

# The Elephantine Google Books Settlement

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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

# The settlement

- Original lawsuit: scanning and searching
- Settlement: sale of whole books
  - \$60/book scanned; 63% of revenues
- Removal, Exclusion, and Specified Price
  - All require owners of OOP books to act
- Currently pending before Judge Chin

# Class actions

- Procedural issues (e.g. notice) fixable?
- Bad economic terms fixable, too?
- More interesting: future claims
  - Worse than *Amchem*?
  - Punch-you-in-the-face settlement?
  - “identical factual predicate”

# Copyright

- Not a fair use case any more
- Impermissible opt-out system?
  - Extended compulsory licensing, etc.
- Orphan works made available
  - Orphan works for Congress?
  - But the Rules Enabling Act is law, too

# Antitrust

- Google sets prices for many books
  - Algorithm mimics competitive pricing
  - Whatever that means
- Subscription resembles BMI/ASCAP
  - But with individual purchase option
  - And no consent decree

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

The settlement uses an opt-out class action to bind copyright owners (including the owners of orphan works) to future uses of their books by a single defendant.



“The settlement uses an opt-out class action to bind copyright owners ...”

- Response to “opt-in only” objection?
  - We’ve made a trans-substantive choice
- But perhaps indicative of a deeper copyright/class-action tension?

“... (including the owners of orphan works) ...”

- Settlement “solves” orphan works because it’s opt-out
- But we also know they won’t show up
- Bertrand Russell’s class action

“... to future uses of their books...”

- copyright is nothing *but* future uses
- and note the having-it-both-ways aspect
  - full-display uses *can* be compromised
  - but Google studiously avoided them

“... by a single defendant.”

- Class action is formally nonexclusive
  - in practice, no one else can find orphans!
  - settlement doesn't help 3rd parties
  - nor are me-too settlements likely
- Class action to create exclusivity?
- Antitrust depends on © policy.

# Bottom line: concentrated power

- Antitrust is all about it
- Class actions empower but threaten
- Copyright history of decentralization
- Also makes privacy/censorship urgent
- Even dry commercial terms *matter*

# 0, 1, or $\infty$ ?

- I get 0: respect copyright
- I get  $\infty$ : reform copyright
- But 1? Creating this concentration of power is worrisome
- *Especially* when done via privately initiated lawsuit overseen only by a court

**And I'm done**