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Einer Elhauge

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Harvard Law School
Cambridge, MA 02138

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WHY THE GOOGLE BOOKS SETTLEMENT IS PROCOMPETITIVE

By Professor Einer Elhauge*

August 21, 2009

Although the Google Books Settlement has been criticized as anticompetitive, I conclude that this critique is mistaken. For out-of-copyright books, the settlement procompetitively expands output by clarifying which books are in the public domain and making them digitally available for free. For claimed in-copyright books, the settlement procompetitively expands output by clarifying who holds their rights, making them digitally searchable, allowing individual digital display and sales at competitive prices each rightsholder can set, and creating a new subscription product that provides digital access to a near-universal library at free or competitive rates. For unclaimed in-copyright books, the settlement procompetitively expands output by helping to identify rightsholders and making their books saleable at competitive rates when they cannot be found. The settlement does not raise rival barriers to offering any of these books, but to the contrary lowers them. The output expansion is particularly dramatic for out-of-print books, for which there is currently no new output at all.

JEL Codes: K21, L12, L40, L41, L42, L49.

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I. INTRODUCTION AND SUMMARY

The Google Books settlement gives Google default rights to digitize and make searchable all books published before January 5, 2009, and to display and sell digital versions of all out-of-print books, unless the book rightsholder chooses otherwise. This settlement has been criticized by those who argue that it creates an effective cartel among rightsholders and a de facto monopoly over digital sales of out-of-print books. However, I conclude these antitrust critiques are mistaken. The settlement procompetitively increases book output by expanding unfettered competition in book licensing and reducing legal and logistical barriers to their distribution by both Google and its rivals. In short, it has no anticompetitive effects and dramatic procompetitive effects, including resurrecting a treasure trove of intellectual heritage that would otherwise largely be lost and making books more easily accessible to more persons than they ever have been in history. Because the analysis is complex, I begin by summarizing the conclusions for each category of books.

Out-of-Copyright Books. The settlement expands the number of books that are effectively in the public domain by clarifying their out-of-copyright status and allowing Google to add them to the books that are fully searchable and available for free download online. This procompetitively expands output by taking a set of books that previously were impossible or costly to find or own and making them easy and free to find and own. The settlement imposes no barrier for Google rivals who wish to distribute these books. To the contrary, it lowers those barriers by allowing rivals to free ride on Google's costs of digitizing those books and clarifying which are in the public domain. The expanded availability of free out-of-copyright books should also put downward pressure on used-book prices for these books and to some extent on licenses and prices for in-copyright books.

In-Print Books. The settlement procompetitively provides a process for making decisions in the face of uncertainty about who owns digital rights to in-print books, thus easing the digital

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licensing of these books and increasing the output of digital in-print books. The settlement also expands the sales of in-print books by making them searchable on Google and directing searchers to the firms that sell them, thus helping buyers locate the books they want to buy, whether in printed or digital form. Finally, the settlement provides an additional nonexclusive vehicle for promoting in-print books, allowing rightsholders to choose to have Google display and sell their books at a price each individual rightsholder can individually set, which economic analysis indicates would create enormous benefits to consumer welfare. The settlement imposes no barrier to digital distribution of these books by Google rivals, who can distribute these same books if the rightsholders want at any price they wish, and indeed lowers barriers to Google rivals by providing information on how much digital demand there is for each book.

In-Copyright But Out-of-Print Books. The settlement also procompetitively expands sales of books that are out-of-print but still in copyright. Today, zero output of these books is being created each year, and their availability is limited to those who can find them for resale on the used-book market or for loan from a library. The settlement makes all these books by default searchable and available for preview and sale on Google. This creates additional output that today is nonexistent and vastly increases the availability of these books. The settlement also increases the number of these books whose rightsholders are known by clarifying whether authors or publishers own their rights, creating a Book Rights Registry funded to locate rightsholders, and paying royalties to registered rightsholders that gives unknown rightsholders a financial incentive to come forward. This increase in known rightsholders will increase licensing competition and further increase the output of digital books, whether through Google or its rivals.

Competition among claimed books is entirely unrestrained, because any rightsholder can set

its own book price for sale through Google and remains free to sell its books through any Google rival. For out-of-print rightsholders who elect not to set their own price or who are unknown, the settlement requires Google to set a price using an algorithm designed to mimic competitive pricing. Google has ample incentives to follow this algorithm faithfully because low book prices would increase its web traffic and revenue from advertising (which provides 97% of its revenue), and in any event any effort to set a supracompetitive price would be constrained because known rightsholders would have incentives to undercut it. Although unknown rightsholders may be unable to set their own prices, prices for their books would also be constrained by the settlement algorithm, Google's incentives not to sacrifice advertising revenue, competition from claimed books, and the fact that any supracompetitive price would incentivize unknown rightsholders to identify themselves. In any event, unclaimed books[1] would by definition be unlicensable absent the settlement, making the but-for price for new output of unclaimed books effectively infinity, so that the settlement can only lower their price and expand their output. Further, by lowering the number of unclaimed books, the settlement lowers the number of books with this effectively infinite but-for price on new output.

Nothing in the settlement impairs the ability of Google rivals to offer out-of-print, in-copyright books. There are barriers to offering such books, but they are created by the costs of digitizing these books, the transaction costs of locating and negotiating with rightsholders, and the risk-bearing costs of situations where rights are unclear or unknown. The settlement overcomes

[1] I will use the term "unclaimed books" rather than "orphan books" to refer to books with unknown rightsholders because the terminology "orphan books" is misleading. Orphans have no parents, whereas so-called orphan books have rightsholders whose identity or location is unknown. (If they had no rightsholder they would be out-of-copyright and thus pose no issue). Because a key benefit of the settlement is converting unknown rightsholders into known rightsholders, it is clearer to refer to these books as "unclaimed books".

these barriers to entry for Google without raising them for any rival. Indeed, the settlement affirmatively lowers rival entry barriers because it: (1) allows rivals to free ride off of Google's digitization efforts; (2) lowers transaction costs by expanding the number of known rightsholders and clarifying the commercial value of their books, (3) lowers risk-bearing costs for distributing unclaimed books without a license by clarifying that those books have rightsholders who lack the interest or ability to claim rights, and (4) provides a roadmap for how the class action vehicle could be used by rivals to get similar default rights, perhaps through a second competing Registry.

Indeed, the settlement may lower rival entry barriers even further because it allows the Registry to license Google rivals to distribute books, subject only to a limited nondiscrimination constraint that for ten years the Registry cannot license a substantial proportion of unclaimed books to Google rivals for a lower licensing rate than it charges Google. This leaves the Registry totally unconstrained in how it licenses claimed books at any time or unclaimed books after ten years. Even for unclaimed books over the next ten years, the nondiscrimination constraint does not restrict the Registry from acting on its incentives to minimize the distribution markup by licensing Google rivals who are willing to undercut Google's markup, because the Registry can do so while charging the rivals the same licensing fees as it charges Google. Any Google rival who can distribute unclaimed books as or more efficiently than Google can compete by paying the same licensing fee, and the Registry has affirmative incentives to maximize efficient distribution competition. The nondiscrimination provision thus imposes no restraint on distribution competition for any books, and even if it did for unclaimed books, any restraint would be justified by the need to protect Google against facing a permanent cost disadvantage for distributing unclaimed books (given that Google could not renegotiate with unknown rightsholders) after Google invested hundreds of millions of

dollars in making those books distributable.

In contrast, barring the settlement would anticompetitively raise entry barriers to prohibitive levels for Google and any other firm hoping to distribute in-copyright but out-of-print books. Absent a class action settlement, the transaction and risk-bearing costs created by copyright law are too high to distribute these books, resulting in zero output. A holding that such a settlement violates antitrust law would not only prevent Google from overcoming these entry barriers, but set a precedent preventing any rival from overcoming them either, condemning us all to zero output of these books and an effective price of infinity for new copies of them.

Institutional Subscriptions to All Google Books. The settlement also creates a brand new product, the institutional subscription, which gives institutions the ability to fully view all out-of-print books that are available for purchase through Google and all in-print books that the rightsholders elect to include in the subscription. This sort of blanket license is totally unfeasible today, and adding a market option that otherwise would not exist can only be procompetitive. Google must also provide this institutional subscription for free at one terminal per public library and one or more terminals at colleges. For other institutions, the settlement requires that subscription fees be set to earn only competitive market rates and to assure the sort of broad access that would exist with competitive market output. Further, any ability to set a supracompetitive price for institutional subscriptions would be constrained by competition with other book sources (which the settlement enhances) and by Google's incentives to keep the price low to increase the advertising revenue that provides 97% of its current revenue. Nor does the settlement in any way increase the barriers that Google rivals might face in offering similar institutional subscriptions. To the contrary, it lowers those barriers for the same reasons described above for in-print and out-of-print books.

Other Procompetitive Benefits. The Settlement also provides a sundry of other powerful procompetitive benefits. It makes all displayed books available to the 15-30 million print-disabled Americans, who currently can access only a small subset of these books. It creates a digitized database of almost all books, which researchers can use to conduct research in linguistics, translation, or search protocols that currently would be impossible. It encourages a digitization of books that protects against books getting damaged or lost to history. Finally, it dramatically aids general research by making the bulk of past published books available online for free search, free preview, and free or lower cost purchase, thus curing the unfortunate tendency of current research to favor less-developed, more-recent works because of their online availability.

Precedent. The settlement compares favorably to the blanket licenses for copyrighted songs that the opinions in *BMI vs. CBS* held were too procompetitive to be subject to the per se rule and too lacking in anticompetitive effect to violate the rule of reason. There, as here, transaction costs made direct licensing with many rightsholders costly, and the agreements created an intermediary that offered a blanket license covering all their works but left individual rightsholders free to license directly. The Supreme Court concluded that lowering transaction costs and creating the new product of a blanket license were both procompetitive justifications that made the per se rule inapplicable, and the lower appellate court concluded that the ability to directly license with individual rightsholders eliminated any anticompetitive effect. The same logic is equally applicable here, with the difference that the settlement is even less restraining in multiple respects. First, the *BMI* intermediary offered blanket licenses but not individual songs, and the plaintiff sought the remedy of requiring individual song sales. In contrast, under the settlement Google already offers books on both a blanket and individual basis. Second, the *BMI* rightsholders could not set their own price for

sales through the intermediary, whereas the settlement allows rightsholders to set their own prices for sales through Google. Third, the *BMI* rightsholders could *not* license the same song through a rival intermediary, whereas the settlement allows rightsholders to license their books for distribution through any Google rival and Google at the same time. Thus, given that the *BMI* agreement was neither *per se* illegal nor a rule of reason violation, the settlement here cannot violate antitrust law either.

II. ENTRY BARRIERS AND THE BUT-FOR BASELINE

Nothing in the settlement in any way diminishes the ability of any Google rival to compete in distributing digital books. True, there are obstacles to doing so, but they are not obstacles imposed by the settlement. Instead they are obstacles imposed by digitization costs and the transaction and risk-bearing costs of ascertaining which books are in copyright, determining who holds any rights, locating rightsholders, and negotiating an agreement. Because every right that the settlement gives Google to digitize, display, or sell books is expressly non-exclusive,[2] the settlement in no way increases the barriers to entry imposed by these costs. To the contrary, the settlement reduces barriers to entry for any Google rival in several ways.

Lower Digitization Cost Barriers. Google has incurred the enormous cost of digitizing the books, which included labor costs, significant legal risk, and creating new technologies to automate

[2] Settlement §2.4 ("The authorizations granted to Google in this Settlement Agreement are non-exclusive only, and nothing in this Settlement Agreement shall be construed as limiting any Rightsholder's right to authorize, through the Registry or otherwise, any Person, including direct competitors of Google, to use his, her or its Books or Inserts in any way, including ways identical to those provided for under this Settlement Agreement."); *see also id.* §3.1(a) (Google's digitization rights are "non-exclusive");

scanning and deal with book page curvature.[3] The settlement allows Google to provide each fully participating library with a digital copy of its books.[4] Those libraries are in turn free to sell those digital books to any Google rival if they are out of copyright or the library gets approval from the rightsholder.[5] In fact, the University of Michigan has already used its digitized books to enter into an agreement to sell print-on-demand access to hundreds of thousands of its out-of-copyright books through Amazon.com.[6] Thus, Google rivals can free ride off of Google's digitization without incurring those digitization costs when selling any out-of-copyright books, as well as any in-copyright books for which they can get rightsholder approval. Facing this prospect, Google itself has proven willing to provide its digitized book collection to rival distributors: Sony and Barnes & Noble have entered into agreements with Google to each market over 500,000 out-of-copyright books that Google digitized.[7]

Further, the settlement makes the entire corpus of digitized books available for non-consumptive research, including developing improved search algorithms, and expressly allows commercial exploitation of those new algorithms.[8] Thus, the settlement allows rivals to free ride

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[3] *See* John Harrington, *Book Scanning Technology*, PHOTO BUSINESS NEWS & FORUM, May 4, 2009, *available at* http://photobusinessforum.blogspot.com/2009/05/bookscanning-technology.html; Maureen Clements, *The Secret of Google's Book Scanning Machine Revealed*, NPR.org, Apr. 30, 2009, *available at* http://www.npr.org/blogs/library/2009/04/the_granting_of_patent_7508978.html.

