts.

D. Tying Arrangements

Tying presents another antitrust concern.¹⁸⁹ Adverse tying effects may result from this Settlement, even if the negotiating parties did not overtly intend such effects. As

184. *Id.* §§ 4.5(b)(ii), 4.5(b)(v)(2).

185. *Id.* § 4.5(b)(v)(2).

186. *See id.*

187. Open Book Alliance Supplemental Memorandum, *supra* note 85, at 11; *see also* Amazon Objection, *supra* note 64, at 20 (“[T]he Resellers provision would not foster competition, but rather install “resellers” as weak sub-distributors of Google. Because only Google hosts the digital copies, Amazon would be effectively referring its customers to Google. . . . [This] creates incentives for customers to migrate to Google faster than they otherwise would.”).

188. Open Book Alliance Memorandum, *supra* note 18, at 26–31.

189. “A tying arrangement exists when a seller of one product, *A*, requires its customers to purchase from it a second product, *B*, as well.” BLAIR & KASERMAN, *supra* note 12, at 391.

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of March 2009, Google had a 63.7% percent market share of web searches.¹⁹⁰ However, Google's market share in search is primarily due to Google's superior ability to rank and retrieve pages effectively using PageRank, as well as its ability to integrate advertisements into its search results using unobtrusive text advertisements.¹⁹¹ To the extent that Google earns market power based on such insights and innovation in the mass book digitization industry, Google should have some degree of leeway to establish such power. However, to the extent that the Settlement allows Google to tie Google Web Search to Google Book Search, Google will obtain a significant market advantage in the book search market that will allow Google to establish firm market control before any competitor even has an ability to establish itself as a viable alternative in that market.

At first glance, a tying relationship between Google Web Search and Google Book Search may seem counterintuitive. The tying product (Google Web Search) is used at no direct monetary cost to consumer—thus, it is unclear how consumers are forced to pay for the tied product (Google Book Search) through the use of the tying product. In addition, it may not be entirely clear to consumers how Google Web Search is tied to Google Book Search. These ambiguities are quickly resolved, however. First, consumers do “pay” for the tying product each time they execute their searches on Google Web Search. Their payment takes the form of viewed advertisements that are displayed after each search. Absent Google's large market share, advertisers would not pay Google to display their advertisements. With each search, consumers exercise the purchasing power that establishes this market share and determines the subsequent success of Google Web Search; and Google Book Search is tied to Google Web Search when Google Web Search includes results from books in its results pages. If consumers are drawn to search results that highlight book-purchasing options within Google Book Search, Google could further entrench its monopoly power over the purchase of digitized books.¹⁹² The groundwork is already being laid—as Dan Clancy, engineering director for Google Book Search, has stated, “[e]very time you search Google [Web Search], you're searching twelve million books.”¹⁹³ Although Google uses its search algorithm, it preferences its own properties

190. *Google Widens Lead in U.S. Searches: comScore*, REUTERS, (Apr. 15, 2009), <http://www.reuters.com/article/technologyNews/idUSTRE53E6YT20090415>.

191. PageRank is a proprietary Google technology that ranks pages according to their relative importance. See *Corporate Information—Technology Overview*, GOOGLE, <http://www.google.com/corporate/tech.html> (last visited Sept. 17, 2010).

192. In fact, if you type *Black Beauty* into Google Web Search, the Google Book Search result for the Anna Sewell classic is the fifth link. Because this is a public domain work copyrighted in the United States in 1895, its inclusion in the Google Web Search results is not anti-competitive, in-copyright books can be located using Web Search as well. ANNA SEWELL, *BLACK BEAUTY* (Double Day Page 1922) (1895). Project Gutenberg (the Open Content Alliance) indicates that this book is in the public domain in the United States. *Black Beauty by Anna Sewell*, PROJECT GUTENBERG, <http://www.gutenberg.org/ebooks/271> (last visited Oct. 25, 2010).

193. *Google's Goal: Digitize Every Book Ever Printed*, PBS NEWSHOUR (Dec. 30, 2009), http://www.pbs.org/newshour/bb/entertainment/july-dec09/google_12-30.html. Both the transcript and a video of the original broadcast are available on the above website.

in search results and has admitted that it “changes the rank ordering of paid search ads to prioritize company messages it wishes to convey.”¹⁹⁴ Thus, it is possible that books in GBS will be ranked higher than a competitor’s digitized book offerings.

