

7 September 2009

**ICOMP Statement on Competition Issues
Presented by the Proposed Google Book Search Settlement**

ICOMP, the Initiative for a Competitive Online Market-Place, welcomes this opportunity to participate in the European Commission's Information Hearing on the proposed Google Book Search U.S. Settlement Agreement. In organising the hearing, the Commission has stated that it seeks stakeholder views on a number of specific aspects of the proposed Settlement, which ICOMP addresses below, namely:

- the scope of the proposed Settlement;
- the Book Registry;
- the impact of the proposed Settlement on European works, and online players; and
- the consequences and implications of the proposed Settlement for European consumers and society at large.

For the reasons explained below, ICOMP believes that the proposed Settlement would have material harmful consequences for the ongoing development of Europe's cultural sector as well as for European rightsholders, consumers, and competition. Specifically, it would effectively eliminate competition in the online supply of books, imperil vigorous competition in online search and search advertising by reinforcing Google's overwhelming dominance in those sectors, and undermine innovation and consumer welfare.

In essence, the proposed Settlement would effectively confer on Google, and Google alone, what amounts to a blanket authorisation to copy and exploit virtually every book published in Europe and throughout the world on or before 5 January 2009. As a result, the proposed Settlement goes much further and inflicts far more damage on the Internet ecosystem than is necessary to achieve the goal of enhancing availability of digitised works, and it does this all to the disproportionate advantage of a single company and in a manner that will effectively destroy future competition in the online supply of books.

ICOMP firmly supports the laudable aim of providing greater online access to books and making books more easily searchable online. It is absolutely critical, however, that these goals are achieved in a manner that is reasonable, transparent, pro-competitive, and respectful of rightsholders' rights. While we recognise that there are potential challenges to achieving these goals under existing law, that fact does not justify endorsing a settlement that creates an enduring monopoly in the supply on online books and related markets, disregards vital European interests, and stifles future creativity and innovation.

An appropriate solution could take any number of forms such as carefully crafted changes to the law that facilitate digitisation by parties operating on a level playing field, a solution that gives third parties access to the copies authorised under the proposed Settlement on fair, reasonable and non-discriminatory terms, or other means. ICOMP would welcome the opportunity to explore these options further with the Commission and other European policy makers. Because the proposed Settlement does not satisfy these fundamental goals, however, we would urge the Commission to oppose the proposed Settlement in its current form, while an appropriate framework for digitisation is developed.

About ICOMP

ICOMP is an industry initiative for businesses and organisations involved in internet commerce. ICOMP's overall mission is to advocate sustainable growth of the Internet consistent with the rule of law. To this end, ICOMP's members seek to encourage competition, transparency, data protection and respect for intellectual property protection as well as the adoption of best practices to promote creativity, innovation, security and trust.

Over 55 companies, trade associations, consumer organisations and individuals are members of ICOMP and have endorsed ICOMP's principles. These members represent 14 countries across Europe, North America and the Middle East. Microsoft is ICOMP's founding sponsor, Burson-Marsteller acts as its Secretariat, and Lord Alan Watson is ICOMP's first Chairman.

ICOMP's work programme has largely centred on helping to educate and inform stakeholders and decision-makers on how the online marketplace functions and how competition rules should be applied. ICOMP also works to bring together participants from across the Internet to identify and promote best practices. In this context, the issues raised by the proposed Google Booksearch Settlement fall very much within ICOMP's frame of reference. The views set out in this statement reflect both the views of the ICOMP membership, as well as broader views that have emerged from ICOMP's extensive discussions with online advertisers, content owners and the very many other groups interested in ensuring that the online marketplace is vibrant and competitive.

Background to the Google Book Search Settlement

Google began digitising books in 2004 and since then has scanned millions of works that it has obtained from libraries (through its "Library Program"), without obtaining licences from the relevant rightsholders. These works provide the vast majority of content that is copied, indexed and offered online through Google Book Search.

