

## GOOGLE AND THE PROPER ANTITRUST SCRUTINY OF ORPHAN BOOKS

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### ABSTRACT

We examine the consumer-welfare implications of Google's project to scan a large proportion of the world's books into digital form and to make these works accessible to consumers through Google Book Search (GBS). In response to a class action alleging copyright infringement, Google has agreed to a settlement with the plaintiffs, which include the Authors Guild and the Association of American Publishers. A federal district court must approve the settlement for it to take effect. Various individuals and organizations have advocated modification or rejection of the settlement, based in part on concerns regarding Google's claimed ability to exercise market power. The Antitrust Division has confirmed that it is investigating the settlement. We address concerns of Professor Randal Picker and others, especially concerns over the increased access to "orphan books," which are books that retain their copyright but for which the copyright holders are unknown or cannot be found. The increased accessibility of orphan books under GBS involves the creation of a new product, which entails large gains in consumer welfare. We consider it unlikely that Google could exercise market power over orphan books. We consider it remote that the static efficiency losses claimed by critics of the settlement could outweigh the consumer welfare gains from the creation of a valuable new service for expanding access to orphan books. We therefore conclude that neither antitrust intervention nor price regulation of access to orphan books under GBS would be justified on economic grounds.

JEL: K20; K21; L40; L41; L50; O34

### I. INTRODUCTION

New goods and services are among the most important sources of increased economic welfare. Recently, a Wharton School ranking of new products listed the internet, personal computers (PCs), and cell phones as the top three innovations of the past thirty years.<sup>1</sup> Google's project to scan a large

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<sup>1</sup> See Phyllis Korkki, *These Things Went From New To Much-Used*, N.Y. TIMES, Mar. 8, 2009.