The Settlement is unlikely to constitute a per se tying violation under current antitrust law. This is because, in general, the plaintiff must prove that there is a sale or agreement to sell one product or service conditioned on the purchase of another to establish a per se violation.¹⁹⁵ Because there is no explicit purchase of Google Web Search by potential consumers of Google Book Search, this case is unlikely to fall under the traditional per se rule. In addition, the per se rule is usually not applied to cases involving technological integration with demonstrable efficiencies, or to products and markets “where there are arguably benefits from tying and the industry is one in which the economics and technology have not been thoroughly examined by the courts.”¹⁹⁶ Due to the relative novelty of this industry and the associated technology, courts (and the DOJ) are likely to pursue a rule of reason inquiry.¹⁹⁷

Nevertheless, there is a strong argument that there is a tying violation under the rule of reason. The court stated in *Microsoft*:

The core concern is that tying prevents goods from competing directly for consumer choice on their merits, *i.e.*, being selected as a result of “buyers’ independent judgment.” With a tie, a buyer’s “freedom to select the best bargain in the second market [could be] impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product”¹⁹⁸

This need to purchase the tying product manifests in our constant use of Google Web Search. If consumers are drawn to purchasing digital copies of books as a primary result of their propensity to perform searches on Google Web Search, is Google legitimately earning market share? More importantly, are customers gaining a legitimate opportunity to compare Google’s consumer purchase offerings with other book digitizers’ offerings? It is important that we scrutinize the extent to which the Settlement allows Google to establish a superior market position over individual consumer purchases based solely on Google Book Search’s connection to Google Web Search.

Under the terms of the Settlement, there is room for Google to promote anti-competitive behavior through a tying arrangement between Google Book Search and Google Web Search. In a section that otherwise restricts Google’s ability to provide hyperlinks to Google Book Search preview pages from some of its products,

194. Open Book Alliance Supplemental Memorandum, *supra* note 85, at 20.

195. *See* HANDBOOK, *supra* note 92, at 192.

196. *Id.* at 194–95.

197. *See* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (alteration in original) (citation omitted) (“While *every* ‘business relationship’ will in some sense have unique features, some represent entire, novel categories of dealings. . . . There being no close parallel in prior antitrust cases, simplistic application of per se tying rules carries a serious risk of harm.”).

198. *Id.* at 87 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13–15 (1984)).

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Google is *not restricted* to provide hyperlinks to the GBS pages from its search services (including Google Web Search and Google Earth).¹⁹⁹ Moreover, Google can provide links to Google Book Search pages when its services “have the effect of making discovery of Books easier, more efficient, more widespread or more useful.”²⁰⁰ This latter clause is particularly broad and may provide Google with a court-sanctioned justification for virtually any tying arrangement under the guise of efficiency. Most may agree that it is acceptable for a public domain work such as *Black Beauty* to come up in Google Web Search results.²⁰¹ However, should in-copyright, revenue-generating books be included in search results as well? On the one hand, inclusion of these works in search results would promote accessibility and improve efficiency in locating books. On the other hand, such inclusion could hinder competition with other book digitizers.

This leads to the key question. If Google is allowed to tie its Google Web Search functionality to Google Book Search, how will it react when other competitors enter the market? The search for *Black Beauty* currently yields results from other book digitizers such as Project Gutenberg and the Open Content Alliance, as those are other digitizers who have focused on public domain works. However, if Amazon were to begin digitizing its own books and attempted to sell them, would Google Web Search results return links to their books when you search for a book title?²⁰² If not, Google could be seen as exhibiting deliberate behavior that would represent an attempt to monopolize the market. It would be saying to consumers, “[i]f you use Google Web Search, we are going to make it very easy for you to buy a digital book from us, but, we are not going to let you know that there are digital books being offered by others.”²⁰³

Two basic proposals could minimize the anti-competitive effects of tying on the Settlement. First, Google should not be allowed to integrate Google Book Search functionality into Google Web Search *by default* under the Settlement. If such integrated functionality were allowed, consumers should at least be required to explicitly opt-in to any Google Book Search functionality within Google Web Search. A default rule of separation such as this will allow different digital book options to compete on their merits, and the opt-in opportunity would still allow Google to efficiently integrate its products as it desires. Second, Google should not be able to exploit its current market position in web searching to entrench a

199. Settlement Agreement, *supra* note 5, § 3.10(b).

200. *Id.*

201. *See supra* note 192 and accompanying text. It is a non-revenue-generating public domain work.