In September 2005, a group of authors filed a U.S. class-action copyright infringement lawsuit against Google for its Book Search service,¹ and related litigation was brought by a group of U.S. publishers.² These cases challenged Google's unauthorised copying of millions of in-copyright books and the display of those works through the Google Book Search service. On 28 October 2008, a negotiated settlement was announced (the "Settlement"). The proposed Settlement is subject to approval by the U.S. District Court for the Southern District of New York, which is scheduled to hold a hearing on the fairness of the proposed Settlement on 7 October 2009.

In broad terms, the proposed Settlement would enable Google, and Google alone, to digitise virtually any book protected by a U.S. copyright - including effectively every in-copyright book published in Europe (since these books are protected by U.S. copyright law pursuant to various international treaties) - unless the relevant rightsholder affirmatively and formally "opts out" of the proposed Settlement. Included within the scope of the Settlement are so-called "orphan works", works that are within their term of copyright protection but whose rightsholder cannot be located. One noted academic commentator has described the Settlement as giving Google a "compulsory licence to all books in copyright throughout the world forever".³

Further, the proposed Settlement would grant Google the right to sell online access to these digitised works, as well as to analyse them to produce indices and to improve its Internet search and search advertising algorithms. It would also give Google a huge advantage in the development of new services such as language-based tools including automatic translation services. It would also enable Google to further entrench its dominance in the search and search-related advertising sectors, and would enable it to use its substantial private library of world literature to obtain licences to provide access to online books outside the U.S.⁴

¹ *The Authors Guild, Inc. et al v. Google Inc.* Case No. 05 CV 8137 (S.D.N.Y.).

² *The McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc. and John Wiley & Sons, Inc. v. Google Inc.* Case No. 05 CV 8881 (S.D.N.Y.).

³ "The audacity of the Google Book Search Settlement", P. Samuelson, Huffingtonpost.com, 12 August 2009. This article and a number of other key commentaries are listed in the Annex to this statement.

⁴ While the proposed Settlement would limit Google's display of book content to users in the United States, it has direct ramifications for Europe for at least three reasons: (i) the proposed Settlement would fundamentally alter the scope of U.S. copyright protection enjoyed by European rightsholders; (ii) Google would be authorised to make "non-display" uses of scanned books to improve its other services (such as search and search advertising), which it offers globally; and (iii) its possession of a substantial library of scanned books would provide the basis for Google to seek to persuade holders of non-U.S. rights to license it to provide access to books outside the U.S.

The sweeping effects of the proposed Settlement, described further below, are especially troubling because:

- As a practical matter, the proposed Settlement would give Google the right to copy, distribute, and otherwise exploit works owned by European rightsholders, without their consent, unless those rightsholders are sufficiently well informed of the need to opt out and take the necessary steps to do so.
- In this respect, the proposed Settlement turns copyright law and common sense on its head. Normally, a party wishing to exploit a copyrighted work must obtain the rightsholder's consent in the form of a licence. The proposed Settlement, however, authorises Google to exploit virtually the entire corpus of the world's books unless the relevant rightsholder affirmatively objects under the formal procedures of U.S. class-action law, which given the low levels of awareness about the proposed Settlement and the practical challenges of doing so effectively, is unlikely to happen.
- The exclusive rights and other competitive advantages that Google would enjoy are the result not of its commercial acumen or technological prowess, but rather its use of U.S. class action law - a legal device which has largely been rejected by policymakers in Europe - combined with the controversial copyright practices that led to this lawsuit.
- The far reaching policy consequences of the proposed Settlement are not subject to general legislative review and public consultation - either in the U.S. or Europe - but are instead being shaped in the context of a private lawsuit among a relatively small number of parties, all of which stand to benefit from the proposed Settlement.⁵

We also question whether U.S. authorities would ever accept a European court granting a European entity unilateral authority to exploit works owned by U.S. copyright owners without their consent, and to the lasting detriment of vigorous competition in the affected sectors. Indeed, we are confident they would not. Yet this is precisely the effect that the proposed Settlement will have on rightsholders and competition in Europe.

Scope of the Proposed Settlement

There are many troubling aspects of the scope of the proposed Settlement, including the types of works covered, the nature and extent of the rights conferred on Google, and the mechanisms built into the proposed Settlement to ensure that no third party is able to secure better commercial terms or more favourable rights than those conferred on Google.