[4] Google can give "fully participating libraries" digital copies of all its books that Google digitized and even its books that Google digitized from other sources as long as a substantial portion of the library books were digitized. *See* Settlement §7.2(a). What makes a library "fully participating" is that it has not only agreed to have its books digitized but also agreed to conditions limiting the use of those digitized copies. Settlement §§ 1.58, 7.1, 7.2. "Cooperating libraries," in contrast, have allowed digitization of their books but have not agreed to the same conditions limiting use of those digitized copies, and thus do not receive those digital copies. Settlement §1.36.

[5] *See* Settlement §7.2(a)(ix)(2), 7.2(c).

[6] *See* Dave Gershman, *University of Michigan, Amazon Announce Book-Printing Deal*, ANN ARBOR NEWS,(July 21, 2009).

[7] *See* Brad Stone, "Sony Reaches Deal to Share in Google's E-Book Library," The New York Times (March 18, 2009); Motoko Rich, "Barnes & Noble Plans an Extensive E-Bookstore," The New York Times (July 20, 2009).

[8] Settlement §7.2(d)(x) ("Commercial exploitation of algorithms developed when performing Non-Consumptive Research on the Research Corpus is permitted."); §1.90 (defining "non-consumptive research" to include research on indexing and search).

on Google's creation of this research corpus to use it to discover superior search algorithms for their own book search software.

Lower Costs to Valuing Digital Books. The settlement also lowers the barriers to rivals offering digital versions of any books by providing useful information about the extent of commercial value each book might have in digital form. Google rivals can easily free ride on this information by seeing the display price and asking rightsholders about their sales volume. They can then use this information to offer books only when their commercial value makes doing so profitable given any digitization, transaction, royalty, and distribution costs.

Lower Costs to Identifying Out-of-Copyright Books. The settlement agreement lowers the barriers for rivals offering out-of-copyright books by clarifying which books are in the public domain. Currently, books published in the United States between 1923-1963 are in copyright only if the copyright was both noticed in the publication and properly renewed.[9] It is costly to resolve when these tests are met, especially because the renewal records were not digitized and because the average value of these books can be slight compared to these costs and the risk of tens of thousands of dollars of statutory damages for mistakenly replicating a copyrighted book.[10] Thus, many of books in this time frame have not been offered by Google or others, even though 93% are actually out-of-copyright.[11] The settlement lowers these costs and risks by providing a process for determining which books are out of copyright that is binding on rightsholders and funded by Google

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[9] *See* http://copyright.cornell.edu/resources/publicdomain.cfm

[10] Under the Copyright Act, rightholders can choose between (1) actual damages plus the infringer's profits or (2) statutory damages per infringed book of up to $150,000 if the infringement was willful or $30,000 if it was not. 17 U.S.C. §504(c)(1).

[11] See Barbara Ringer, Study No. 31: Renewal of Copyright (1960), reprinted in Library of Congress Copyright Office, Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session. (Washington: U. S. Govt. Print. Off, 1961), at 220 (fewer than 7% of registered book copyrights were renewed).

and the Registry.[12] Because the settlement makes this information publicly available, rivals can free ride on it to offer all out-of-copyright books without incurring similar costs and risks.[13]

Lower Costs to Offering In-Copyright, Out-of-Print Books . The settlement also lowers the barriers to rival efforts to offer in-copyright books that are out-of-print *First*, the settlement clarifies who holds the rights to out-of-print books that are in copyright by providing and funding a mechanism for resolving reversion issues.[14] Today, when a publisher allows a book to go out of print, it is often unclear whether the rights have reverted to the author. Even when the reversion issue is clear, it may be hard to identify the author or publisher or their successors in interest.[15] The settlement lowers the costs of identifying unknown rightsholders by funding a Registry that is required to search for rightsholders and by incentivizing rightsholders to identify themselves by giving them royalties if they register.[16] Rivals will be able to free ride on these costly efforts to resolve and locate rightsholders for out-of-print books because the settlement provides that the Registry will make publicly available a database that identifies all registered rightsholders.[17] Because the settlement will reduce the number of unclaimed books from current levels, it will lower

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[12] Settlement §3.2(d)(v); Settlement Attachment E.

[13] A book's display status on Google presumptively indicates its status because out-of-copyright books are 100% displayed for free, whereas no more than 20% of in-copyright books will be freely displayed unless a registered rightsholder specifies otherwise. *See* Settlement §4.3(b)(i)(1). Further, the settlement provides that the Registry will make publically available which books have registered rightsholders. Thus, a rival can easily identify all the books that are out of copyright by taking the set of books that are 100% displayed by Google and subtracting any of these books that the Registry database indicates have registered rightsholders.

[14] *See* Settlement Attachment A, Article IV.

[15] *See* United States Copyright Office, *Report on Orphan Works* 22-34 (2006) (rightsholders can be difficult to identify because the book fails to identify the initial rightsholder, ownership has been transferred or the rightsholder has relocated, existing databases of copyright information are incomplete, and researching copyright information is difficult, costly, and uncertain to succeed).

[16] Settlement §6.1(c) (Registry "will attempt to locate Righstholders with respect to Books and Inserts"). Google will pay $34.5 million to initially fund the Registry. §§ 5.2, 6.4. If rightsholders do not register, after five years their unclaimed royalties are distributed first to cover Registry costs, second on a proportional basis to registered rightsholders to bring them up to 70% royalties, and if anything remains, to non-profits that benefit rightsholders and readers. §6.3(a)(i).

[17] *See* Settlement §6.6(d).

the transaction costs for licensing this set of books from effectively infinity to a potentially more feasible amount.

Second, the settlement will lower the risk-bearing costs of selling unclaimed books without a license. If these rightsholders have not come forward to register despite the settlement rewards for doing so, then that indicates they lack the knowledge, ability, or interest to claim their rights, thus lowering the risk that offering their books without a license would trigger a lawsuit.

Third, the settlement also lowers the costs for rivals to obtain rights for a broad range of out-of-print books similar to those obtained by Google. To begin with, the settlement's creation of a public database of all registered rightsholders makes it easy to make a mass offer directly to them. Further, the settlement provides that: "The Registry will be organized on a basis that allows the Registry ... to..., ... to the extent permitted by law, license Rightsholders' U.S. copyrights to third parties."[18] This clearly allows the Registry to license books to Google rivals if it gets rightsholder authority. Some critics argue that neither the Registry nor rightsholders would have incentives to license a Google rival.[19] But that is incorrect because they would have the same incentives to minimize the distribution markup that any upstream supplier has.[20] Thus, if a Google rival would undercut the distribution markup that Google charges or be a more efficient distributor in any other way, then both the Registry and individual rightsholders would have incentives to license that rival.

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[18] *See* Settlement 6.2(b)(iii); *see also* Settlement §6.1(a). Several other settlement provisions expressly contemplate the possibility that the Registry might license rivals and make clear the settlement does not prevent the Registry from doing so, however none of these provisions purports to grant the Registry any affirmative authority to do so either. *See* Settlement §§2.4, 3.8(a), 6.3(a)(i).

[19] *See* Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, John M. Olin Law and Economics Working Paper No. 462, University of Chicago Law School, at 21 (July 2009).

[20] *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 896 (2007) ("in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize."); EINER ELHAUGE, UNITED STATES ANTITRUST LAW & ECONOMICS 441-442 (2008).

Accordingly, the Registry would have incentives to ask each registrant to authorize it to license rivals, each registrant would have incentives to give that authority, and the Registry could then license all authorized books in aggregate to any rival.

The above methods would not provide default rights or cover unclaimed books, but the settlement provides a roadmap by which rivals could use a similar class action vehicle to obtain those rights. Rivals could simply engage in copying efforts similar to Google, inviting a class action lawsuit that they can settle on similar terms, perhaps with the Registry, perhaps with other class action representatives that agree to create a second competing Registry. If no class action were brought against the copying rivals, then they would be even better off because they would be able to offer the same books as Google without incurring the same royalty costs.

Indeed, the settlement arguably provides an even lower cost way for rivals obtain default rights to offer out-of-print books because of the above provisions allowing the Registry to license rivals "to the extent permitted by law"[21] The effect of this provision depends on what one believes the law permits. Suppose one believes that the current class action settlement could not itself legally permit the Registry to license rivals because there is no current case or controversy involving those rivals. Then this provision means only that the Registry should be organized in a way that does not preclude the Registry from later getting permission to license rivals, but the provision does not itself affirmatively confer that permission. Such permission would instead have to be obtained either directly from the rightsholders, through a second class action against rivals, or perhaps from new legislation covering unclaimed books. In that case, the settlement still lowers entry costs in all the

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[21] *See* Settlement 6.2(b)(iii). Several other settlement provisions expressly contemplate the possibility that the Registry might license rivals and make clear the settlement does not prevent the Registry from doing so, however none of these other provisions purports to grant the Registry any affirmative authority to do so either. *See* Settlement §§2.4, 3.8(a), 6.3(a)(i).

ways noted above. Now suppose one instead believes that the rightsholders represented in the current class action could legally permit the Registry to license rivals. Then this provision would seem to affirmatively give the Registry the power to license Google rivals without requiring later rightsholder permission or a second class action, as long as the relevant rightsholders did not object. In this case, the settlement lowers the barriers for rivals even further, allowing rivals to get a default license similar to Google for all out-of-print books through an agreement with the Registry without incurring the costs of a class action at all.

The But-for-Baseline. Critics argue that these entry barriers will remain insuperable for rivals after the settlement because outside of a class action it is (a) impossible to get licenses from unknown rightsholders and (b) infeasible to get simultaneous licenses over a comprehensive set of out-of-print books with known rightsholders. The critics argue that this means the settlement will give Google a *de facto* exclusive license and monopoly in offering unclaimed books and a comprehensive set of out-of-print books.[22]

In addition to the problems with their factual premise that were described in the prior section, a deeper problem with their argument is that, even if true, it does not explain why rivals could not obtain a similar license by going through precisely the same class action process as Google. Indeed, as just noted, this settlement lowers the costs and risks for rivals to do so. Some critics argue that a rival would still regard a second class action as too costly and risky.[23] But if Google is the only firm that is willing or able to incur these costs and risks, that does not mean that the settlement

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[22] *See* Eric M. Fraser, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, at 2 (June 23, 2009); Picker, *supra* note, at 3-4; Pamela Samuelson. *The Dead Souls of the Google Book Search Settlement*. Communications of the ACM, July 2009 (Vol. 52, No. 7); James Gibson, Google's New Monopoly, Wash. Post, Nov. 3, 2008, at A21; James Grimmelmann, How to Improve the Google Book Search Settlement, 12 J. Internet L. at 1, 11-20 (April 2009); Robert Darnton, Google & the Future of Books, 56 N.Y. Rev. Books 2 (Feb. 12, 2009).

[23] *See* Sameulson, *supra* note __.

confers a *de facto* exclusive license. The *de facto* exclusivity would be provided by the unwillingness or inability of Google rivals to overcome entry barriers that the settlement did not create (and in fact lowers).

Further, if critics are right in their factual premise that these entry barriers are insuperable without this sort of class action settlement, it means that the but-for alternative to this settlement is a world where *no* firm offers either unclaimed books or a comprehensive set of out-of-print books. In other words, the critics' own premise confirms that this settlement provides a powerful procompetitive benefit – making available books that could not be available without the settlement.[24] Even if the critics are right that no Google rival could overcome the barriers to entry in a similar way, a market with one competitor is better than a market with none, because it increases market options and output from nothing to something, thus improving consumer welfare. If the critics are wrong, and other rivals can overcome the same entry barriers (perhaps because the settlement lowers them), then the settlement is even more procompetitive – creating a competitive market in digital distribution of a set of books that otherwise would not be offered at all.

Any ruling that antitrust law bars the sort of class action resolution proposed here would not reduce the relevant entry barriers. Instead, it would greatly increase entry barriers by preventing any firm – including Google and its rivals – from obtaining similar default rights. This would make it impossible for any firm to offer books that are unclaimed or insufficiently valuable to make it worthwhile for anyone (including the rightsholder) to incur the transaction costs of licensing, and would make it much more difficult for any firm to provide easy searchable access to most of the books that have been written. It would be perverse to employ antitrust law to require such an

[24] *See* Fraser, *supra* note, at 2 (acknowledging it would have been an "impossibility" for Google to have reached agreements with all rightsholders absent the class action settlement).

anticompetitive result.