202. This, of course, assumes that we are searching for book titles, and not within the full text of books. Google should not be expected (as a default rule) to search the full text of Amazon’s digitized books unless Amazon is willing to provide a full-text copy of its books to Google.

203. Another sub-issue of this is whether Google will allow competitors to submit their texts to Google to be searchable. Some digitized books that will be purchased may not be found as a result of title searches. Rather, someone may search for a topic of interest on Google and see a book of interest that is returned based on Google’s search of the scanned text of the book. If Google refuses to search the scanned texts of competitors’ books, this could be another potentially anti-competitive practice.

monopolistic market in book searching. An alternative option would be to allow Google to include links to Google Book Search pages from Google Web Search queries, but to also ensure that other competitors' digitized books are well-represented and displayed adjacent to all Google Book Search results.²⁰⁴

V. OTHER CONSIDERATIONS: IS THE SETTLEMENT REASONABLE?

The foregoing analysis has demonstrated that many anti-competitive outcomes could arise after approval of the Settlement. It ultimately is the responsibility of the DOJ to investigate a licensing arrangement if it determines that the licensing arrangement is likely to promote anti-competitive outcomes—presumably this is why the DOJ began an inquiry into the Settlement and filed a statement expressing some initial concerns. However, even if a licensing arrangement is perceived to restrain competition, the agency will conduct an investigation to determine whether or not the restraints are “reasonably necessary” to achieve pro-competitive efficiencies—thus, we are not clear what the final verdict from the DOJ will be in this matter.²⁰⁵ As the expected anti-competitive effects of a particular licensing arrangement (or, in this case, the Settlement) increase, the DOJ is less likely to defer to that arrangement unless a correspondingly high level of competitive efficiency can be expected as well.²⁰⁶ This Part provides a general discussion about whether or not the restraints imposed by the current Settlement are “reasonably necessary” based on doctrinal principles and an analysis of the tradeoffs between the Settlement's anti-competitive effects and its efficiencies.

A. Antitrust Safety Zone

As a baseline test to determine the reasonableness of a particular settlement, the DOJ has established an “antitrust safety zone.”²⁰⁷ Settlements or licensing arrangements that fall within this zone are unlikely to have significant anti-competitive effects that outweigh the efficiency gains of the arrangements, and so the agencies would not use their valuable resources to challenge those arrangements. According to the *Guidelines*, two criteria must be met for a settlement to fall within the safety zone. First, a restraint must not be facially anti-competitive. Activities that are facially anti-competitive are those that warrant per se antitrust scrutiny such as naked price-fixing, output restraints, and market divisions among horizontal competitors. Second, the licensor and its licensees may collectively account for no more than twenty percent of each relevant market significantly affected by the

204. Examples include digitized books from the Open Content Alliance's Internet Archive, Amazon, and others. INTERNET ARCHIVE, <http://www.archive.org/> (last visited Oct. 14, 2010); OPEN CONTENT ALLIANCE, <http://www.opencontentalliance.org/> (last visited Oct. 14, 2010); AMAZON, <http://www.amazon.com/exec/obidos/subst/home/home.html> (last visited Oct. 14, 2010).

205. See GUIDELINES, *supra* note 69, § 4.2.

206. *Id.*

207. *Id.* at 22.

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restraint.²⁰⁸ It is unlikely that the DOJ would consider the Settlement to be facially anti-competitive based on the analyses that have been applied above. Although many of the Settlement's provisions can foster anti-competitive outcomes—including some price-fixing that borders on per se illegality—most of the antitrust risks are likely to be scrutinized under the *rule of reason*.

Under the second condition, however, the Settlement falls far outside the safety zone. Google, the Authors, and the Publishers, bound by the Settlement collectively, account for far more than twenty percent of the relevant market impacted by the restraint. Google, to date, has digitized tens of millions of books.²⁰⁹ All books that were digitized by Google prior to January 5, 2009 are bound under the Settlement, with the exception of those few authors who voluntarily chose to opt out.²¹⁰ Given that, on average, only 0.6% of those individuals bound by a settlement choose to opt out, we can assume for all intents and purposes that most of the tens of millions of books that have been scanned will be covered by the Settlement.²¹¹ Meanwhile, Google has dwarfed its current competitors in the book digitization market. Besides Google, only the not-for-profit Open Content Alliance's Internet Archive has reached the two million-book threshold, which places it in a distant second place.²¹² This should raise a red flag to the DOJ both before and after the Settlement's approval.