⁵ At best this situation would seem antithetical to the process envisaged by the Commission in the Copyright Green Paper. At worst, it suggests that the Commission's capacity to propose legislation and other solutions reflecting the Community interest would become devoid of purpose and effect. This outcome may be especially applicable to orphan works such that various Member States and the Commission, which have taken steps to address the issue, could be effectively out-manoeuvred by the proposed Settlement. When the Commission stated in the Copyright Green Paper that "*The potential cross-border nature of this issue [orphan works] seems to require a harmonised approach*", it is safe to assume the proposed Settlement was not the approach envisaged.

A. Types of Works Covered

1. Copyrighted Works

The proposed Settlement would authorise Google, and only Google, to copy and monetise any work protected by a U.S. copyright, as long as the rightsholder has not formally and expressly “opted out” of the Settlement. This, of course, reverses the normal practice under copyright law, where an entity must obtain a rightsholder’s express consent before copying or otherwise exploiting a protected work. The proposed Settlement takes advantage of rightsholders’ lack of understanding and knowledge of U.S. class action law (in place of informed consent and the exercise of choice), to Google’s unique advantage.

The proposed Settlement is likely to place European rightsholders at an unfair disadvantage to their U.S. counterparts for several reasons:

- European rightsholders are highly unlikely to be familiar with and understand a court proceeding taking place in New York, within the context of a class action;
- the proposed Settlement is inordinately lengthy and complicated, and there has been insufficient guidance, transparency and clarity as to its scope and meaning; and
- the language of the proceedings is English, which may have significantly reduced the ability of many European rightsholders to understand and respond. Translations of Notices of the proposed Settlement have been widely deplored for their inaccuracy.

Implications and consequences. While Google would be able to digitise and commercialise all works protected by a U.S. copyright through the *involuntary* class action procedure (with the exception of the works of those rightsholders who are well enough informed about the need, and then choose, to opt out), any other entity seeking to compete with Google would have to obtain *voluntary* licences from rightsholders to copy and monetise their works. To the extent the Registry has the authority and the inclination to negotiate licences with rightsholders who register with the Registry, Google’s competitors may be able to obtain licences for that discrete class of works from the Registry. It seems beyond any doubt, however, that the Registry will be unable to license rights to orphan works, may not be authorized to license works from known but unregistered rightsholders, and may even have little incentive to negotiate licences with rightsholders who have registered their books with the Registry. Further, potential competitors would have no control over (or input regarding) the scope of any licences that the Registry may manage to negotiate. Perhaps most importantly, the Registry would seem to be incapable of providing the broad release of claims to competitors that the proposed Settlement provides to Google - a fact that will place potential competitors at a serious and perhaps insurmountable competitive advantage to Google. In other words, any other entity seeking to provide online access to books comparable to Google’s would have to make enormous investments of time and resources to negotiate licences (with individual rightsholders and, as further explained below, possibly the Registry).

Also, it is patently unreasonable to believe that it would be possible for a competitor to mimic Google's behaviour, commence digitising works without permission, and invite its own class action lawsuit. Even if one puts aside the fundamental absurdity of the idea that market entry would require a potential entrant to engage in potentially unlawful conduct (copyright infringement) in order to invite a lawsuit, there is no assurance that rightsholders would again have the desire to file a class action lawsuit, that the court would approve such a class, or that any such class (if approved) would agree to terms comparable to those in the proposed Settlement. Indeed, given the monopoly position that Google would establish for itself through the proposed Settlement, the incentives to settle on comparable terms (if at all) would have changed significantly. That is precisely why private class action lawsuits are an especially unsuitable means of addressing the issues of broad public interest presented here.

Finally, as a practical matter, even if Google's competitors are able to obtain licences from rightsholders, many of the libraries and other institutions that provided Google access to their collections are known to have reservations about granting access to others. Specifically, many libraries, having found that books provided to Google for scanning were damaged in the process, are now reluctant to provide Google's competitors with access to their collections. Others take the view that the social imperative of digitising their collections has already been met by Google's scanning, and have no interest in getting involved in the debate over commercialisation of the digitised works.

2. Orphan works

The proposed Settlement would effectively give only Google the right to digitise orphan works (*i.e.*, works that are within their copyright term, but whose rightsholders cannot be located).