Any claimed anticompetitive effects must be measured from the but-for baseline of what would have existed without the settlement. The available evidence indicates that without this sort of class action settlement, no firm would offer widespread digital access to in-copyright, out-of-print books. Google itself did not attempt to do so before the settlement. Google just digitized these books for purposes of searches that gave snippets of text, which it argued was covered by the fair use doctrine, without making any effort to offer their full text.[25] If the settlement were rejected and Google lost the litigation, it wouldn't be able to offer even those searches and snippets, and in the best case scenario where Google won the litigation, the fair use basis for its victory would limit Google to offering no more than those searches and snippets.

Nor has any other firm attempted to offer the full text of a similar set of books without going through a similar class action settlement process. In fact, the most likely potential entrants into the digital book market have affirmatively demonstrated that they would be unlikely to do so. Amazon began its "Search Inside the Book" feature in 2003 by scanning over 120,000 books for which it provides a partial preview, but it did not provide full digital text for any books or extend these partial displays to any out-of-print works or any books where it did not have prior publisher approval.[26] Microsoft attempted to assemble a library of 750,000 public domain and licensed in-print works, but later abandoned the project in May 2008, explaining that its Live Book Search did not constitute a

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[25] See Joint Public FAQ from Authors Guild, Association of American Publishers & Google, Question # 6, available at http://books.google.com/googlebooks/agreement/faq.html (accessed August 11, 2009); Conversation with Eric Schmidt hosted by Danny Sullivan, Search Engine Strategies Conference, August 9, 2006, available at http://www.google.com/press/podium/ses2006.html.

[26] Barbara Quint, "'Search Inside the Book'": Full text on Amazon," *NewBreaks* (November 3, 2003), *available at* http://newsbreaks.infotoday.com/nbreader.asp?ArticleID=16587.

"sustainable business model."[27] This suggests that even a giant like Microsoft finds it unprofitable to offer a digital library combining out-of-copyright and in-print books that does not include the in-copyright, out-of-print books that would be hard or impossible to offer without a settlement like this. Microsoft's experience thus indicates that offering users the knowledge that they are searching through a complete or nearly-complete database of books may be a necessary precondition for a successful business model. Microsoft itself admitted as much when, in its online announcement that it was ending its Book Search project, it noted that it hoped to move to "more sustainable strategies" in which "our investments will help increase the discoverability of *all* the valuable content that resides in the world of books and scholarly publications."[28] If so, this confirms the high procompetitive benefits of allowing a settlement that creates such a universal library. Either way, this indicates that without this settlement, neither Amazon nor Microsoft would provide anything resembling the universal access to digital books that this settlement provides.

This but-for baseline has several implications. Even if (as we shall see is contrary to fact) the settlement gave Google the power to set monopoly prices for unclaimed books or for widespread digital access to books, that would not be an anticompetitive effect because having a monopolist offer a product is better for consumer welfare than having no one offer a product. Nor is it at all unusual or improper if the first firm to overcome the entry barriers to offering a product reaps monopoly profits from doing so. That is regarded as their proper reward for investing to overcome those entry barriers to providing consumers with a desired product.[29] Investing to be the first to

[27]Miguel Helft, "Microsoft Will Shut Down Book Search Program," *The New York Times* (May 24, 2008).

[28]Bing, "Book Search Winding Down" (May 23, 2008) (italics in original), *available at* http://www.bing.com/community/blogs/search/archive/2008/05/23/book-search-winding-down.aspx.

[29] Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is

overcome entry barriers is procompetitive, not anticompetitive, as long as the firm does not artificially increase entry barriers for later rivals. The first-mover's investment in overcoming those entry barriers makes consumers better off and restrains no competition that would have existed in the but-for world. That is especially true where, as here, the first-mover's investments in overcoming those entry barriers actually lower entry barriers for subsequent rivals.

In fact, the settlement is even more beneficial to consumers than suggested above because, even if no rival enters the market with a similar settlement, this settlement would not give Google the power to set monopoly prices over any set of digital books because the settlement (1) gives individual rightsholders total freedom to price their books through Google or any Google rivals, and (2) requires that Google set prices for individual books and institutional subscriptions using algorithms that mimic competitive pricing. The details are explained in the next section. For here the important point to emphasize is that we should not infer, from the fact that the settlement would (even if rivals do not enter) create something as close as feasible to competitive market pricing, that the but-for baseline should be taken to be a fully competitive market in distributing these books, because that clearly would not exist without this settlement. Instead, without this settlement there would be no possible market in unclaimed books, no or little market in other out-of-print books, and no firm offering a universal library.

Thus, even if this settlement failed to eliminate all possible supracompetitive pricing, it

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what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth,"); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STANFORD LAW REVIEW 253, 332 (2003) ("when a firm uses proper conduct to create something sufficiently more valuable than existing market options to enjoy dominant market power, then any high prices it earns are the proper social reward for that creation..."); Elhauge, *Why Above-Cost Price Cuts to Drive out Entrants Do Not Signal Predation or Even Market Power – and the Implications for Defining Costs,* 112 YALE LAW JOURNAL 681, 796 (2003) ("We thus must be careful not to act as if the purpose of antitrust laws were to eliminate monopoly profits themselves. Such profits are an extremely valuable inducement to the creation of better or cheaper products.").

would still be beneficial to consumer welfare because it would increase output from nothing to something, although the output would not be quite as high as it would be with full competitive pricing. If, as argued below, the settlement does provide full competitive pricing even without rival entry, then the results are even more beneficial to consumers. Alternatively, if rivals in fact do later enter with similar settlements, then encouraging settlements like this will lead to full competitive pricing for these books, which again would be even more beneficial to consumers. But these remarkable procompetitive effects do not alter the fact that the applicable antitrust test is whether the settlement improves consumer welfare from the but-for world, not whether it maximizes consumer welfare to the fullest extent conceivable.[30]

III. THE STRONG PROCOMPETITIVE EFFECTS AND LACK OF ANTICOMPETITIVE EFFECTS

Relative to the proper but-for baseline, the settlement has remarkably strong procompetitive effects and no anticompetitive effects. The analysis is easiest to follow if one takes each category of books in turn.

A. Out-of-Copyright Books

For reasons noted above, the settlement will increase the number of books that are known to be out of copyright. The fact that the settlement clarifies their status also encourages Google to digitize them for reader access, as does the fact that the rest of the settlement gives Google the opportunity to create a universal searchable library. Google allows searchers to read, download, and print out-of-copyright books for free.[31] Creating an expanded, digitized set of free out-of-copyright

[30] DOJ-FTC, Antitrust Guidelines for Collaborations among Competitors §3.3 (2000) ("Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement.")

[31] *See* See Joint Public FAQ from Authors Guild, Association of American Publishers & Google, Question # 9, available at http://books.google.com/googlebooks/agreement/faq.html (accessed August 11, 2009).

books has several procompetitive effects.

Lower Reader Costs. The Google Book Search program dramatically lowers the costs of finding and owning out-of-copyright books. Without the Google Book Search program, it might be difficult, if not impossible, to discover whether an out-of-copyright book might be of interest. Once discovered, if copies of the book are rare, they might be impossible or costly to find and buy in the used-book market. Even if they are available in a library, it might costly to travel to a library that has them, the library might not allow duplication of rare books, and any allowed photocopies may be of poor quality. Further, rummaging through used-book stores or libraries imposes considerable delay. With the Google Book Search program, anyone online can easily search the full text of all out-of-copyright books to find which books are of interest, and immediately read, download, or print them for free. Because the settlement expands the set of books that are available as digitized out-of-copyright books, it lowers the costs and delays of buying and reading these books to zero, and thus increases the output of book copies and reading experiences.

Lower Rival Costs. The settlement also lowers the costs for any Google rivals who wish to also offer out-of-copyright books, as explained above, by allowing rivals to buy digitized copies of these books from fully participating libraries and by clarifying which books are in fact out-of-copyright. Because Google offers these books for free, this increased distribution competition cannot further reduce book prices, but it can make the books available in even more platforms and help constrain any Google advertising prices.

Lower Used Book Prices for Out-of-Copyright Books. Expanding the set of out-of-copyright books that are available for free should exert downward pressure on used book prices for these books. This will benefit even consumers who do not want digital books and only like to read

books with printed pages.

Lower Prices for Competing In-Copyright Books. The free availability of all out-of-copyright books can also put downward pressure on licensing fees and book prices for some in-copyright books. For example, a reader who wants great or fun literature may find many out-of-copyright books that, at a price of zero, they are willing to read instead of buying an in-copyright book. Thus, expanding the free and easy availability of out-of-copyright books can also be expected to have procompetitive effects on prices for the remaining categories of books.

No Anticompetitive Effect. The settlement has no anticompetitive effect on out-of-copyright books, and as far as I know no critic has even suggested any might exist. The effect on out-of-copyright books is thus solely and unremitting procompetitive.

B. In-Print Books

Resolving Unclear Digital Rights. Currently, it is generally unclear – even for many in-print books – whether the author or publisher holds digital rights because their contractual language usually did not anticipate digitization.[32] This can lead to an unfortunate state of affairs where neither the author nor publisher is willing to give a digital license because the profits from doing so are smaller than the risk of paying statutory damages if the other is ultimately held to have the right. However, each would be willing to sue if the book were published without their permission given the prospect of collecting those statutory damages. The settlement lowers these transaction and risk-bearing costs by providing a clear process by which, despite such uncertainty, decisions can be made whether to allow a book to be included in the digital database and displayed or sold through

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[32] *See* Random House v. Rosetta Books, LLC, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd per curiam*, 283 F.3d 490 (2d Cir. 2002) (finding that contractual language that gives the right to "print" a book does not give a right to make digital copies).

Google.[33] This makes it much easier to license these books for digital sale, and thus increases the output of these books. This is a clear procompetitive benefit with no anticompetitive effect.

Allowing Book Searches. The settlement further allows Google to digitize all books (including those in print) published before January 5, 2009, thus making them searchable by readers, and to provide indexing information about the books found in searches, unless the rightsholder chooses to remove the book from the Google database.[34] Google then uses this information to direct searchers to bookstores or local libraries where the books are available.[35] This is a clearly procompetitive result with no anticompetitive effect. It increases the ability of buyers to find which books they want and where to buy them, without in any way impeding competition among book sellers. If rightsholders prefer not to promote their books in this way, they can always remove them from the searchable database. Without the settlement, Google might have lost the litigation and been unable to digitize these books and make them searchable unless it affirmatively secured permission from each rightsholder, which would have imposed prohibitive costs.

Allowing Display and Nonexclusive Sale Through Google. By default, actual content from in-print books can neither be displayed nor sold by Google.[36] However, the settlement provides that rightsholders may at any time choose to allow Google to display free preview portions of their in-

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[33] *See* Settlement Attachment A, Articles V-VI.

[34] *See* Settlement §3.1(a) (allowing digitization of all books);§3.2(b) (making all in- print books "no display" by default); §3.4(a) (allowing Google to make "non-display" uses of "no display books"); §1.91 (defining "non-display uses" to allow searches of the full-text and providing indexing information but not displaying any content of the books); §3.5(a)(i) (allowing rightsholder to remove book from digitized database).

[35] *See* Google, *The Future of Google Book Search*, *available at* http://books.google.com/agreement (accessed August 3, 2009)("if the book you want is available in a bookstore or nearby library, we'll continue to point you to those resources, as we've always done.")

[36] *See* Settlement §3.2(b) (making all in-print books "no display" by default); §3.4(a) (allowing Google to make "non-display" uses of "no display books"); §1.91 ("'Non-Display Uses' means uses that do not display expression from Digital Copies of Books or Inserts to the public").

print books.[37] If the rightsholder chooses to allow display, then its book is by default available for non-exclusive sale on Google both through individual consumer purchase and institutional subscriptions, but an in-print rightsholder may at any time choose to make its displayed book unavailable for sale by Google through either or both means.[38] For any sales under the settlement, Google pays rightsholders 63% of revenues from sales and advertising associated with their books.[39]

Institutional subscriptions cover both in-print and out-of-print books, and raise special issues that will be discussed in a separate section below. Consumer purchases are book by book, and each rightsholder can set whatever price it wants for sale of its book through Google or allow Google to set the price using a pricing algorithm that, as shown below, is designed to mimic the competitive prices that rightsholders would set if they had Google's information.[40] Rightsholders can also switch back and forth between the two pricing methods for consumer purchases through Google.[41] Further,

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[37] *See* Settlement §3.4(b) ("Rightsholders of Books may...direct Google or the Registry to change the classification of a No Display Book to a Display Book, or to include any or all of their No Display Books in one or more the Display Uses"); §1.48 ("'Display Uses' means the following: Snippet Display, Front Matter Display, Access Uses and Preview Uses"). Although §3.2(e)(i) provides that the Registry can also change a book to display status, Settlement Attachment A §5.1 provides that "for an In-Print Book, both the Author and the Publisher of such Book must agree, in accordance with the following procedure, that Google may make one or more Display Uses of the Book." Thus, it appears that §3.2(e)(i) allows the Registry to change in-print books to display status only with prior approval of the rightsholders, thus allowing a convenient way for the rightsholders to communicate to Google through the Registry without giving the Registry a right to act without their permission.