B. Moving Towards an Antitrust Regime that Protects Individual Consumers

In gauging the reasonability of the Settlement Agreement, the DOJ should also consider the long-term public interest goals of accessibility, innovation, and public transparency that have been introduced in this article. These goals are all meant to protect the individual consumer who, in the absence of intervention, may be shut out from the discussions that will shape the final incarnation of the Settlement. Each of these public interest goals is promoted by the Settlement to some degree. Insofar as Google is expanding access to millions of books, Google is providing an unambiguous public access benefit. GBS, meanwhile, is innovative. Never before have books been so widely digitized and searchable at the same time. In some respects, Google has been remarkably transparent about the Settlement by maintaining blog postings and sending its representatives to panels and public forums. However, this transparency was not present during settlement negotiations to the extent that Google may have acted by willful misdirection.²¹³

208. *Id.*

209. See DOJ ASA Statement, *supra* note 83, at 21.

210. See Google Settlement Notice, *supra* note 74.

211. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1541–43 (2004).

212. See *supra* note 45. As of October 14, 2010, the Internet Archive's website shows that 2,523,580 digitized texts are available. INTERNET ARCHIVE, <http://www.archive.org/> (last visited Oct. 14, 2010).

213. See discussion *supra* Part IV.C.

However, these public goals will be negatively impacted by the Settlement as well. The Settlement hinders accessibility by opening the door to a potentially rigid pricing scheme and creating barriers to entry for future competitors; it fails to fully address the needs of libraries, public schools, and other institutions that should have the opportunity to receive broad access; and remote access appears to be limited. Innovation is hindered by barriers to entry created by its failure to proactively reduce collective action problems faced by third parties who may want to broker deals with a registry and anti-competitive tying between Google Web Search and Google Book Search. Despite Google's relative degree of public transparency, many of the Settlement's provisions are highly ambiguous, which has left many in the dark as they have attempted to discuss the merits of the Settlement.²¹⁴ Because the Settlement provides no formal mechanisms for public accountability, the public will have minimal ability to express its will through the market, absent competition, once it is approved.

Recent case law suggests that the focus of antitrust law has shifted to protect the individual consumer, even when such protections may seem to decrease efficiency somewhat.²¹⁵ Thus, even if Google, the Authors, and the Publishers champion the efficiency gains from the Settlement, the DOJ should still be mindful of the Settlement's overall impact on individual consumers. Professors Kirkwood and Lande, for example, cite the *Brooke Group* case, which indicated that "consumer welfare" was equated with the benefits the consumers received in the relevant market.²¹⁶ Moreover, opinions have tended to focus on consumer impact rather than overall efficiency,²¹⁷ and "whenever the courts have addressed an actual or potential conflict between consumer well-being and efficiency, consumer interests have always prevailed."²¹⁸ Thus, while overall economic efficiency concerns are important—and could be construed as a "major antitrust desideratum"²¹⁹—the interests of the individual consumer should be weighed heavily when examining antitrust issues that may fall under the rule of reason.²²⁰ I contend that the three public interest principles I present are in line with the interests of most, if not all, individual consumers.

214. I am not the first one who has called for the settlement agreement to be clarified. Professor Picker devotes an entire subsection of his paper to this concern. See Picker, *supra* note 17, at 21.

215. From an economic perspective, one could argue that a settlement that promotes broad access to knowledge amongst *all* consumers is more Pareto efficient, while a settlement that merely maximizes overall access to knowledge would be Kaldor-Hicks efficient. Kaldor-Hicks efficiency, however, is only optimal if redistribution of efficient outcomes amongst consumers is possible.

216. John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 89, 94 (Robert Pitofsky ed., 2008).

217. *Id.*

218. Kirkwood & Lande, *supra* note 216, at 94 (emphasis added).

219. GOETZ & MCCHESENEY, *supra* note 125, at 11.

220. *Id.* at 11–12.