Implications and consequences Since, by definition, rightsholders in orphan works are not identified, it is virtually impossible to obtain rightsholder consent or, therefore, to commercialise these works. In contrast, the proposed Settlement would authorise Google, and again only Google, to copy, distribute and otherwise monetise orphan works (since rightsholders in orphan works will, by definition, not exercise their theoretical right to opt out).

Given that orphan works are estimated to account for 50% or more of the works covered by the proposed Settlement, this aspect of the Settlement would put every entity seeking to compete with Google at an overwhelming disadvantage, not only because competitors could not obtain rights to orphan works but also because Google's acquisition of them would give it a unique advantage over any entity or group that could hope to pursue a library project similar to Google's in relation to the logistics of assembling a database.

Specifically, having the right to copy and exploit orphan works for profit would allow Google to copy entire collections of books without having to check, title-by-title, whether the collection includes orphan works. No competitor would enjoy this luxury. Competitors will continue to have to check each book against a list of books that they are authorised to copy - making their copying process materially slower, far more cumbersome, and costly, and leaving them with a database of books that is much smaller and therefore inferior to Google's. As a result, the proposed Settlement would confer on Google an enduring material advantage over its competitors.

B. Extent of Authorisations Conferred on Google

The proposed Settlement would authorise Google to digitise all works within its scope and to make available bibliographic information and full-text and geographic indices for the works included as well as create algorithmic listings of key terms. In addition, if a book is not "commercially available", Google may make available previews of up to 20% of its content to searchers, and may make its entire text available either through institutional subscription or individual purchase. The proposed Settlement prohibits rightsholders, the Book Registry (discussed below), and libraries from allowing third parties to access the digital copies created and/or authorised pursuant to the proposed Settlement, unless Google consents.

Implications and consequences As discussed below, the proposed Settlement would give Google the exclusive right to sell (either through subscriptions to institutions or through individual sales) complete copies of books that are not available new through one or more customary channels in the U.S. Further, it would enhance Google's already super dominant position in the markets for online search and search advertising, and would create a dominant position in the supply of book search and related search advertising.

The Book Registry

The proposed Settlement effectively creates a vast new collecting society - the Book Registry - to administer payments pursuant to the proposed Settlement. Google would pay US\$45 million to cover payments owed to rightsholders for works digitised without authorisation prior to 4 September 2009 and US\$34.5 million to cover the initial administrative costs of the Registry.

On an ongoing basis, Google would pay to the Registry 63% of all revenues earned through the use of copied works. The Registry would be responsible for allocating these funds to rightsholders. However, revenues generated from orphan works presumably would be "unclaimed", and after five years would be used to cover costs of the Registry, with the balance of these revenues (if any) being paid to registered rightsholders.

In addition to prohibiting the Registry, libraries, or others from allowing other providers of online access to books (or anyone else) from accessing the digital copies of books authorized under the proposed Settlement, the proposed Settlement incorporates a “most favoured nation” clause which provides that, in the event that the Registry enters into a similar agreement with a third party, Google must be offered economic and other terms that are similar to those offered to the third party. As a result, whatever competition may arise, Google can never be disfavoured or disadvantaged, in terms of the works covered, the rights conferred or the terms on which the rights have been granted. Naturally, it is extremely unlikely that any entity would accept *less* favourable terms than those offered to Google under the proposed Settlement, particularly given the massive competitive barriers erected through Google’s exclusive access to orphan works and other provisions in the agreement.

It is also important to point out that there is a common misunderstanding that the proposed Settlement grants rights to the Registry and that the Registry is licensing Google and is able to license other book search projects. This is not true. Google gets its license to digitize and use books from the proposed Settlement agreement, not from the Registry. The settlement creates the Registry, but the Registry must separately obtain copyright rights from voluntary “opt-in” licences granted to it by copyright holders, and can only licence the collection of copyrights obtained through that process. Google, on the other hand, will enjoy a license created by the involuntary “opt-out” class action process, which will necessarily be a much larger collection of copyrights because of the inclusion of orphan works as a result of the proposed Settlement. The anti-competitive effects of the proposed Settlement become much clearer once this is understood.