[38] *See* Settlement §1.48("display uses" includes "access uses"); §1.1 ("access uses" means "Institutional Subscriptions, Consumer Purchase and the Public Access Service"); Settlement §3.5(b)(allowing a rightsholder to remove its book from any "display use" or any "revenue model"); §1.131 (defining "revenue model" to include "Institutional Subscriptions, Consumer Purchases, Advertising Uses, Public Access Service and any other revenue models"); §3.5(b)(i) (allowing rightsholder to at any time remove their books from any display use or revenue model); §3.5(b)(iii) (providing that in-print books are exempt from the "coupling requirement" that requires out-of-print rightsholders to make any book they make available for consumer purchase also available for institutional subscription); §2.4 (providing that any authorizations a rightsholder gives Google are "non-exclusive only" and do not preclude "Rightsholder's right to authorize . . . direct competitors of Google, to use his, her or its Books or Inserts in any way, including ways identical to those provided for under this Settlement Agreement.")

[39] Settlement §2.1(a) (63%); §4.5(a) (providing that this 63% split applies to both purchase and advertising revenue). Google also pays $60 per book to rightsholders whose books were scanned before the settlement opt-out deadline. Settlement §2.1(b).

[40] Settlement §4.2(b).

[41] Settlement §4.2(b).

give the above provisions, rightsholders can also (1) sell through a Google rival instead of through Google, (2) bargain with Google to sell through Google on terms different from those offered on the settlement; (3) simultaneously sell the same book through Google and a Google rival at any price they wish, and (4) even take advantage of the ability to display previews of their books on Google, but have Google direct potential buyers to a Google rival rather than allowing sale by Google.

These provisions have strong procompetitive effects. They add a new nonexclusive promotional platform by which buyers can more easily identify the books they want and purchase them either through Google or its rivals in digital or non-digital form. These provisions do not take away or impede any existing vehicles for promoting or selling in-print books, but add a new one with lower distribution costs and without any shipping delay. These provisions should thus increase the output of in-print books. Even for books that rightsholders choose to make available only in non-digital form, these provisions will increase the degree to which purchase decisions reflect true consumer preferences because Google searches will expose users to books irrespective of print volume or advertising expenditure, and lower the transaction costs in searching for obscure in-print works. Economists have shown that websites like Amazon.com that made it easier to search online for a greater variety of books led to an annual increase in consumer welfare of $731 million-$1.03 billion, which they note is 7-10 times greater than the consumer welfare gain from the increased competition and lower costs resulting from the Internet.[42] Because Google Book Search will make it even easier to search for a greater variety of books than are available on Amazon, we can anticipate that it will advance this trend. For titles that rightsholders permit Google to sell, the procompetitive impact on distribution competition will be direct and even greater: Google will

[42] Brynjolfsson, Erik, et al., *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, 49 MANAGEMENT SCIENCE 1580 *(*November 2003).

become a new competitor to existing retailers, precipitating a reduction in prices, particularly given the low overhead costs associated with digital sales.

These provisions have no anticompetitive effects given that they leave individual rightsholders entirely unrestrained from selling at any price and through any distributor or multiple distributors. Some have objected that these provisions allow rightsholders to appoint Google as their agent to set cartel prices for them, and thus amount to a horizontal agreement in restraint of trade.[43] One might similarly object that the royalty split amounts to a horizontal agreement by rightsholders to demand 63% of all sales. But these critiques are mistaken on several grounds.

First, there is no horizontal agreement among the rightsholders because none of them have agreed with each other that they will accept Google's algorithm price and royalty split. All the settlement provides is a nonexclusive *offer* by Google to display and sell their books at certain prices with a 63% royalty split, which by default all in-print rightsholders have rejected. Each rightsholder then must individually decide whether it wants to instead (1) accept the offer, in which case it is still free to sell at any other price or royalty through a Google rival; (2) reject the offer and instead sell through a Google rival at any price or royalty it wishes, (3) reject the standard form offer and try to bargain for different terms from Google; (4) accept the Google offer to display its book but not to sell its book; (5) accept the Google offer to sell its in-print book through consumer purchase but not through institutional subscription, or vice versa; or (6) accept the Google offer to sell its book but set the price for that book itself. To the extent multiple rightsholders eventually accept Google's offer, this does not create a horizontal agreement among them to do so, but rather a series of vertical agreements between each rightsholder and Google whereby the individual rightsholder agreed to

[43] *See* Picker, *supra* note , at 1, 3, 17, 27; Fraser, , *supra* note , at 15-17.

Google's standard form offer.

For whatever set of rightsholders eventually choose to distribute their books through Google, the situation is just like any case where a distributor offers many suppliers an opportunity to sell through the distributor at a given price and commission and many suppliers agree. In such cases, we have a series of vertical agreements on the price and commission, but no horizontal agreement. Further, because the opportunity is nonexclusive, we have the sort of vertical agreements that solely affect distribution through that particular distributor and have no exclusionary effect on rivals of that distributor.

Second, for rightsholders who do choose to accept the Google-set price, the settlement requires Google to set prices using an algorithim that is designed to mimic competitive rather than cartel pricing. The settlement provides:

> In this option, the Rightsholder permits *the* price for which *its* Book authorized for Consumer Purchase is to be sold to be determined by an algorithm . . . that Google will design to find the optimal such price for *each* Book and, accordingly, to maximize revenue for *each* Rightsholder.[44]

This provision does not authorize Google to use an algorithm that sets a schedule of cartel prices for *all* books at the same time that would maximize revenue for *all* rightsholders collectively. Instead, it requires Google to set "the price" for "each book" separately in a way that would maximize revenue for "each" rightsholder given the prices for other books. Suppose, for example, there were two books, each of which are partial substitutes but have enough distinctive demand that with competitive pricing they would each sell at $5 rather than the marginal cost of $0, and that if they entered into a cartel the *joint* profit-maximizing price would be $10 for each book. This provision

[44] Settlement §4.2(b) (italics added).

would be violated if Google set a price of $10 for each book, because in setting the price for each book separately, each rightsholder would earn more revenue if it undercut that price slightly to take sales away from the other book. The same would be true for any price Google might set between $5 and $10. Thus no price above $5 would maximize revenue for "each" rightsholder when separately setting "the" price for "its" book.

Other provisions likewise make clear that the algorithm price must be separately set for each *individual* book given data about the demand for it. The settlement specifies:

> The Pricing Algorithm shall base *the* Settlement Controlled Price of an *individual* Book upon aggregate data collected with respect to Books that are similar to such Book. Based on the Pricing Algorithm, Google may change *the* price of an *individual* Book over time in response to sales data and in order to collect additional data to establish the optimal price for such Book.[45]

This provision allows Google to use information about the demand elasticity for an individual book in order to derive the demand curve for that individual book, and thus to determine the optimal price for each book under competitive pricing. But it does not allow Google to raise prices for multiple books simultaneously to levels that, while they would increase group revenue, would not maximize an individual rightsholder's revenue as much as setting the price for its individual book a little lower to undercut the cartel price.

I understand that in fact the algorithm Google has designed works in precisely the way I described, finding the competition-mimicking price for each book that maximizes its revenue given its book-specific demand elasticity, but does not set prices for all books simultaneously to maximize group revenue.[46] Further, to the extent the provision is at all ambiguous, if interpreting the provision

[45] Settlement §4.2(c)(ii)(2) (italics added).

[46] See Alexander Macgillivray, "A Discussion Around the Google Book Search Settlement," Berkman Center for Internet & Society at Harvard University (July 21, 2009), video available at http://cyber.law.harvard.edu/events/luncheon/2009/07/macgillivray (see video at 00:20:35) ("The idea behind that

to allow setting supracompetitive prices would create an antitrust violation, then standard canons of contractual construction would require reading the provision to avoid that illegality.[47] Indeed, even if interpreting the provision to allow supracompetitive prices were not illegal, then contractual canons would require reading the term to maximize competition and further the public interest.[48]

Third, if Google tried to misuse its pricing ability to set book prices at supracompetitive levels, each rightsholder would undercut the price in order to increase sales of its book. Suppose, for example, that in the above hypothetical Google did try to set prices at $10 per book. Then each rightsholder would have incentives to specify a slightly lower price because that would increase its profits, and the settlement explicitly allows it to do so. The other rightsholders in turn would have incentives to undercut that price, until the prices spiraled down to the competitive level of $5. They could do so without giving up Google display or distribution by simply directing Google to charge a lower price. They could also do so by charging a lower price through a Google rival, and wouldn't even have to give up having their book sold or displayed on Google unless they wanted to do so. The latter would be particularly costly to Google because it would lose the 37% profit on books sales as well as market share to Google rivals. Thus Google would have powerful incentives not to

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algorithm is to essentially simulate a market for all these different books, so that the prices become what the market might have priced the book at had there been a market").

[47] *See* Walsh v. Schlecht, 429 U.S. 401, 408 (1977) ("ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable."); Nat'l Labor Relations Bd. v. Local 32B-32J Serv. Employees Int'l Union, AFL-CIO, 353 F.3d 197, 202 (2d Cir.2003) (same); Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a ... lawful ... meaning to all the terms is preferred to an interpretation which leaves a part ... unlawful....").

[48] Restatement (Second) of Contracts §207 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."); II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §7.11, at 304 (3d ed. 2004) ("if the language is reasonably susceptible to two interpretations and only one favors the public interest, this interpretation will be preferred."); Atlanta Center Ltd. v. Hilton Hotels Corp., 848 F.2d 146, 148 (11th Cir. 1988) (when a contractual term "is susceptible of more than one reasonable interpretation, the preferred interpretation is the one that least restricts competition, thereby posing the least affront to the public policy."); Herrera v. Katz Communications, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) ("a meaning which serves the public interest . . . is preferred over a meaning which does not").

even attempt any price less attractive than the prices charged for in-print books at other retailers, which includes not only printed books but digital books at rivals such as Amazon Kindle, Sony Reader and Project Gutenberg.[49]

In short, Google would have no incentives to even attempt a price less attractive than the prices that are available through rival retailers for those same books. Because those rivals would be the only sellers in the but-for world where Google could not sell digital books, Google's prices thus could be no higher than the but-for prices that would be available without the settlement. Further, because competition between Google and those rivals should lower rival prices, rival pricing should constrain Google to charge less than but-for prices. Google's lack of incentives to attempt to set supracompetitive prices are even stronger when one recognizes that it derives 97% of its revenue from advertising, and thus would not want to sacrifice website traffic by charging high book prices.[50] This provision thus could not possibly result in any anticompetitive harm from the proper but-for baseline.

In fact, the settlement is even more procompetitive, because it assures consumers of competitive pricing for books sold through the new Google platform by allowing rightsholders to set their own prices on that platform and by requiring Google to set competitive prices. Thus, these provisions are not only provide clear procompetitive benefits from the but-for world, but even

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[49] Google currently has 0% market share in books. Even if we assume printed and digital books will prove to be in separate markets, which will not be clear until we learn more about the extent to which buyers will regard them as reasonably interchangeable, Google is unlikely to gain a large market share in digital books. The reason is that, given that the settlement by default gives it no rights to distribute in-print books and that those books generally are distributed by existing publishers, Google will primarily be selling books that are out of print because of limited consumer demand and that currently constitute less than 3% of all books sales. *See infra* at __. Further, Google's digital books will be readable only online, *see* Settlement §§1.32, 1.74, and thus may be less attractive than digital books through Kindle or Sony. There is thus little reason to think Google will gain a dominant market share or market power in any digital book market.

[50] See Google Inc. Form 10-K at 42 (February 13, 2009).

provide consumers with the benefits of full book competition within the new Google option being added to that but-for world.

Fourth, no anticompetitive effect can flow from any rightsholders' vertical agreements to the 63% royalty split that Google offers under the settlement. This royalty split cannot affect consumer pricing because it does not alter the incentives or algorithm for setting prices, but instead alters only the distribution of any resulting revenue. Each rightsholder thus has incentives to set a price for its book that maximizes the revenue for that individual book, whether it gets 63% or any other share of that revenue, and the settlement algorithm requires Google to set prices in the same way.

