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

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In this talk

- The settlement's history, terms, and posture
- Three ways of looking at the settlement:
  - Class action
  - Copyright
  - Antitrust
- The real story is the connections

1. Just the facts

A quick timeline

- 2004: Google starts scanning books
- 2005: Authors and publishers sue
- 2006: (Secret) negotiations begin
- 2008: Settlement 1.0
- 2009: Settlement 2.0
- 2010: Fairness hearing

The structure of the settlement

- Google pays $60/book scanned already
  - And 63% of the Revenue Models
    - Split between authors and publishers
- Google released from past liability
  - And authorized to offer Revenue Models
  - With some wiggle room for error

Revenue Models

- Preview up to 20% (with ads)
- Consumer Purchase of online e-books
- All-you-can-eat Institutional Subscription
  - Public Access: one free terminal
- Research Corpus for the machines
- Plus, possibly, print-on-demand & download

Claiming & opt-out

- The *class action* opt-out deadline has passed
  - ~6,000 class members opted out
- Settlement also allows "internal" opt-outs
  - Removal, Exclusion, and Specified Price
  - Requires claiming books with Google
  - Metadata quality has been controversial

Where are we now?

- Settlement delayed twice, revised once
  - Opt-out/objection deadline in January
  - Fairness hearing in February
  - Judge Chin hasn't hinted at his timing
  - Jonathan Band's flowchart

II. Individual areas

CLASS ACTION!

Procedural hurdles

- Notice to foreign © owners sucked?
  - Settlement 2.0 is nationally narrower
  - Opt-out and objection
    - By class action standards, this one is good
- Google's database has bad metadata
  - Commitment to improve it

Substantive fairness

- Is 63% a good deal?
- Who owns the electronic rights?
- Are Insert owners at a disadvantage?
- Complex industry, complex settlement
- Internal opt-outs go a long way here

Jurisdiction and future claims

- *Amchem*: future claims are problematic
  - And these involve future conduct, too
    - "identical factual predicate"
- *Shutts* gives jurisdiction over the class
  - But *Shutts* assumed (?) a damage action

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

Opt-out and opt-in

- Turning copyright on its head?
- Berne dogma is that © allows only opt-in
    - But what about collecting societies?
- Authors Guild then: opt-out unacceptable
- Authors Guild now: opt-out acceptable

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?

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 many works, no alternative sellers
  - Settlement doesn't license others
    - 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

III. Synthesis

Class action ⇒ 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 ⇒ 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.
- Orphans can't exercise internal opt-outs

Class action ⇒ antitrust

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

Copyright ⇒ 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 1?
  - 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?