Impact of the Proposed Settlement on European Rightsholders and other European Stakeholders

Because the proposed Settlement is directed to all works covered by U.S. copyright, it will in fact cover virtually every in-copyright book published in Europe. Specifically, the proposed Settlement will apply both to works under U.S. copyright by identifiable European authors who did not opt out (possibly because they were unaware of the proposed Settlement), as well as to the rightsholders of European orphan works subject to U.S. copyright.

In addition, the proposed Settlement would affect European entities in a number of other ways. First, the proposed Settlement will enable Google to create a digitised database of the world’s books that effectively cannot be replicated. As a result, European authors and other rightsholders who wish to offer online access to their books within the United States may well have no option but to accede to the terms set forth in the proposed Settlement and, in time, agree to other terms relating to non-U.S. copyright that Google may offer.

Second, many EU-based entities bid on Google search advertising key words (and otherwise advertise their products and services with Google), and they too would be affected. As the Commission noted in *Google/DoubleClick*, a significant proportion of Google’s advertisers target an audience outside their home country, and advertising campaigns are increasingly conducted on an international scale by global advertisers and agencies.⁶ These advertisers would be adversely impacted by the decreased level of competition in search and search advertising resulting from the proposed Settlement.

Finally, since Google would likely become the sole online supplier of the millions of books, non-Google search advertising platforms (including European platforms) would be at a material disadvantage in relation to the negotiation of search syndication deals.

The Broader Implications of the Proposed Settlement for Consumers and the Public at large

The Hearing Notice expresses specific interest in the broader implications of the proposed Settlement for consumers and the public at large. Since one of the key functions of the Community’s competition rules is to protect consumers,⁷ we believe that the Commission should make full use of its powers of investigation and enforcement under those competition rules to consider and address the effect of the proposed Settlement on consumers.

As described above, several key terms of the proposed Settlement have fundamentally anti-competitive effects. In particular the potential anti-competitive consequences flow from the unprecedented scope of the works covered, the many critical authorisations granted solely to Google under the proposed Settlement, the so called “most favoured nation” clause in favour of Google, the price setting mechanisms, and the monopoly roles of Google and the Book Registry under the proposed Settlement in paying rightsholders.

As explained above, the proposed Settlement would authorise Google and Google alone to copy, distribute, and otherwise exploit orphan works, including works whose rightsholders (including many European rightsholders) are unaware of the “opt out” structure. Further, it would confer on Google unilateral control over the digital copies of books created pursuant to the proposed Settlement, both in terms of selling access to these digital copies and exploiting the associated search and search advertising opportunities. As the Commission has noted many times, input foreclosure of this kind is liable to result in anticompetitive foreclosure.⁸

⁶ Case No COMP/M.4731, at para. 82.

⁷ See, for example, para. 5 of the *Commission’s Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (the “Article 82 Guidelines”).

⁸ See for example footnote 23 of the Article 82 Guidelines.

The competitive advantages that flow from the proposed Settlement would not have been gained through competition on the merits, commercial acumen or technological prowess, but through the vagaries of U.S. class action law and the widespread misunderstanding of the scope and effect of the proposed Settlement among affected rightsholders - problems that impose particular burdens and disadvantages on rightsholders that are located in Europe or elsewhere outside the United States.

As a result, the proposed Settlement would have material anti-competitive consequences for consumers in a number of markets within Europe, including:

- the market for online search
- the market for online search advertising; and
- the market for digitisation of books (including orphan works) and, through this market, the future retail markets for the sale of subscription-based online access to books and the online supply of individual books).

Taken together, these terms enable Google to reinforce its market dominance in ways that are the antithesis of competition on the merits and which would never be permitted in commercial practice outside the context of a class action lawsuit. They must not be permitted within the context of such a lawsuit either.

A. Online search and search advertising

1. Online search

Google already enjoys a super dominant position in the markets for online search and search advertising. Google's share of global paid search queries is already approximately 77%, rising even higher, to approximately 90%, in Europe. In January 2009, comScore data put Google's query share in the UK as approximately 78%, and in France and Germany, at approximately 81%. Its shares of paid keyword searches were even higher: 86% in the UK, 90% in France and 93% in Germany.