Nor can the 63% royalty split prevail if it does not match an efficient split. Imagine, for example, that Google's 37% share turns out to too high a markup for its distribution efforts. Then any rightsholder could simply decline to sell its book through Google (without even giving up Google display promotion) and instead sell its book at a Google rival that offers a lower distribution markup, which rivals would have every incentive to do if the distribution markup were excessive. Or the rightsholder could threaten to pull its book from Google and bargain with Google to sell the book through Google at a more attractive markup.

Now imagine instead that the 37% Google share turns out to be inefficiently low, meaning that it fails to provide sufficient revenue to induce an efficient level of distribution effort. Then, just like a manufacturer in any vertical distributional restraint, rightsholders would want to increase the downstream share of profits in order to induce an efficient level of distribution effort, and should agree to pay a higher share to Google or its rivals in order to induce or get commitments for more

distribution effort.[51] Settlement critics miss this point when they assert that no rightsholder would ever have incentives to sell through a rival at a lower royalty rate.[52] Rightsholders would have incentives to pay more for distribution services whenever that would get them more efficient distribution, thus increasing their book sales enough to offset the higher distribution fee.

Moreover, to the extent rightsholders would not pay more than 37% for distribution because that is what Google offers under the settlement, this does mean the rightsholders have horizontally agreed to pay no more than 37%. It simply means that the 37% distribution fee that Google is individually offering has driven the market price for distribution, much like the price individually offered by any marginal seller might drive the market price for any good or service, leaving independent buyers without any incentive to pay more than the market price. Offering a low price for distribution or anything else is not predatory as long as that price is above cost,[53] and no one claims that 37% results in below-cost pricing for Google's distribution services. Nor would the answer be any different if we instead view Google as buying books and reselling them: the price Google is individually willing to pay for book licenses might drive their market price, but paying an excessive price for book licenses would not be predatory unless it resulted in below-cost pricing in the downstream book market, which again no one claims here.[54] Indeed, it would be implausible to claim below-cost pricing for either distribution or books given the low incremental cost of distributing digital books and the fact that rightsholder incentives and the settlement algorithm

[51] *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 896 (2007)("A manufacturer has no incentive to overcompensate retailers with unjustified margins.... As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the 'increase in demand resulting from enhanced service ... will more than offset a negative impact on demand of a higher retail price.'"); EINER ELHAUGE, *supra* note , at 441-442.

[52] *See* Picker, *supra* note , at 27.

[53] *See* Brooke Group Ltd. (Liggett) v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[54] *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc, 127 S.Ct. 1069 (2007).

require setting downstream book prices that maximize individual book revenue. However one categorizes the transaction, Google would have no incentive to accept a lower distribution fee or pay a higher royalty than it could have accepted/paid through separate negotiations with rightsholders, and if Google is undercharging/overpaying with a 37/63% split, it would be equally able to do so without any settlement by publicly offering that split.

Finally, the agreements here are less restrictive than the usual set of agreements between authors and an individual publisher. In the typical publishing agreement, unlike here, the authors agree (1) to exclusivity so that rival publishers cannot distribute the same book, and (2) to have their prices set by a common publisher who is under no obligation to set prices to mimic competition among its book offerings and faces no constraint from authors free to set their own book prices. For such standard publishing contracts, the fact that many authors may agree to the prices and royalty rates offered by the publisher, perhaps in a standard form contract sent to all authors, is deemed neither horizontal nor otherwise problematic. Given that such publishing contracts are more restrictive of competition than the prospective agreements that would result from the settlement, the latter should raise no concern.

C. Out-of-Print, In-Copyright Books

Clarifying Rights. Just as for in-print books, the settlement provides a process for making decisions when it is unclear whether the author or publisher has digital rights over out-of-print books. In addition, the settlement clarifies who has any rights to out-of-print books by resolving reversion issues, funding a Registry to identify rightsholders, giving rightsholders incentives to come forward, and making this information available in a public database. This procompetitively makes it easier for Google and its rivals to license these books for digital or non-digital sale. Without the

settlement, books with unknown rightsholders would likely go unutilized because, compared to the small rewards from publication, the costs of identifying rightsholders are too high and the risk of penalties for violating copyright law by not getting a license are too great.[55] The settlement can thus only increase the output of out-of-print books, especially since by definition there is currently no new output of out-of-print books. Further, the settlement decreases the transaction costs of obtaining licenses for a myriad of other purposes, like making a movie or derivative work based on a book. Such clarification has no anticompetitive downside.

Allowing Book Searches. The settlement allows a digitization of out-of-print books that makes them searchable and easier for readers to find, unless the rightsholder removes the book from the database. The terms for doing so are the same as the terms for in-print books, but the effects are even more procompetitive because out-of-print books are currently unadvertised and thus difficult to find. Making these out-of-print books searchable on Google vastly increases the ability of potential readers to identify and locate the books they want, dramatically increasing the output of these books.

Allowing Display and Nonexclusive Sale Through Google. The settlement terms for displaying and selling out-of-print books through Google are much the same as those for in-print books with two exceptions: (1) by default out-of-print books can be displayed and sold by Google,[56] and (2) rightsholders who choose to allow Google to offer consumer purchases of out-of-print books must also allow Google to include those books in institutional subscriptions.[57] The other terms

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[55] REPORT ON ORPHAN WORKS, *supra* note, at 1.

[56] Settlement §3.2(b) (making all out-of-print books "display" by default); §3.3(a) ("Google may make Display Uses and Non-Display Uses of all Display Books"); §1.48("display uses" includes "access uses"); §1.1 ("access uses" means "Institutional Subscriptions, Consumer Purchase and the Public Access Service").

[57] Settlement §3.5(b)(iii).

described above for in-print books are all equally applicable to out-of-print books. Thus, rightsholders of out-of-print books can (1) remove their book from Google display or sale, (2) choose whatever price they want for sale of their book through Google, (3) sell through a Google rival instead of or in addition to selling through Google, or (4) bargain with Google for a different royalty than the standard 63%.

As with in-print books, these provisions procompetitively add a new valuable promotional vehicle for buyers to identify the books they want and obtain them from Google or other sources. But the effects are even more procompetitive on out-of-print books because, for them, these provisions makes commercially-unavailable books commercially available. To be sure, there is a used book market for out-of-print books. But the used book market is limited, constituting 3% of regular book sales, only a subset of which are also both out-of-print and in-copyright.[58] It is also hard to find books on the used-book market because there is no common database of used books; the settlement would dramatically increase accessibility by allowing online searches, previews, and purchases of out-of-print books. Finally, unlike the settlement, the used book market cannot produce any new copies of these books. The settlement thus clearly and sharply increases the current output of out-of-print books from a baseline of zero.

As with in-print books, settlement critics have argued that the provision allowing Google to set book prices (if the rightsholder declines to do so) creates anticompetitive cartel pricing.[59] To

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[58] Total non-textbook sales were $21 billion in 2004, of which used book sales represented $600 million, or three percent. *See* BOOK INDUSTRY STUDY GROUP, USED-BOOK SALES: A STUDY OF THE BEHAVIOR, STRUCTURE, SIZE AND GROWTH OF THE U.S. USED-BOOK MARKET (New York 2006). For textbooks, used book sales made up 30% of sales, or $1.6 billion out of $5.3 billion, but given the need to update textbooks with developing academic knowledge, these probably are not usually out-of-print books, but rather are used copies of in-print books that the professor has assigned for a class and are resold by students from prior classes.

[59] *See* Picker, *supra* note , at 1, 3, 17, 27; Fraser, , *supra* note , at 15-17.

consider this argument, it is convenient to separate the discussion of books with currently known versus unknown rightsholders.

Currently Known Rightsholders. For out-of-print books with currently known rightsholders, the critics' argument fails not only for all the reasons noted above for in-print books,[60] but for a powerful additional reason: the alternative is a world where new copies of out-of-print books are not sold *at all*, that is where the effective price is infinity given the thin demand and relevant economies of scale in publishing. Whatever pricing one thinks the settlement will allow for these books, that pricing can only reduce the effective price from infinity to something lower, and increase output from zero to something. These are unambiguous procompetitive effects from the proper but-for baseline.

Currently Unknown Rightsholders. For currently unknown rightsholders, we can further divide them into two subgroups: those who would become known after the settlement and those who would not. Let's start with the former group. Because the settlement funds a Registry to identify rightsholders and gives them incentives to self-identify, many of these currently unknown rightsholders will become known. For their books, the procompetitive effects will include all those noted above for books with currently known rightsholders. In addition, the settlement will have the procompetitive effect of making these books available for licensing by rivals that might wish to either take advantage of low digital distribution costs to offer their own digital versions or respond

[60] It fails for the same reasons that: (1) there is no horizontal agreement but instead a series of vertical agreements by some individual rightsholders to accept the standard settlement pricing and royalties (here by declining to reject them); (2) the settlement pricing algorithm actually mimics competitive pricing; (3) any effort to set supracompetitive pricing would be undercut by rightsholders setting a lower price through Google or its rivals; (4) the royalty split cannot affect prices and any inefficient royalty split could not be maintained; and (5) the arrangements are no more horizontal and less restrictive than a series of agreements with a publisher that uses a standard form contract that applies unless the author opts out of it.

to a demonstration of surprising demand for some of these books by republishing a printed version. This will reduce the effective royalty rate for licensing these books from infinity, and will increase the licensing of these books from zero to something.

It seems likely that at least 80% of currently unknown rightsholders could be located by the Registry because a recent study by the Carnegie Mellon University Library indicates that approximately 80% of rightsholders can be located and induced to respond using letters alone.[61] The actual percentage is likely higher because the Registry could engage in more extensive efforts, and because the settlement will create an easy and salient online site for rightsholders to identify themselves and pay royalties that give them strong incentives to do so. Thus, for currently unclaimed books, the effects will be unambiguously procompetitive for at least 80% of them and probably for far more.

For the (less than 20% of) currently unclaimed books whose rightsholders would remain unknown despite Registry searches and incentives for self-identification, the results are also unambiguously procompetitive. These books are effectively not only unclaimed but unclaimable given the relevant rewards and costs for making a claim. In the but-for world, such unclaimable books would be both commercially unavailable and unlicensable. Their output would be zero, and their effective royalty rate would be infinity. Further, without a class action settlement, this would be true in any conceivable but-for world because if these rightsholders cannot be identified with this settlement, they are almost certainly unidentifiable through any feasible means. The settlement thus clearly increases the output of these unclaimable books from zero and reduces their effective price and royalty rate from infinity.

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[61] *See* DENIS TROLL COVEY, ACQUIRING COPYRIGHT PERMISSION TO DIGITIZE AND PROVIDE OPEN ACCESS TO BOOKS 13 (Washington D.C.: Digital Library Federation, Council on Library and Information Resources 2005).

To be sure, given that the rightsholders of unclaimable books would remain unknown, their rightsholders could not individually set prices through Google or decide to license rivals to undercut any monopoly pricing through Google. However, when setting prices for unclaimed books, Google must use the same competition-mimicking algorithm used for claimed books.[62] Pricing for unclaimed books will thus be constrained by the direct terms of the competition-mimicking algorithm. In addition, the fact that the *same* algorithm must be used for both unclaimed and claimed books means that any attempt to misuse the algorithm to set supracompetitive prices for unclaimed books will be constrained by all the market forces (described above) that would prevent supracompetitive pricing for claimed books, including the fact that rightsholders of claimed books would undercut any supracompetitive prices. Given that over 97% of the revenue comes from in-print books where the rightsholders are known,[63] and at least 80% of currently unknown rightsholders are likely knowable,[64] this means that over 99% of all book revenue will come from claimed books, even without adjusting for the percent of out-of-print revenue comes from books with currently unknown rightsholders. Google could not plausibly be tempted to use supracompetitive prices that lose it market share in more than 99% of the market in order to increase profits in less than 1% of the market.

Several other factors would also constrain Google from trying to misuse the competitive-pricing algorithm to set supracompetitive prices for unclaimed books. ***First***, unclaimed books compete with claimed books. If claimed books, which form over 99% of the market, are being priced competitively, it is unlikely that supracompetitive prices can be charged for unclaimed books,

[62] *See* Settlement §4.2(b).
[63] *See supra* at __.
[64] *See supra* at __.

especially because the main reason the latter will be unclaimed is that there is little demand for them.

Second, Google makes 97% of its revenue from advertising.[65] Supracompetitive pricing on unclaimed books that reduced traffic to its site would thus likely lose Google more advertising revenue than it could gain in sales.