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On a related note, I question the assumptions of some leading antitrust economists who have argued that the Settlement is pro-competitive.²²¹ In general, they argue that, because the Settlement increases output in the digital book market, it produces net efficiency gains that warrant its approval.²²² Following Robert Bork's philosophy, these economists uphold the theory that, "unless the conduct or industry structure limits output, it does not harm consumers."²²³ A central tenet of Professor Elhauge's analysis, for example, is what he calls the "but-for baseline." But for the Settlement, the argument goes, we would have "a world where *no* firm offers either unclaimed books or a comprehensive set of out-of-print books."²²⁴ So, on the margin, the Settlement enhances competition in relation to a world without a settlement—thus, there may be some net efficiency, and to these scholars, the inquiry ends there.

There are multiple problems with this argument. First, it illustrates the shift to pure efficiency considerations to the exclusion of broader considerations of individual consumer welfare in antitrust analyses. Rather than focus on the efficiency of the post-settlement world in relation to a world with no settlement, the inquiry should begin with the post-settlement world and, mindful of its anti-competitive constraints, it should consider whether or not alterations to the Settlement could promote competition and enhance consumer welfare in relation to the world that is established *immediately after the Settlement is approved*. The question should not be whether competition is enhanced *at all* by the Settlement, but whether competition is enhanced *enough* by it. Put another way—while the Settlement may increase output relative to a pre-settlement world, can we imagine a world with *even more output* if the Settlement were approved in a different form? Context may be relevant to this inquiry too, which is why I have strongly emphasized the unique competitive landscape of the market for fully searchable, digitized books. Broader, long-term assessments of anti-competitive effects necessarily removes antitrust analysis from a more rule-bound, predictable, regime,²²⁵ but such analyses—such as the DOJ inquiry—are normatively desirable. Unlike the narrow inquiry conducted by Professor Elhauge and others based on marginal book output, broader inquiries are within the spirit of the rule of reason because such inquiries may enable analysts to better gauge the effects—both short-term and long-term—of a particular restraint.²²⁶ And, as the Open Book Alliance keenly noted in its filing, "[t]he Court will note the dearth of citations in

221. Professors' Brief, *supra* note 138, at 1.

222. See Elhauge, *supra* note 7, at 3; see also Professors' Brief, *supra* note 138, at 1.

223. REBACK, *supra* note 90, at 30.

224. Elhauge, *supra* note 7, at 14 (emphasis in original).

225. See, e.g., REBACK, *supra* note 90, at 30–31 ("Bork claimed that evaluating the trade-off between the economic loss of reduced competition and the benefit of greater competitive efficiency flowing from a merger or business practice in any given lawsuit is not only well beyond the competence of judges, but is simply impossible for anyone, even the most talented economist.").

226. See, e.g., National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (holding that the purpose of antitrust analysis under the rule of reason is to "form a judgment about the competitive significance of the restraint . . .").

the brief to the case law supporting a criterion [of increased book output]. A rule of reason evaluation does not turn solely on increasing output; if it did, every joint venture for the creation of product would pass antitrust scrutiny.²²⁷

Finally, even assuming that the inquiry should solely turn on output, Settlement supporters make a bold assertion when they assume that a complex settlement such as this one will undoubtedly increase output along all sectors of the book industry. We should acknowledge the reasonable possibility that this Settlement leaves room for more output restrictions than may be desirable in the long-term, and the DOJ's continued oversight of the Settlement that I advocate would allow it to take remedial action when necessary.

C. *Historic Court Deference to Copyright Settlements*

Even if a DOJ or court inquiry were broader than the inquiry advocated by the Settlement's proponents, however, courts generally defer to copyright settlements once they are agreed to. In the absence of apparent ulterior motives on the part of settling parties, for example, at least one court has refused to delve deeply into the potential antitrust concerns of settlements.²²⁸ In addition, absent ethical and deceptive practices on their part, the *Noerr Pennington* doctrine could have provided Google, the Authors, and the Publishers with immunity from antitrust liability if the Settlement is later found to be anti-competitive.²²⁹ However, the parties have agreed to waive their claims to *Noerr Pennington* immunity.²³⁰ It would, however, be inefficient to pursue additional rounds of litigation if that option were avoidable. This is another reason why it is crucial that the DOJ, and other entities, should be proactive rather than reactive in addressing the antitrust concerns addressed in this article. Nevertheless, in view of the Settlement's likely approval, and Google's waiver

227. Open Book Alliance Supplemental Memorandum, *supra* note 85, at 12.

228. *See* *Hutzler Bros. v. Sales Affiliates*, 164 F.2d 260, 267 (D. Md. 1947) (holding that “[w]e cannot attach . . . any ulterior motives, or any improper conduct, to plaintiffs in connection with the agreed settlement . . .”).

