

THE GOOGLE BOOK SEARCH SETTLEMENT: A NEW ORPHAN-WORKS MONOPOLY?

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ABSTRACT

This paper considers the proposed settlement agreement between Google and the Authors Guild relating to Google Book Search (GBS). I focus on three issues that raise antitrust and competition policy concerns. First, the agreement calls for Google to act as agent for rightsholders in setting the price of online access to consumers. Google is tasked with developing a pricing algorithm that will maximize revenues for each of those works. Direct competition among rightsholders would push prices towards some measure of costs and would not be designed to maximize revenues. The consumer access pricing provision might very well fail a challenge under Section 1 of the Sherman Act. Second, and much more centrally to the settlement agreement, the opt-out class action will make it possible for Google to include orphan works in its book search service. Orphan works are works as to which the rightsholder cannot be identified or found. The opt-out class action is the vehicle for large-scale collective action by active rightsholders. Active rightsholders have little incentive to compete with themselves by granting multiple licenses of their works or of the orphan works. Plus under the terms of the settlement agreement, active rightsholders benefit directly from the revenues attributable to orphan works used in GBS. We can mitigate the market power that will otherwise arise through the settlement by expanding the number of rights licenses available under the settlement agreement. To do that, we should take the step of unbundling the orphan works deal from the overall settlement agreement and create a separate

* Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School, and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory (E-mail: r-picker@uchicago.edu). This paper is based on a talk that I gave on March 13, 2009 at the conference “The Google Books Settlement: What Will It Mean for the Long Term” at Columbia Law School’s Kernochan Center for Law, Media and the Arts. I thank the Kernochan Center for hosting the conference and June Besek, in particular, for inviting me. I thank the John M. Olin Foundation and the Paul H. Leffmann Fund for their generous research support. I also thank Matthew Stoker for research assistance. Three disclaimers. First, I have served as a consultant in connection with the opposition to Google’s proposed deals with DoubleClick and Yahoo!. I think that nothing there bears directly on the issues raised in this paper. Second, I have received research grants from Microsoft directly and the Law School receives funding from Microsoft. Again, I think that none of these bear directly on this paper. Third, and finally, I currently chair the faculty board for the Library at the University of Chicago. Our library is a member of the Committee on Institutional Cooperation, a library consortium of Chicago and the eleven schools in the Big Ten. As a group, the CIC has been library partners with Google since June 2007. Copyright © 2009 by Randal C. Picker. All rights reserved.