Third, if Google tried to set supracompetitive prices on unclaimed books, that would strongly increase the incentives of their rightsholders to identify themselves to get their royalties. After all, rightsholders are typically unidentified because they are difficult to locate, not because they are unaware that they hold copyrights.[66] Thus, given the negligible costs of registering, one would expect them to do so if they could reap supracompetitive profits. If 63% of these profits are insufficient to induce this effort by the rightsholders, those profits are likely negligible, and 37% of such negligible profits would certainly be insufficient to induce Google to use excessive pricing on these books that risks not only more than 99% of the book sales market but also the advertising revenue that provides 97% of Google's profits.

Fourth, if supracompetitive pricing does not induce these unknown rightsholder to identify themselves, it may well induce some rivals to offer their books without a license. Normally, publishers are reluctant to sell any book without a copyright license, but the fact that these rightsholders have not bothered to register to earn supracompetitive profits suggests that they are unlikely to file copyright infringement cases either, making the odds of copyright penalties low. The supracompetitive pricing would also increase the benefits of publishing without a license. Google would be particularly reluctant to induce this sort of rival competition because the rival could easily

[65] *See supra* at __.

[66] *See* United States Copyright Office, *Report on Orphan Works* 22-34 (2006) (listing as reasons for orphan works difficulties in identifying and locating the rightsholders, not the unawareness of the rightsholders that they have copyrights).

undercut Google given that the rival would not be paying any royalties: the rival could charge 37% of the price that Google charges and still earn the same profit per book sale. To be sure, if a rival sold unclaimed books without a license, it it might invite a class action lawsuit on behalf of unregistered rightsholders. But if so, that brings us to the next constraint.

Fifth, supracompetitive pricing for unclaimed books would be constrained by the ability of Google rivals to obtain similar default licensing rights for these books through the same class action mechanism. Settlement critics argue that provoking such a second class action lawsuit would be prohibitively risky.[67] But the risks would seem lower than those incurred by Google, even if the same digitization were done, because at that time there was no precedent for such a settlement. The rival could further lower its risks by limiting its digitization to unclaimed books. Given that the affected rightsholders would be unknown, it would seem difficult to find named plaintiffs for such a class and also difficult to get a court to award monetary recovery when there is no way to identify who would receive the damages. If the rival's digitization did not provoke a second class action, then the rival would effectively get free rights to the same books that Google pays 63% to sell. This possible payoff may well be worth any financial risk, especially because if the rival digitization did provoke a second class action, then the rival could settle on terms that gave it the same sort of default license over unclaimed books that Google obtained.

Settlement critics argue that the plaintiffs in a second class action would be unlikely to give the rival as good a settlement as Google got.[68] But their argument seems to presuppose that the second class action would be controlled by the same group that brought the first. This is not clear.

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[67] Samuelson, *supra* note .

[68] Samuelson, *supra* note __; Picker, *supra* note , at 24.

A rival class action might well involve different groups and the creation of a second Registry, which would have incentives to settle on terms that licensed the rival at prices that undercut Google because then the rival would gain market share and pay more into the second Registry.

Even if the first Registry were allowed to represent the unregistered rightsholders in the rival class action, the first Registry would also have incentives to undercut any supracompetitive Google pricing in a settlement licensing the rival, because doing so would minimize the distribution markup. For example, suppose Google were on average charging a supracompetitive price of $10 for unclaimed books when the competitive price would be $5. The Registry would be receiving $6.30 per book sale from Google, and thus should be happy to charge $6.30 per book to a rival that charged consumers $9 instead. The Registry would have incentives to do so because at a lower downstream price, more books would be sold and thus the Registry would receive $6.30 per book on more book sales. Although the Google settlement has a nondiscrimination provision for licenses covering a significant portion of unclaimed books within ten years of the settlement, that provision would not be violated because the Registry would be charging the rival the same dollar license fee per unclaimed book and a higher percentage royalty of 70% ($6.30/$9), so the Registry would not be licensing the rival on terms that "disfavor or disadvantage Google."[69]

Indeed, the settlement "allows the Registry ... to..., ... to the extent permitted by law, license Rightsholders' U.S. copyrights to third parties,"[70] and many other settlement provisions expressly contemplate the possibility that the Registry might license rivals [71] If the Registry indeed licensed rivals either by this settlement or a second class action, it would have ample incentives to license

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[69] *See* Settlement §3.8(a).
[70] Settlement 6.2(b)(iii).
[71] *See* Settlement §§2.4, 3.8(a), 6.3(a)(i).

to any rival that will pay the same licensing fee but take a lower distribution markup than Google. Because the Registry would be earning the same fees per book from the rival as it would from Google, and because the lower price will increase the number of books sold, Registry revenues would increase. The nondiscrimination provision would not be any impediment because the Registry would be charging the rival the same or worse than Google. The ability to license rivals will thus constrain the distribution markup to the extent 37% is too high a distribution fee. It will also constrain book pricing because, given that Google is paid a percentage of book revenue, any supracompetitive book price would result in a supracompetitive distribution markup that the Registry would have incentives to undercut, just like any upstream manufacturer facing a supracompetitive distribution markup. Moreover, because a rival who undercuts Google's prices would lower Google's market share, Google would have strong incentives never to engage in supracompetitive pricing that induces the Registry to license rivals.

To be sure, the nondiscrimination clause would (for the next ten years) prohibit the Registry from licensing a significant portion of unclaimed books to Google rivals for less than it charges Google. But this is no impediment to the Registry minimizing the distribution markup by licensing rivals at equal or higher licensing fees, and thus suffices to allay any concern that Google might enjoy a distribution monopoly over unclaimed books. To be sure, the Registry would be unable to take less than a 63% royalty split when licensing unclaimed books to Google rivals. But given that unknowable rightsholders are by definition unable to make their own decisions about the minimum royalty they would take, class counsel had to make some choice on their behalf, and this choice is a reasonable one. Indeed, given that this is the same rate being offered to compete for books with known rightsholders, it is presumptively competitive for unknown rightsholders as well.

Any minimal constraint this nondiscrimination provision imposes is, in any event, fully justified by the need to avoid disadvantaging Google. Google made an enormous investment in digitizing these books, taking the legal risks, spending years in litigation, and paying over $100 million in up-front settlement costs.[72] Google would have had no incentive to do so if the day after the settlement the Registry could take all those nicely digitized unclaimed books and license them to a Google rival at lower prices, which would be unavailable to Google because Google could not renegotiate the settlement with unknown rightsholders. If that happened, Google would not only be unable to recoup its initial capital costs, but also would suffer a permanent per unit cost disadvantage compared to rivals who paid none of the initial capital costs. This provision is thus procompetitive because it is necessary to encourage the entire settlement and reap all its other procompetitive benefits. It is also narrowly tailored to solve the free rider problem because it (1) does not apply to claimed books, because for them Google could renegotiate with known rightsholders to match any terms the Registry offered rivals, (2) is limited to ten years, during which initial capital costs might be recouped, and (3) does not prohibit the Registry from licensing unclaimed books to rivals at the same rates as Google, and thus doesn't ever give Google any cost advantage for claimed books or prevent the Registry from encouraging distribution competition to minimize the distribution markup.

Sixth, even if the settlement *did* allow monopoly pricing over unclaimable books, the settlement would still be procompetitive because one market option is better than none and monopoly pricing is better for consumer welfare than no market at all. The but-for alternative for unclaimable books is no licensing at all, which produces the anticompetitive output of zero and

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[72] *See* Settlement §5.3.

effective prices and royalty rates of infinity on new output. Even monopoly pricing would necessarily increase output and lower effective prices and royalty rates from that but-for baseline. One must also keep in mind that unclaimable books comprise a very small share of the overall market and will continue to shrink if the settlement is approved.

Some have suggested separating unclaimed books from the rest of the settlement.[73] But that would reduce the procompetitive effects of the settlement without alleviating the supposed anticompetitive concerns. It would reduce the procompetitive effects for at least two reasons. First, a great deal of the value of this settlement come from having a common searchable database for locating and viewing all these books. Second, if the licenses were separated, unknown rightsholders would not have the same incentives to register to get the advantages of being a known rightsholder and there would not be a commonly funded Registry to help locate them. To the extent unknown rightsholders are a problem, separating them would prevent the settlement from reducing the size of that problem. Nor would separating them help alleviate anticompetitive concerns because a separate settlement license for unclaimed books would still have to set some price for their books, and it is hard to know how one could do much better than requiring a pricing mechanism designed to mimic how their unknown rightsholders would have competitively set prices if they had all the information Google will have.

D. Institutional Subscriptions to View All Google Books

The settlement also procompetitively creates a brand-new product – the institutional subscription – under which universities, schools, corporations, governments, and other institutions can buy blanket licenses to access both all out-of-print books that are available for consumer

[73] *See* Picker, *supra* note , at 1, 27.

purchase through Google and in-print books if their rightsholders choose to include them in the institutional subscription.[74] Rightsholders can withdraw their books from the institutional subscription if they wish and, as always, remain free to directly license or sell their books to anyone who prefers that option to the institutional subscription. In addition to selling institutional subscriptions, Google must provide free access to them at one terminal per public library, as well as at one terminal per 4,000 students at two-year colleges, and one terminal per 10,000 students at four-year colleges.[75]

Creating this new product is a huge procompetitive benefit that could not exist absent the settlement. Non-digital technology simply does not permit a book supplier to sell blanket access to millions of volumes. Nor would any vaguely comparable existing product – such as, hypothetically, paid access to a university library – allow large numbers of users to simultaneously search through or annotate these products with comparable ease. Such institutional subscriptions promise to be an enormous boon to researchers, allowing them to delve into books freely before knowing how valuable the books may be to their research and without being deterred by any marginal monetary or transaction costs.

Settlement critics object that Google and the Registry will have a monopoly over such institutional subscriptions, and thus will be able to charge a monopoly price. But this concern is misplaced for several reasons. ***First***, the settlement requires that institutional subscriptions be priced to achieve two objectives:

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[74] *See* Settlement §4.1(a)(v) (institutional subscription includes all books available for such subscriptions); §3.5(b)(iii) (out-of-print books available for consumer purchase must also be available for institutional subscription, but in-print books need not be).

[75] The settlement agreement itself says Google "may" provide this public access, Settlement §4.8(a)(i), but in a separate agreement Google has contractually committed to do so within two years. *See* Amendment to Cooperative Agreement (Between Google and the University of Michigan) Attachment A (May 19, 2009), at §3(a)

> (1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education.[76]

The first objective requires that revenue be realized at "market" rates for "each" book, and thus requires that pricing achieve only competitive market returns, just like the competitive-pricing algorithm does for individual consumer purchases. The second objective reinforces this goal by requiring that pricing be low enough to realize "broad access" by the public. If the price were raised to a high enough level that a substantial number of institutions decided to refrain from subscribing, Google will be obligated to lower the price to achieve broad access. In essence, this requirement bars any monopoly or supracompetitive pricing that would produce allocative inefficiency in terms of some significant set of buyers not taking the output. Instead, institutional subscriptions must be priced low enough to produce a broad access consistent with the market output that would exist with competitive pricing. To the extent this provision were at all ambiguous on these points, it must (like the competitive-pricing algorithm) be interpreted to avoid antitrust illegality and advance the public interest.[77]

Some settlement critics argue that the "broad access" requirement would not constrain monopoly pricing because demand for these institutional subscriptions would be "completely inelastic."[78] But this assertion is implausible. Institutions have many demands on their funds and would not be willing to pay an infinite price for institutional subscriptions, particularly because they can turn to substitutes that include not only current libraries and inter-library loan, but the free terminals provided under the settlement and the option of buying individual books through Google.

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[76] *See* Settlement §4.1(a)(i).

[77] *See supra* at __.

[78] Darnton, Robert. "Google & The Future of Books." The New York Review of Books, February 12, 2009 (Volume 56, Number 2).

Indeed, libraries today often decline to buy many books, thus confirming that their demand for books is not completely inelastic, and most of the books covered by the institutional subscriptions will likely be books the libraries declined to buy.[79] In any event, even if the "broad access" requirement did not constrain pricing, the requirement that revenue be limited to competitive market returns for each book would.

