

**STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR**

**Regarding Comment on Google Books Project
September 3, 2009**

At the outset, I want to emphasize how fortunate the Federal Trade Commission is to have David Vladeck at the helm of the Bureau of Consumer Protection. Director Vladeck is an effective champion for consumers. Under his leadership, the Bureau of Consumer Protection is now expanding the scope of the Commission's privacy policy.¹

This statement addresses Director Vladeck's letter to Jane Horvath, Global Privacy Counsel, Google Inc., dated September 2, 2009. The letter discusses Google's privacy policies and their applicability to the Google Books project.²

As Google's own letter³ indicates, the ultimate scope of Google Books services is presently unknown. Google cannot design or construct its product until after a federal district court approves the underlying class action settlement.⁴ Therefore, as Google admits, Google cannot currently articulate a comprehensive privacy policy for Google Books.⁵ Amidst so much speculation, the Bureau has been appropriately circumspect in its comments regarding the adequacy of Google's preliminary privacy commitments. I expect the Commission will carefully evaluate any actual product-specific privacy policy Google may develop for Google Books.

¹ See, e.g., Stephanie Clifford, *Fresh Views at Agency Overseeing Online Ads*, N.Y. TIMES, Aug. 4, 2009, available at <http://www.nytimes.com/2009/08/05/business/media/05ftc.html>; Amy Schatz, *Regulators Rethink Approach to Online Privacy*, WALL ST. J., Aug. 5, 2009, available at <http://online.wsj.com/article/SB124949972905908593.html>.

² Letter from David Vladeck, Director, Bureau of Consumer Protection, Federal Trade Commission, to Jane Horvath, Global Privacy Counsel, Google Inc. (Sept. 2, 2009), available at <http://www.ftc.gov/os/closings/090903horvathletter.pdf>.

³ Letter from Jane Horvath, Global Privacy Counsel, Google Inc., to David Vladeck, Director, Bureau of Consumer Protection, Federal Trade Commission (Aug. 31, 2009), available at <http://www.ftc.gov/os/closings/090903bcpgoogleletter.pdf>.

⁴ *The Authors Guild, et al. v. Google Inc.*, Civ. No. 1:05-CV-8136 (S.D.N.Y.).

⁵ [This footnote was added on September 8, 2009.] After receiving Director Vladeck's letter – and after release of that letter, this statement, and related materials – Google posted a “Google Books Privacy Policy,” dated September 3, 2009, available at <http://books.google.com/googlebooks/privacy.html>.

The Bureau's response urges Google to focus on limiting secondary uses of data collected through Google Books, and I agree, in principle. But as I have noted elsewhere,⁶ the Commission needs to better understand secondary uses before we will be able to analyze fully the complex linkages between and among data collectors and users. The Bureau asks Google to commit to a continuing dialogue regarding consumer privacy policies for Google products and services, to ensure consistency with reasonable consumer expectations. I believe such a commitment would require Google to adhere to the concept of privacy by design,⁷ and also to embed privacy protections into its system.

The myriad issues raised by the Google Books proposed settlement confirm my strong belief that there is a nexus between privacy and competition, and that privacy issues may be cognizable under the antitrust laws⁸ (for example, as a non-price dimension of competition⁹). Our sister agency, the Antitrust Division of the United States Department of Justice, is conducting an investigation to determine whether the proposed class action settlement may violate the Sherman Act.¹⁰ Given that the Antitrust Division has not yet completed its investigation, the Bureau's letter wisely reserves judgment on whether Google Books will, on balance, be beneficial to consumers. I intend to do the same.

⁶ Concurring Statement of Commissioner Pamela Jones Harbour, *Regarding Staff Report, "Self-Regulatory Principles for Online Behavioral Advertising"* (Feb. 12, 2009) [hereinafter Harbour Behavioral Advertising Statement], available at <http://www.ftc.gov/os/2009/02/P085400behavadharbour.pdf>.

⁷ For a fuller discussion of privacy by design, see Ann Cavoukian, Information and Privacy Commissioner, Province of Ontario, Canada, *Privacy by Design*, at <http://www.privacybydesign.ca/index.htm>.

⁸ See, e.g., Dissenting Statement of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick*, F.T.C. File No. 071-0170 (Dec. 20, 2007) [hereinafter Harbour Google/DoubleClick Dissent], available at <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. ____ (2010) (forthcoming).

⁹ See Harbour Google/DoubleClick Dissent, *supra* note 7, at 10; Harbour Behavioral Advertising Statement, *supra* note 5, at 8.

¹⁰ See Letter from William F. Cavanaugh, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, to Honorable Denny Chin (July 2, 2009) available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/120/>.