The authorisations that the proposed Settlement would confer on Google would only increase (and further insulate from competition) these huge market shares. Search engines are driven by their algorithms, particularly the relevance and usefulness of the search results that algorithms produce. Algorithms are improved by constant experimentation on data. As a result, the size and nature of the data pool available and the ability to run experiments on that data are key to the success of search engines and the advertising business model on which they rely.

The proposed Settlement would authorise only Google to copy entire libraries, and to use the digitised copies that it creates for its own profit. Google would also have the exclusive authority to conduct computational analyses on the scanned books and user access to them in order to improve its own search and search advertising algorithms. This would make Google the *de facto* monopoly supplier of online access to books and related book search services. It would also give Google a unique significant advantage in terms of developing new web-based services such as language tools and automatic translation services, in addition to further enhancing Google's already super dominant position in search and search advertising.

2. Online search advertising

As the Commission noted in *Google/DoubleClick*,⁹ Google enjoyed a dominant position in the supply of online search advertising (and had a share approaching 40% of EEA online advertising), already in 2006. Google's global and EEA share of online search advertising was between 60 and 70%, and was even higher in Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Spain and the UK. Given the growth in Google's online search share since 2006, it is highly likely that its share of online search advertising has increased substantially since then as well.

Here again, the *de facto* exclusive authorisations conferred by the proposed Settlement on Google almost certainly would further increase its share of online search advertising. First, because it improves search algorithms, greater scale (*i.e.*, more search queries) not only improves search relevance and usefulness, it also improves the relevance of search ads - advertisers are more likely to have their ads seen by consumers who are actually interested in purchasing the advertised product or service. This means that a larger search engine is more likely to attract advertisers than its smaller competitors.

Moreover, search advertising is driven by advertisers bidding on "key words". The authorisations that Google would acquire under the proposed Settlement would inevitably affect key word purchasing by advertisers. If an advertiser is interested in reaching customers who are buying or searching for information about a particular book to which Google and only Google provides online access (*e.g.*, to advertise related merchandise, related books or movies), they would know that those customers would be using Google for book search. As a result, those advertisers would only bid on these key words with Google's ad platform.

The combination of these effects would only further increase Google's dominant position in the supply of online search advertising, likely leading to higher prices (for key words) for advertisers and smaller shares of revenue for publishers.

⁹ Case COMP/M.4731.

B. Sale of Institutional Subscriptions and Individual Digitised Books

The proposed Settlement authorises Google and only Google to sell access to the texts (both complete and extracts) of, and bibliographic and index material from, any copies of books created pursuant to or authorised by the proposed Settlement. Google would be able to offer subscriptions providing access to the entire database to institutions and companies (public and private), and to sell copies of individual digitised books.

1. Access to the Digitised Books

For the reasons stated above, the proposed Settlement would authorise only Google to copy, distribute, and otherwise exploit orphan works. It would also give Google practical advantages in providing online access to non-orphan works that could not be replicated by any of Google's competitors - all through the device of a class action lawsuit. As a result of its monopoly control over the digitisation process, Google would also have the ability (and the incentive) to adopt proprietary file formats and standards to increase the barriers to entry for competitors.

Given Google's monopoly, unless Google provides (or is required to provide) third parties with access to digital copies of books authorised under the proposed Settlement on fair, reasonable and non-discriminatory terms (that do not create a margin squeeze), competitors will not be able to commercialise or otherwise use or exploit digitised works - extending Google's monopoly downstream.

Finally, Google's de facto monopoly in the U.S. supply of online access to books would undermine competition outside the U.S. as well. While the proposed Settlement expressly authorises Google to provide access to books only in the United States, the reality is that Google would be able to use the copies it creates pursuant to the proposed Settlement as the basis for seeking to persuade non-U.S. rightsholders to authorise it to providing access to books outside the U.S. as well.

The fact that European entities would be unable to obtain access to the world's literature on anything near the scope granted to Google under the proposed Settlement means that no European entity, whether public or private, will have any possibility of meaningfully competing in the supply of online access to books. Google can reasonably be expected, once the proposed Settlement is approved, to approach holders of European rights (whose U.S. rights it would already have expropriated) to obtain licences, knowing fully well that there is unlikely to be anyone else able to offer European rightsholders an online route to customers.