Some settlement critics also object that these requirements are enforceable only by the Registry and that it has no incentive to object to high prices.[80] But this is untrue. The Settlement provides that "all disputes between and among Google, Rightsholders, the Registry and Participating Libraries arising out of this Settlement Agreement" are subject to arbitration, and explicitly states that arbitration shall apply to disputes regarding the pricing of institutional subscriptions.[81] Any individual rightsholder thus clearly has standing to challenge any high institutional subscription price in arbitration, which is likely to be the case for at least one rightsholder because many are ideologically committed to free access and many others would simply have incentives to broaden access to their works if (like most academics with university press books) they care more about being read than about the paltry royalties they are likely to get. Further, while the settlement itself is ambiguous about whether university libraries can bring such a challenge,[82] subsequent agreements

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[79] See Norman Oder, "Budget Report 2008: Treading Carefully, Budgets Nudge Upward, but Many Libraries Remain Wary," Library Journal, available at http://www.libraryjournal.com/article/CA6515839.html (explaining that public libraries face budget constraints); see also Dan Clancy, "Increasing Access to Books: the Google Book Search Settlement Agreement," available at http://www.google.com/librariancenter/newsletter/0904.html (noting that institutional subscriptions will provide libraries with access to "million of additional books").

[80] Darnton, *supra* note __ ("Only the registry, acting for the copyright holders, has the power to force a change in the subscription prices charged by Google, and there is no reason to expect the registry to object if the prices are too high").

[81] Settlement §§ 9.1(a), 9.3(e)(iii).

[82] The settlement defines "participating libraries" to mean "Fully Participating Libraries, Cooperating Libraries, Public Domain Libraries and Other Libraries", Settlement §1.101, so all of them have standing to arbitrate if they have a dispute "arising out of this Settlement Agreement." § 9.1(a). However, it is not clear these libraries have rights arising out of the settlement to enforce §4.1(a)'s requirements for institutional subscription pricing, because the libraries are not

make clear that universities can bring arbitration if Google tries to charge university subscription fees that violate these requirements.[83] Universities would have clear strong incentives to bring such challenges to minimize the fees they must pay. Outside of arbitration, the provision limiting subscription pricing might also be enforceable in court by non-university institutions or the general public on the theory that they are intended third-party beneficiaries of that provision.[84] Such an intent to benefit could be grounded in the fact that the provision explicitly lists the need to provide the "public" with broad access and seems explicitly designed to protect institutions from high subscription fees.[85] Again, to the extent there was any ambiguity, the settlement must be interpreted to avoid antitrust illegality and favor the public interest.

Second, any attempt to violate this provision and charge excessive institutional subscription fees would be constrained by other forces. To begin with, it would be constrained by Google's own incentives to keep fees low in order to promote its brand and encourage use of its search engine, from which it reaps the advertising revenue that provides 97% of its profits. In addition, high

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parties to the settlement agreement and the settlement provides a list of the provisions for which libraries are third-party beneficiaries that does not include §4.1(a). *See* §7.2(f). Arguably §7.2(f) excludes by implication library third-party beneficiary status under §4.1(a), although one could instead read §7.2(f) to clarify the provisions for which libraries definitely had this status without resolving which other provisions might also confer that status. *See* ELHAUGE, STATUTORY DEFAULT RULES 189-190 (2008) (noting that courts sometimes apply the *expressio unius* canon that listing some applications excludes unlisted applications and other times hold that listed applications can include unlisted ones by analogy, and some reasons supporting the latter).

[83] *See* Amendment to Cooperative Agreement (Between Google and the University of Michigan) Attachment A (May 19, 2009), at §1(d) (defining an "interested institution" to include any fully participating or cooperating library); §3.c(allowing any "interested institution" to challenge university subscription rates).

[84] *See* Restatement (Second) of Contracts § 302 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 10.3 (2d ed. 1990).

[85] Cutting the other way is the fact that the the settlement defines third-party beneficiary rights for libraries but not other institutions, Settlement §7.2(f), which one could say excludes by implication any intent to benefit other institutions. However, the provision could equally be read to simply clarify the extent to which libraries are definitely third-party beneficiaries without resolving whether and when other institutions might also be intended beneficiaries. *See supra* note __ (noting mixed application of the *expressio unius* canon). Supporting the latter interpretation is the Restatement, which provides "It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." RESTATEMENT (SECOND) OF CONTRACTS § 308 (1981). Here the institutions and public were in fact identified, though their third-party beneficiary status was not explicitly identified.

subscription prices would to be constrained by competition from free library terminals, the ability to purchase books through Google or other sources, and the fact that rightsholders retain the right to directly license or sell their books whether or not those books are included in the institutional subscriptions. The last constraint is particularly significant legally because, as we shall see, precisely that sort of constraint was deemed sufficient to eliminate anticompetitive effects in *BMI*.

High subscription fees would also be constrained by the prospect of rivals offering their own institutional subscriptions at lower rates. Rightsholders will be just as able as Google to obtain licenses for in-print books and journals, which are what institutions mainly buy.[86] Rivals who wanted to offer an institutional subscription of comparable scope could also seek licenses for any out-of-print books, which the settlement makes easier in several ways. *(A)* The settlement creates a public database that makes it easy for rivals to make a mass offer to all registered rightsholders to license their books. *(B)* The settlement allows the Registry to collect licenses from multiple registered rightsholders and license them in aggregate to rivals, which the Registry and rightsholders have incentives to do.[87] *(C)* The settlement might be read to provide the Registry with authority to license books to rivals absent rightsholder objection, in which case the Registry could give rivals precisely the same default rights over all out-of-print books that Google has, and would have incentives to do so.[88] *(D)* The settlement provides a roadmap as to how rivals could engage in digitization to provoke a second class action and obtain similar default licenses for all out-of-print books. If the second class action were controlled by the same forces who control the Registry, they

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[86] *See* http://www.ala.org/ala/mgrps/divs/acrl/publications/trends/2007/index.cfm (the bulk of library spending is on current periodicals)

[87] *See supra* at __.

[88] *See supra* at __.

would have incentives to license the rival.[89] If it were not, then the second set of class action plaintiffs would have clear incentives to license a rival and undercut the Google subscription price.

In short, if methods *(C)* and *(D)* prove feasible, a Google rival could obtain default rights over all out-of-print books – even if unclaimed – and thus could offer precisely the same institutional subscription as Google. If methods *(C)* and *(D)* prove unfeasible, then the rival could not obtain licenses over unclaimed books, but unclaimed books currently provide only a faction of out-of-print book revenue and will provide an even smaller fraction once the settlement lowers the number of unclaimed books. Thus, even if *(C)* and *(D)* prove unfeasible, the rival institutional subscription could be a close substitute for the Google subscription, and indeed could be more attractive than Google's subscription if the rival offers more in-print books, lower prices, or additional features.

Third, even if the critics were right both that the settlement gives Google the power to price institutional subscriptions at monopoly levels and that rivals could not possible offer a similar competing subscription, the settlement would still be procompetitive because having one firm offer a desired product is preferable to having no firm offer it. After all, if rivals cannot offer an institutional subscription, and the critics also succeed in making it impossible for Google to offer an institutional subscription by blocking this settlement, then no one will offer a similar institutional subscription. The but-for output of such subscriptions will thus be zero and the but-for price will effectively be infinity. Even monopoly output and pricing would thus expand output and lower effective prices relative to the proper but-for baseline. Indeed, to the extent critics are right that this new product would be so attractive relative to alternative market options that demand for it would be completely inelastic, then that just underscores how harmful to consumer welfare it would be to

[89] *See supra* at __.

deny buyers access to such a product by rejecting this settlement.

E. Other Procompetitive Benefits

The settlement also has several other profound procompetitive effects. ***First***, under the settlement, Google intends to display books in such a way that users unable to read print will be able to access them to the same extent as users without any disability, and Google must provide displays that accommodate their disabilities without charging them a higher price.[90] For the 15-30 million Americans who are print-disabled, this will dramatically expand their access to written knowledge, perhaps more than anything since the invention of Braille.[91] In the less evocative language of antitrust economics, this is an enormous increase in market output and consumer welfare for 5-10% of Americans.

Second, Google will designate two research centers to house the digital copies of all books that it has scanned, and qualified researchers will be given free access to these files in order to conduct "non-consumptive" research, which is defined as research unrelated to the intellectual content of the works, such as developing search algorithms or conducting linguistic analyses.[92] The creation of this research corpus will enable researchers in a variety of disciplines to conduct

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[90] Under Settlement §7.2(g), Google "intends" to display books in a way that satisfies the §3.3(d) goal of providing the print-disabled a similar experience to the nondisabled and "must ... use commercially reasonable efforts to enable an Accommodated Service," which includes displaying books "in the form of electronic text used in conjunction with screen enlargement, voice output, and refreshable Braille displays . . . at no greater charge than the charge to view Books in a similar manner to users . . . without a Print Disability".

[91] *See* http://www.readingrights.org/faq#n13 (estimating that there are about 15 million print-disabled people in the United States); The Council on Access to Information for Print-Disabled Canadians, "Fulfilling the Promise: Report of the Task Force on Access to Information for Print-Disabled Canadians" (October 31, 2000), available at http://collectionscanada.ca/accessinfo/005003-4300-e.html (estimating that 10% of Canadians are print-disabled, which would imply 30 million are in the United States).

[92] Settlement §1.130 (""Research Corpus" means a set of all Digital Copies of Books made in connection with the Google Library Project"); §7.2(d)(ii) ("The Research Corpus may be hosted at up to two Host Sites at any given time"); §7.2(d)(i) ("The Research Corpus may be created and used for Non-Consumptive Research"); §1.90 ("Categories of Non-Consumptive Research include...Image analysis and text extraction...Textual analysis and information extraction...Linguistic analysis...Automated Translation...Indexing and Search").

technical analyses across the universal library of books which would have been exponentially more difficult, if not entirely impossible, absent the settlement. This, too, is in effect a new product, and one which can lay the groundwork for new technologies in full-text searching, automated translation and other areas of programming.

Third, the settlement will provide a vast increase in the availability of human knowledge that is desirable for its own sake and promises to improve research to further advance knowledge. The net effect of the increased accessibility of each category of book – the uniformly positive effects, that is, which the settlement will have on consumers' ability to locate and read books of all sorts – will be a quantitative and qualitative expansion of the information available online. Readers will be able to read many out-of-print books that are currently either severely limited in their distribution or wholly unavailable. Further, researchers will be able to perform online research to find and analyze both in-print and out-of-print books that today are inaccessible online with the exception of a small portion of public domain works. This current online inaccessibility today means that relatively ephemeral information is privileged over long-term, enduring knowledge. The settlement thus would not only increase the sheer amount of information online, by adding billions of pages of digitized books, but also ameliorate this distortion in the kinds of information available online. Research would correspondingly improve, and every industry performing online research will recognize efficiency gains. This effect is augmented by Google's agreement to provide free access to all books in its database at one or more terminals in libraries and colleges, which would allow large numbers of interested users to access the information at no cost.

IV. THE SETTLEMENT COMPARES FAVORABLY TO THE BLANKET COPYRIGHT LICENSES APPROVED IN *BMI*

The precedent closest to this case is *BMI v. CBS,* which involved copyrights to perform songs rather than to reproduce book content. In that case, like here, millions of rightsholders provided copyright licenses to an intermediary, which in turn sold blanket licenses to users that combined all their copyrighted materials. The Supreme Court held that this agreement was not per se illegal because it furthered the procompetitive purposes of (1) lowering the transaction costs of identifying and negotiating with millions of individual rightsholders, and (2) creating a new product (the blanket license) that otherwise would not be possible.[93] On remand, the Second Circuit held that the agreement survived the rule of reason because it lacked any anticompetitive effect, given that users remained free to directly license the songs from rightsholders.[94] This logic is all equally applicable to the settlement here. Indeed, the settlement confers these procompetitive benefits and more, and is less restrictive of competition in several respects.

Like in *BMI*, the settlement here both (1) lowers the transaction costs of identifying and negotiating with millions of rightsholders; and (2) creates a new product (a blanket license or institutional subscription) that otherwise would not be available. But whereas in *BMI* the agreement did so simply by grouping the rights in one intermediary that licensed those rights together, the settlement here not only accomplishes that feat, but additionally furthers these procompetitive purposes by clarifying rights and digitizing the copyrighted material in a way that makes it far easier for users to locate and use the materials they want. Also like in *BMI*, the settlement here does not bar direct purchases from the rightsholders, and thus cannot impede competition among them. But in addition, the settlement here is less restrictive than the *BMI* arrangement in three other important

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[93] BMI v. CBS, 441 U.S. 1 (1979).
[94] CBS v. ASCAP, 620 F.2d 930 (1980).

respects.