229. *See* HANDBOOK, *supra* note 92, at 271. The *Noerr Pennington* doctrine provides antitrust immunity to parties who advocate for the passage of laws or settlements, even if they are later found to be anti-competitive. *See* *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135–39 (1961).

230. Attachment L to Amended Settlement Agreement at 6, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/SettlementAttachments/Attachment-L-Proposed-Final-Judgment-and-Order-of-Dismissal.pdf.

[T]he Court hereby reserves jurisdiction over the subject matter and as to each party to the Amended Settlement Agreement with respect to the interpretation and implementation of the Amended Settlement Agreement for all purposes, including enforcement of any of the terms thereof at the instance of any party and resolution of any disputes that may arise relating in any way to, or arising from, the implementation of the Amended Settlement Agreement or the implementation of this Order.

Id.

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of *Noerr Pennington* immunity, the DOJ should consider litigation in the future if necessary as it continues to oversee the Settlement's implementation.

Admittedly, one of the reasons that parties often enter into settlements is because the terms of the settlement may be more favorable to the parties than the outcome of litigation. Jeff Cunard, one of the lawyers representing the Publishers in the case, confirmed this sentiment.²³¹ By settling, the parties involved chose to obtain a middle ground solution out of an interest of avoiding long and protracted litigation. Google was likely seeking expedient approval of its scanning activities so that it could continue its operations, while the risk-averse publishers probably wanted to avoid a successful fair-use claim by Google. Full litigation of this case would have probably taken several years, thereby further delaying public access to digitized books. Thus, there are some advantages to the Settlement.

Ultimately, however, the best interests of the parties are not necessarily the best interests of the consumer. This is why, when discussing patent settlements, Professor Carl Shapiro advises that the antitrust law should be used to prevent settlements that lead to lower expected consumer surplus than would arise from ongoing litigation.²³² Particularly in a case of this magnitude, analysis of the viability of the Settlement should be particularly dependent on the public interest. This settlement is about much more than the interests of Google, the Authors, and the Publishers and about sheer efficiency considerations. It is about all of us.

VI. CONCLUSION

Ironically, co-founder of Google, Sergey Brin, recently called critics of the Google Book Search Settlement "shortsighted."²³³ From his perspective, such a statement may make sense. If I spent two years trying to hammer out a settlement agreement that would allow millions of people to access digital books, I may be frustrated by critics too. As drafted, the Settlement admittedly confers substantial benefits on the public.

For Mr. Brin to assume that the Settlement is adequate as constructed, however, is shortsighted in and of itself. Looking out towards the horizon, other critics and I see the possibility of something better. This article has identified several anti-competitive risks in the Settlement that may adversely affect competition in the market for fully searchable, digitized books. These anti-competitive loopholes pose legal risks to both Google and the Registry. By allowing these loopholes to stand without continued scrutiny, the Settlement could compromise normative goals of book accessibility, innovation in the book digitization market, and accountability to the public. Knowing that the future of books will almost certainly take a digital form,

231. Jeff Cunard, Partner, Debevoise & Plimpton LLP, Library 2.0 Conference at Yale University, Panel 4, Part 1: Digitizing Collections (Apr. 4, 2009), *available at* <http://www.youtube.com/watch?v=9C8ZZepFI2U&feature=Playlist&p=08C1B3123A2AE6DB&index=2>.

232. Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND J. ECON. 391, 395–98 (2003).

233. Cade Metz, *Google Brands Ebook Monopoly Critics 'Shortsighted'*, THE REGISTER, May 21, 2009, http://www.theregister.co.uk/2009/05/21/brin_defends_book_settlement/page2.html. *See also* Picker, *supra* note 17 (suggesting a "no *Noerr*" clause in the settlement).

these are not goals that should be taken lightly. This is why the DOJ needs to exercise continued oversight over the Settlement to ensure that it is implemented in a manner that promotes broad access to knowledge, competition, and innovation in this emerging market. If the DOJ and the parties to the Settlement truly care about access to knowledge and a long-term pro-competitive outcome, I would expect no less.