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

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

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