First, in *BMI* the intermediary offered a blanket license but not individual songs. Indeed the whole case was about the intermediary's refusal to sell songs separately, and the remedy sought by the plaintiff was an order directing the intermediary to sell songs individually.[95] Under the settlement here, Google is *already* committing to offer books both individually and in a blanket license, and thus provides the very option that the plaintiff sought as a remedy in *BMI*. One settlement critic asserts that Google would not allow institutions to purchase books individually,[96] but nothing in the settlement suggests Google could or would discriminate among purchasers of individual books based on whether they belonged to institutions. Google would presumably not allow an institution to purchase a book individually and then share it among all of its members, because that would be tantamount to buying multiple copies for the price of one. But prohibiting that sort of multiple usage would just provide a meaningful distinction between per-book and subscription purchases, and requiring licenses that permitted multiple usage of a single song was not the remedy sought in *BMI*. It is thus hard to see how the Google settlement could violate the antitrust laws when it not only meets the standards required by *BMI*, but even fulfilled the plaintiff demands that the *BMI* Court held were beyond antitrust requirements.

Second, in *BMI* the rightsholders could set their own prices only by going outside the intermediary, which was costly. In contrast, here the settlement explicitly allows rightsholders not

[95] *See* 441 U.S. at 18.

[96] *See* Fraser, *supra* note , at 19. Fraser also writes that the BMI intermediaries "have been forbidden since 1941 from offering only blanket licenses." *Id.* Here refers to the fact that 1941 consent decree, as amended in 1950, did require the intermediaries to offer per-program (but not per-song) licenses. 620 F.2d at 933. However, these licenses were rarely used and the Court did not hold that their existence was necessary to render the blanket license procompetitive. 441 U.S. at 11-12, 20. To the extent per-program licenses were relevant to the *BMI* result, the Google settlement provides the equivalent in the form of discipline-based subscriptions. *See* Settlement §4.1(v). The settlement just goes even further in also providing for per-book sales that parallel the per-song licenses sought by the *BMI* plaintiff.

only to license directly, but also to set their own prices for sales through the intermediary for all individual book sales.[97] Thus, here the settlement procompetitively has the intermediary provide a clearinghouse for rightsholder competition that the *BMI* intermediary declined to provide. It obviously is not possible for individual buyers to set their own prices for a blanket license (like the one in *BMI* or the institutional subscription here) because the collection of all their rights is what is being sold. However, in *BMI,* neither the Supreme Court nor the appellate court opinions found this troubling. Although both noted that the consent decree allowed a court to review whether blanket license prices were reasonable, neither relied on that aspect of the consent decree; instead, they relied on the fact that the consent decree preserved the option of buying directly from individual rightsholders.[98] The appellate court stressed that no anticompetitive effect flowed from the fact that the plaintiff might prefer the blanket license to buying directly from individual rightsholders, as long as the plaintiff still had the latter choice.[99] Adding the option of a blanket license to the option of direct licensing could not leave the plaintiff any worse off than it would have been without a blanket license, even if the blanket license might be so attractive that no one wants the direct licenses. Here there is even more constraint because buyers can not only buy directly from individual rightsholders, but also can buy individual books through the intermediary at a price each individual rightsholder can set.

Third, although the *BMI* agreement was nonexclusive in the sense that the rightsholder

[97] See Settlement §4.2(b)(i)(1).

[98] 441 U.S. at 11-12, 23-24; 620 F.2d at 933, 935. Further, even if the reasonable-fee review were relevant to the *BMI* decisions, an even stronger review is supplied here by the settlement provisions requiring that institutional subscription prices be set to earn only competitive returns and assure broad access. The main difference is that the standard in this settlement is far more manageable because the competitive prices for individual book sales (not available in *BMI*) provides some metric to use in pricing the blanket license, and the competitive returns and broad access tests provide a more objective benchmark than the reasonable-fee test used in the *BMI* consent decrees.

[99] 620 F.2d at 935.

retained the right to license itself directly, the agreement did *not* allow any intermediary member to license through a rival intermediary.[100] Thus, in *BMI* the members did have to exclusively choose one intermediary, and could not sell their songs through multiple intermediaries at the same time. In contrast, rightsholders here not only can license their books directly, but also remain free to license them both through Google and any Google rival at the same time.[101] Thus, unlike in *BMI*, the settlement here does not require any rightsholder to exclusively choose one intermediary. Further, here the Registry can assemble aggregations of book rights and perhaps even license default rights over out-of-print books to rivals who wish to offer their own institutional subscriptions, even though Google is offering the same books. Thus, the procompetitive effects created by the ability of rightsholders in *BMI* to license directly are surpassed here by the ability of rightsholders to do not only that, but to also license Google rivals, and to have a Registry that can license rivals in aggregate forms that can allow rivals to offer institutional subscriptions of similar sweep.

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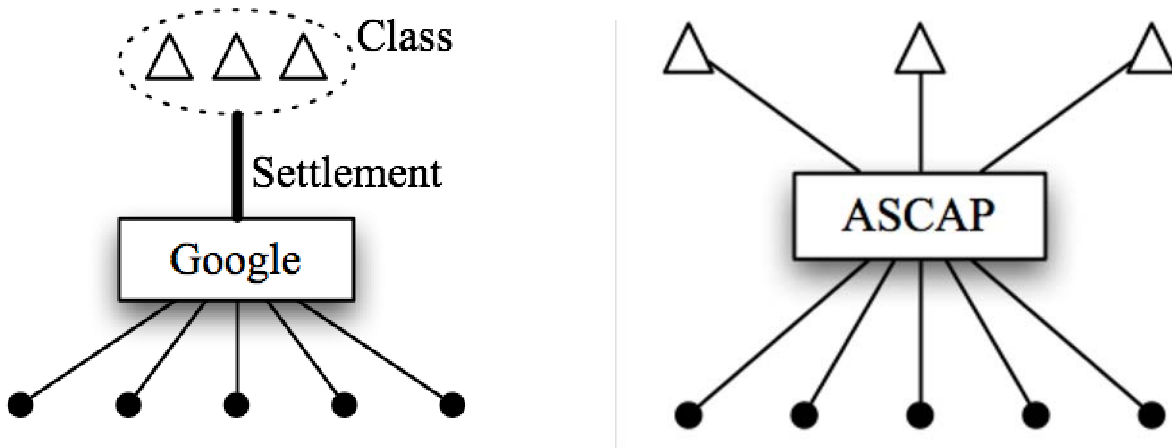
[100]United States v. BMI, 1966 Trade Cas. (CCH) ¶71,141, at Consent Decree § VI.A.

[101] *See* Settlement §2.4.

One settlement critic asserts the contrary, that the *BMI* agreement is less restrictive because while the *BMI* rightsholders negotiated with ASCAP separately, the Google settlement rightsholders effectively agreed to have one party (their class counsel) collectively negotiate with Google for them.[102] He illustrates his claimed difference with the following two diagrams.



However, his diagrams fail to capture the actual set of rights and restrictions of the relevant rightsholders in numerous respects. First, his diagrams incorrectly depict the rightsholders as collectively agreeing to distribute through Google. In fact, each rightsholder individually decides whether it wants to sell through Google, and is free to change its mind at any time.[103] The relationship is thus no less vertical than in *BMI*, and arguably less so because in *BMI* the rightsholders agree to collectively form the ASCAP intermediary,[104] whereas here the rightsholders did not form Google. Indeed, the *BMI* courts assumed the arrangement there

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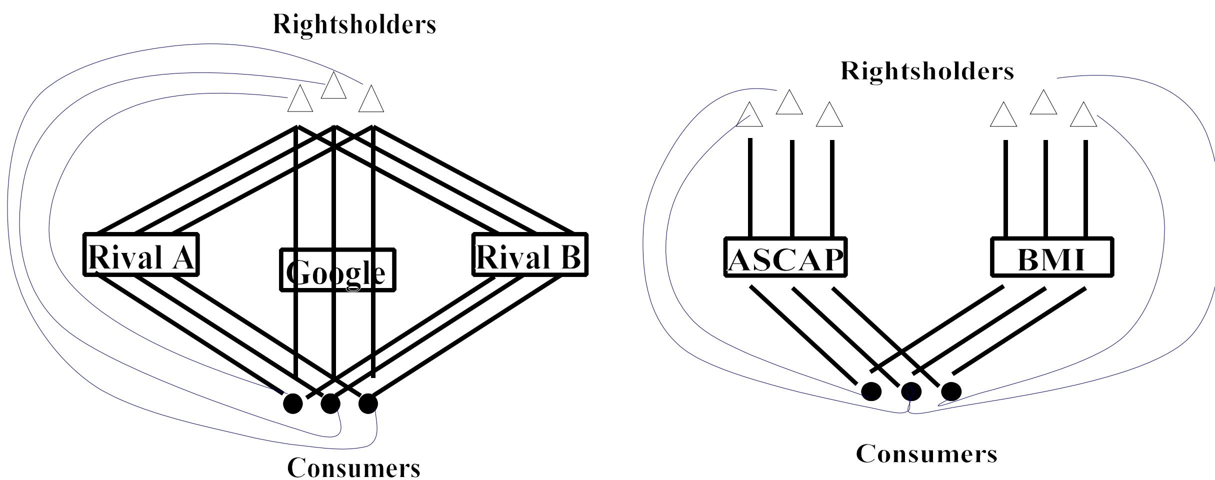
[102] Fraser, *supra* note , at 14.

[103] To the extent that Fraser's comparison rests on Google's agreement with unknown rightsholders, his diagrams are inaccurate because unknown rightsholders could not have competed without a settlement. Indeed, because the new output of their books absent the settlement is zero, any agreement to license their books can only be procompetitive.

[104] 441 U.S. at 4-5.

constituted a horizontal agreement, and resolved the case instead on the grounds that the rightsholders remained free to sell separately. Second, his diagrams incorrectly depict the rightsholders as collectively agreeing to have class counsel or Google set their prices. In fact, the rightsholders each retain the right to set their own prices not only directly but through Google itself, and are free to change that price at any time, whereas the *BMI* rightsholders retained no right to individually price and sell through the intermediary. Third, his diagrams ignore the fact that, while the *BMI* rightsholders could sell only through their intermediary, under the settlement rightsholders may sell through Google and its rival intermediaries at the same time.

A more accurate depiction of the difference would thus be the following diagrams, which include the following four important differences from the prior diagrams. (1) The parallel lines from each rightsholder to Google represent their individual vertical decisions on whether to sell through Google. (2) The fact that the rightsholders' parallel lines go through Google to buyers represent the rightsholders' ability to individually sell and set prices through Google, whereas in *BMI* the lines from the rightsholders stop at the intermediary, rather than going through it, because they had no



right to individually sell and price through their intermediary. (3) The parallel lines between rightsholders and each potential Google rival reflect the fact that rightsholders can sell through Google and its rivals at the same time, whereas in *BMI* the parallel lines link each rightsholders to either ASCAP and BMI but not both, representing the fact that each rightsholder could sell only through one intermediary. (4) The curved lines going from the rightsholders to the consumers depicts the fact that in both cases the rightsholders retained a right to directly license users without going through an intermediary, which is worth stressing because the *BMI* courts held this factor sufficed to make the agreement there procompetitive.

Thus, this critic entirely inverts the relationship between the Google settlement and the *BMI* contracts. Far from forcing more cartel-like behavior among rightsholders than in *BMI*, the settlement's terms involve no horizontal agreement to form or join the intermediary. Those terms also enable the rightsholders to compete by selling individual copyrighted material through the intermediary, setting prices for individual sales through the intermediary, and simultaneously selling that material through other intermediaries, all impossibilities in *BMI*. In short, *BMI* not only shows that settlement critics are wrong when they assert the settlement here constitutes *per se* illegal horizontal price-fixing,[105] but also establishes that the settlement here cannot be judged to fail the rule of reason which the less procompetitive *BMI* blanket licenses passed.

V. CONCLUSION

Critics of the Google Books Settlement like to focus on what they call "orphan" books, meaning books I have been calling "unclaimed." But the situation regarding such books brings to

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[105] Picker, *supra* note, at 33; Fraser, *supra* note , at 13-15.

mind the old Oscar Wilde quote about orphans: "To lose one parent may be regarded as a misfortune; to lose both looks like carelessness." Likewise, here, to be unable to find a book's rightholder is a misfortune, but to compound that misfortune by blocking a settlement that offers the best prospect for both finding those rightsholders and resurrecting their books if they cannot be found, would be sheer antitrust carelessness. The effects of the settlement on competition in orphan/unclaimed books is thus strongly positive, even more so when one considers that the settlement lowers barriers to rivals seeking to offer those books and requires that Google price those books at competitive rates.

The effects on other categories of books is also strongly procompetitive. The settlement clarifies which books are in the public domain and makes them digitally available for free. The settlement also expands the output of claimed in-copyright books by clarifying who holds their rights, making them all digitally searchable, allowing individual digital display and sales at competitive prices each rightsholder can set, and creating a new subscription product that provides digital access to a near-universal library at free or competitive rates. The settlement does not raise rival barriers to offering any of these books, but to the contrary lowers them. The output expansion is particularly dramatic for out-of-print books, for which there is currently no new output at all.