

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

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The Google Book Search Project and Canada:
Cross-Border Legal Perspectives

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In this presentation

- Three ways of looking at the settlement:
 - Class action
 - Copyright
 - Antitrust
- Connecting the three
- Public, private, and procedure

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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 collective 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

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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?
- Class action as override of Berne
 - Or is it *because* of Berne?

“... (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...”

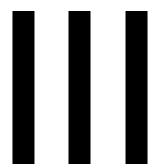
- Copyright is nothing *but* future uses
- And note the having-it-both-ways aspect
 - Full-display uses *can* be compromised
 - But Google studiously avoided them

“... 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 ∞ ?

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

Transactional litigation

- Procedure determines substantive law
 - “Private” ordering of “public” institutions
- Future uses = dangerous bridge to cross
 - Informational disadvantages
 - Undermines security of rights
 - Private ordering, public values

Rule-of-law safeguards

- Ongoing opt-out rights
- True fiduciary for the absent
- Skin in the game
- Public advocate
- Appropriate nonexclusivity

Discussion