As a result, the proposed Settlement would appear to exclude all but small-scale entry by competitors, such that any new entrants are unlikely to be in a position to constrain Google's behaviour.¹⁰ In sum, not only is the proposed Settlement exclusionary, it clearly has the potential to have an exclusionary effect in Europe.

¹⁰ Para. 16 of the Article 82 Guidelines.

2. Institutional subscriptions

As noted, the proposed Settlement would confer on Google a monopoly in the supply of online access to and sale of books in the U.S. Public and private institutions (including libraries, universities, government entities, corporations and non-profit organisations) would either have to acquire access from Google or negotiate with the Book Registry (for in-copyright works) to reach agreement (on terms that could not be better than those of the proposed Settlement). Robert Darnton, director of Harvard University Library, has characterised the proposed Settlement as giving Google “*what can only be called a monopoly... not of railroads or steel but of access to information*”.¹¹

This monopoly, coupled with the institutional subscription pricing provisions of the proposed Settlement, means that Google would be free to charge monopoly prices to institutional subscribers. Google and the Book Registry would set charges for different categories of subscribers at a level designed to maximise revenue. Since Google would be the only supplier, and the institutions that would subscribe would have no choice but to subscribe, neither competitors nor customers would be in any position to constrain Google’s pricing.

Since many institutions (particularly private institutions) are global, or at least multi-regional in scale, the Google/Book Registry institutional pricing could well become the price point for non-U.S. services in the future. Since the mechanism for the setting of those prices is designed to maximise revenues, the proposed Settlement raises the risk that European prices for such services would not be set at a competitive level.

3. Sale of individual books

As with institutional subscriptions, Google would enjoy a monopoly in the sale of individual books and would have sole access to the customer data generated by those sales. Once again, this would confer on Google the ability to charge monopoly prices for individual works. While rightsholders covered by the agreement have the right to specify a price for each work, the proposed Settlement makes provision for rightsholders to allow Google, using an algorithm that it has developed to identify the optimal (revenue maximising) price, to set the price. Given that Google would also use this algorithm to set prices for public domain and orphan works, the “pricing bins” used by the algorithm can reasonably be expected to become the price points for individual books. As such, the pricing mechanisms could clearly amount to price fixing of the sort normally prohibited under competition law.¹²

¹¹ Robert Darnton, *Google & the Future of Books*, N.Y. Rev. of Books (Feb. 12, 2009), at <http://nybooks.com/articles/22281>.

¹² See, for example, “*The Google Book Search Settlement: A New Orphan-works Monopoly*”, Randal C. Picker, John M. Olin, Law & Economics Working Paper No. 462, and the works cited therein. The “most favoured nation” clause may also raise competition concerns, given their potentially chilling effect on price competition.

Given the global nature and transparency of the online environment, and Google's likely monopoly over access to digitised books, there is a strong possibility that these anticompetitive pricing mechanisms would be migrated into the pricing for the sale of individual books to European consumers.

The fact that Google, and Google alone, would have access to the totality of the customer data generated by online book sales resulting from the proposed Settlement is highly likely to reinforce and entrench Google's dominant position,. Not only will Google's direct competitors not have access to such data, but publishers may find it much harder to sell their own digitised works directly to the public.

Conclusion

ICOMP believes that the proposed Settlement would be a serious anti-competitive constraint on the supply of online access to books, would further enhance Google's dominance in the online search and search advertising markets, would undermine innovation in the Internet sector and would be detrimental to consumer welfare and the interests of the broader Internet community. In enhancing Google's existing dominance, foreclosing entry by potential competitors and reducing the choices of online advertisers, publishers and consumers, the proposed Settlement would undermine the competition that is essential to a thriving and innovative online sector.

ICOMP fully acknowledges that providing greater access to knowledge and books through the medium of digitisation is a laudable aim. It is more than willing to participate in any process to further this aim, provided it is reasonable, transparent, pro-competitive, and respectful of rightsholders rights. The proposed Settlement is not such a process. In essence, it effectively rewards Google for its preemptive breaches of U.S. copyright by conferring on it what amounts to a global monopoly to the vast majority of books written on or before 5 January 2009 - quite a reward for an entity that has behaved with little regard for the rights of rightsholders.

