

The Google Books Settlement: Class Actions, Copyright, Antitrust—or All of the Above?

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The Challenge of Building a Digital Library That Benefits All

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In this talk

- Three ways of looking at the settlement:
 - Class action
 - Copyright
 - Antitrust
- The real story is the connections

I. Class actions

The U.S. class action

- Aggregation of claims
- Requires representative plaintiffs
- Effectively controlled by class counsel
- Threat to defendants—and to plaintiffs

Internal limits

- Procedural: notice, opt-out, objections, etc.
- Fairness to class members
- Jurisdiction over class members
- Future claims

Settlements 1.0 and 2.0

- Notice: most countries removed
- Fairness to orphans: UWF
- Class definitions sharpened

II. Copyright

Fair use

- Original scanning and searching
 - To Google (and me): obviously fair use
 - To © owners: obviously not fair use
- Settlement gives Google 90%
- But doesn't set a precedent, either way

Orphan works policy

- Recognized problem of unknown scale
- It's the "fault" of the copyright system
- Argument for scanning as fair use
- Settlement enables reuse of orphan works
- Congress balked at more modest reforms
- Ought they be in the public domain?

Opt-out and opt-in

- Berne dogma is that © allows only opt-in
 - But what about collecting societies?
- Authors Guild then: opt-out unacceptable
- Authors Guild now: settlement is opt-out

III. Antitrust

Consumer Purchase

- Rightsholders can set price
 - But if they don't, Google uses algorithm
 - Orphan works *must* be priced by Google
- Settlement 2.0 says to price competitively
- What are Google's incentives? © owners'?

Institutional Subscription

- Collective pricing for whole catalog
 - Looks and smells like BMI/ASCAP
 - But with individual purchase option
- Rube Goldbergian oversight mechanisms
- Is price-gouging likely?
- Even if it is, is that an *antitrust* problem?

Exclusivity

- For orphan works, no alternative sellers
 - Me-too class actions highly unlikely
- Is this raising or lowering entry barriers?
- Is the settlement output-increasing?

Interlude

- Point: the settlement faces class action, copyright, and antitrust objections.
- Counterpoint: there are colorable replies to all of these objections

IV. Synthesis

Class action $\Rightarrow$ copyright

- Class action as “solution” to orphan works
 - “Works” because orphans are plaintiffs
 - But we *know* they won’t/can’t object
- Class action as override of Berne
 - “Works” because foreigners are plaintiffs
 - Which they are *because* of Berne

Copyright $\Rightarrow$ class action

- Copyright makes some tricky distinctions
 - Contract drafters have made many more
 - Result: a troublesome class definition
- Is the orphan works problem legislative?
 - Large scope, absent stakeholders, etc.

Class action $\Rightarrow$ antitrust

- How could DOJ intervene?
 - Could it sue the plaintiff class?
 - *Noerr-Pennington* issue has been averted
- Settlement grants Google market power
 - Why precisely is this troubling?

Copyright $\Rightarrow$ antitrust

- “Output-increasing” in a static sense
 - Copyright cares about dynamic incentives
 - Copyright “monopoly” is important
- Concentration of power in Google
 - Privacy, censorship, etc.
 - Copyright’s norm is decentralization

Class action + copyright + antitrust

- I understand 0 and ∞ , but I?
 - Google stands in shoes of © owners
- If the settlement were nonexclusive ...
 - The incentives look very different
- This is collective copyright management ...
 - But “authorized” by private action

Conclusion

A few parting thoughts

- There are some exciting ideas in here
 - But this is a procedural Pandora's Box
- Is the U.S. borrowing from other models?
 - Or imposing its class action on everyone?
- International coordination will be very hard
 - Territorial copyright law may be obsolete

Questions?