

Google Books: Inside the “No”

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eBooks: A New Era of Law, Business, and Society

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In this talk

- ✿ The Google Books lawsuit and settlement
 - ✿ Text: opinion in *Authors Guild v. Google*
 - ✿ Subtext: what kinds of reasoning does it use?
- ✿ Who should make copyright policy?

Argument types

1. The settlement is illegal
2. The settlement is a bad deal for class members
3. Class members object to the settlement
4. This is a job for Congress

Background

Google Books

- ✿ Scanning in-copyright books from partner libraries
- ✿ Comprehensive index; display of “snippets” only
- ✿ *Authors Guild v. Google* and *McGraw-Hill v. Google*
 - ✿ *Authors Guild* filed as a class action
 - ✿ Contested fair-use case over these limited uses

Settlement past

- ✿ Google forgiven for past scanning and searching
- ✿ \$60 payment per work digitized
- ✿ \$30+ million for plaintiffs' attorneys

Settlement future

- ✿ Books to be sold individually and via subscription
 - ✿ Opt-in for in-print; opt-out for out-of-print
- ✿ 63% of \$\$ to Google; 37% to © owners
 - ✿ Held for up to 10 years for unclaiming owners
- ✿ Book Rights Registry to handle \$\$ and claims
- ✿ Pricing to be set algorithmically or by © owner

Opinion

Seven-part opinion

- ✦ Class notice
- ✦ Representation
- ✦ Scope of relief
- ✦ Copyright
- ✦ Antitrust
- ✦ Privacy
- ✦ International law

Class notice: text

- ✿ “I am satisfied that the class received adequate notice.”
- ✿ “More than 1.26 million individual notices in thirty-six languages were sent directly.”
- ✿ “[I]t is hard to imagine that many class members were unaware of the lawsuit.”

Class notice: subtext

- ✿ This is a procedural question
- ✿ The analysis is cursory, and implausible on its face
- ✿ Notice for objection purposes clearly worked;
notice for opt-out purposes is a harder question
- ✿ We are already committed to letting judges make these calls

Representation: text

- ✿ “I am confident that [the class’s attorneys] are qualified, experienced, and able to conduct the litigation.”
- ✿ “antagonistic interests between named plaintiffs and certain members of the class.”
- ✿ “Many academic authors ... would prefer that orphan books be treated on an ‘open access’ ... basis”
- ✿ “The parties have little incentive to identify and locate the owners of unclaimed works”

Representation: subtext

- ✿ Quality of representation is a procedural issue
 - ✿ Analysis is pro forma, as it probably must be
- ✿ Class antagonisms go to polycentrism of issue
 - ✿ Academics can be heard from; orphans can't be
 - ✿ This is a fundamental issue with class actions
 - ✿ In theory, Congress considers the public interest

Scope of relief: text

- ✿ “The ASA can be divided into two distinct parts. ... past conduct [and] certain future acts”
- ✿ “matters more appropriately decided by Congress than through an agreement among private, self-interested parties”
- ✿ “the ASA would release claims well beyond those contemplated by the pleadings.”

Scope of relief: subtext

- ✿ Prudential deference rooted in copyright policy
- ✿ Conjoined with strong holding on Rule 23
 - ✿ Details here are ©-based, but not limited to ©
 - ✿ Citations to governing cases, but little attempt to refute caselaw cited by plaintiffs and Google
- ✿ Opinion respects Congress' limited delegation

Copyright: text

- ✿ “Courts should encroach only reluctantly on Congress's legislative prerogative to address copyright issues presented by technological developments”
- ✿ “I need not decide [whether the settlement violates § 201(e)’s ban on “expropriation”]; ... the notion ... is a troubling one.”
- ✿ “A copyright owner's right to exclude others from using his property is fundamental and beyond dispute.”
- ✿ “Many objectors highlighted this concern in their submissions to the Court.”

Copyright: subtext

- ✿ The copyright policy arguments are tendentious
- ✿ The statutory argument is offbeat
- ✿ Pointing to the objections is a procedural move
- ✿ There was no way to make everyone happy here—
does that tell us more about the state of copyright
politics or about the limits of class-action law?

Antitrust: text

- ✿ “The ASA would give Google a de facto monopoly over unclaimed works.”
- ✿ “The ASA would arguably give Google control over the search market.”
- ✿ “further entrench Google's market power in the online search market”

Antitrust: subtext

- ✿ Analysis is substantive but substance-free
 - ✿ No engagement with caselaw or economics
 - ✿ This is probably dictum, not holding
- ✿ The use of class action raises special antitrust concerns; the opinion goes well beyond that
- ✿ U.S. antitrust policy is heavily delegated to courts

Privacy: text

- ✿ “They contend that the ASA fails to follow established law that protects reader privacy by limiting the disclosure of reader information.”
- ✿ “The privacy concerns are real [but not] a basis in themselves to reject the proposed settlement.”
- ✿ “I would think that certain additional privacy protections could be incorporated,”

Privacy: subtext

- ✿ This is a substantive issue, but one that doesn't fit well within the class-action framework
- ✿ Conclusion not necessary to the case's result
- ✿ Judge Chin is dropping hints for version 2.0
- ✿ There's a mismatch between the consumer-centric objections and the author-centric responses

International law: text

- ✿ “I need not decide whether the ASA would violate international law.”
- ✿ “it is significant that foreign authors, publishers, and, indeed, nations would raise the issue”
- ✿ “the matter is best left to Congress”

International law: subtext

- ✿ As with antitrust, this is a supervening objection based in illegality, not in unfairness
- ✿ Yet again, this is dictum rather than holding
- ✿ It avoids caselaw and treaty text like the plague
- ✿ Listing the objectors becomes an argument for letting Congress handle the issue/heat

Observations

Final tally

- ✿ One clear holding that the settlement is illegal...
- ✿ ... which is only thinly explained ...
- ✿ ... but is still the right result for the right reason
- ✿ Refrain of “I am troubled” but “need not decide”
- ✿ Numerous references to fact of objection by itself
- ✿ Repeated deference to Congress

The role of courts

- ✿ An aggressive judge could have pushed a settlement through
- ✿ Judge Chin was not aggressive
- ✿ Judges are good at saying what the law is
- ✿ Judges are good at mediating disputes
- ✿ They are not good at lawmaking, which this was

Courts vs. Congress

- ✿ I am not optimistic about what Congress will do
- ✿ The settlement, however, shows courts' limits:
 - ✿ Absent class members (i.e. orphans)
 - ✿ Antitrust problems from single defendant
 - ✿ Third-party and public interests not represented
 - ✿ Courts are fundamentally reactive

The passive virtues

- ✿ Judges decide cases, but making law has costs:
 - ✿ Risk of creating bad law
 - ✿ Stepping on Congress's toes
 - ✿ Anything you say can and will be held against the U.S.
 - ✿ “I am troubled” as a deliberate strategy
- ✿ A squishy opinion is also nearly appeal-proof

What next?

- ✿ The opinion is probably not now appealable
- ✿ A narrower settlement is a clear possibility
 - ✿ My guess: scanning and searching only—but is this consistent with the Rule 23 holding?
- ✿ A return to litigation is always an option
 - ✿ Google has a strong hand, so who knows?

To be continued ...