In fact, the proposed Settlement would bless the very kind of exclusionary conduct that the Commission has made clear it wants to stop. The proposed Settlement would anti-competitively foreclose Google's competitors, with adverse consequences for consumer welfare.¹³ Further, and in any event, the appropriate forum for considering the impact on competition of the proposed Settlement is not a court hearing a class action. It is the appropriate competition authorities in the jurisdictions where the impact of the contemplated behaviour would be felt.

¹³ Para. 19 of the Article 82 Guidelines.

ICOMP wishes to underscore that it fully supports the digitisation of books and the public's enhanced access to the store of human knowledge that such digitisation will make possible. At the same time, the proposed Settlement paves the way to *de facto* monopoly control by a single company of the supply of online books and related markets. This cannot be the right approach. The key issue for policymakers therefore is how to advance these goals while preserving competition and incentives for creativity and innovation in the sector.

In principle, this could be accomplished in any number of ways - *e.g.*, by carefully crafted changes to the law so as to facilitate digitisation by parties operating on a level playing field, a solution that gives third parties access to the copies authorised under the proposed Settlement on fair, reasonable and non-discriminatory terms, or other means. ICOMP would welcome the opportunity to explore these options further with European policy makers. Because the proposed Settlement does not meet these fundamental goals, however, we urge the Commission to oppose the proposed Settlement as it is currently framed.

Annex: Google Book Search Settlement - Further Reading

- Several putative class members and other stakeholders have filed objections to the proposed Settlement. These objections may be viewed at the docket for *The Authors Guild, Inc. et al v. Google Inc.*, Case No. 05 CV 8136 (S.D.N.Y.), which is available at https://ecf.nysd.uscourts.gov/cgi-bin/DktRpt.pl?727421558294709-L_801_0-1 upon registration with PACER at <http://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl>. Particularly noteworthy are the objections of Scott E. Gant, Esq. at document no. 143 in the docket. NOTE: The PACER service charges a nominal fee of US\$.08 per page.
- Authorlink, [Google Books Settlement Prompts Questions About Effect on Readers, Libraries, Others](#) (19-26 Mar. 2009).
- Lynn Chu, [Google's Book Settlement Is a Ripoff for Authors](#), The Wall Street Journal (28 Mar. 2009).
- Consumer Watchdog, [Letter from Consumer Watchdog to the U.S. Attorney General on the Google Book Search Settlement](#) (1 Apr. 2009).
- Kenneth D. Crews, [Google Books Settlement and Author Rights](#) (17 Aug. 2009).
- Robert Darnton, [Google & the Future of Books](#), New York Review of Books (12 Feb. 2009).
- James Grimmelman, [How to Fix the Google Book Search Settlement](#), Journal of Internet Law, vol. 12, no. 10 (Apr. 2009).
- Harvard Law School, [Scholars Discuss Fallout of Google Booksearch Settlement at Berkman Center Conference](#) (13 Aug. 2009).
- Brewster Kahle, [A Book Grab by Google](#), Washington Post (19 May 2009).
- Brewster Kahle, [It's All About the Orphans](#), Open Content Alliance (23 Feb. 2009).
- Anandashankar Mazumdar, [Internet Archive Warns of Online Book Market Consolidation From Google Settlement](#), BNA Patent, Trademark & Copyright Journal (22 Apr. 2009).
- Randal C. Picker, [The Google Book Search Settlement: A New Orphan-Works Monopoly?](#), Journal of Competition Law & Economics (forthcoming), Olin Working Paper No. 462 (18 July 2009).
- Pamela Samuelson, [The Audacity of the Google Book Search Settlement](#), The Huffington Post (10 Aug. 2009).
- Pamela Samuelson, [Legally Speaking: The Dead Souls of the Google Booksearch Settlement](#), O'Reilly Radar (17 Apr. 2009).
- Textkritik.de/digitalia, [The "Heidelberg Appeal" against Google](#) (9 Apr. 2009).
- Grace Westcott, [Googleoploy](#), Globe and Mail (Apr. 2009).