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

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The Challenge of Building a Digital Library That Benefits All

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In this talk

• Three ways of looking at the settlement:
  • Class action
  • Copyright
  • Antitrust

• The real story is the connections
I. Class actions
The U.S. class action

- Aggregation of claims
- Requires representative plaintiffs
- Effectively controlled by class counsel
- Threat to defendants—and to plaintiffs
Internal limits

- Procedural: notice, opt-out, objections, etc.
- Fairness to class members
- Jurisdiction over class members
- Future claims
Settlements 1.0 and 2.0

- Notice: most countries removed
- Fairness to orphans: UWF
- Class definitions sharpened
II. Copyright
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
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?
Opt-out and opt-in

- Berne dogma is that © allows only opt-in
  - But what about collecting societies?
- Authors Guild then: opt-out unacceptable
- Authors Guild now: settlement is opt-out
III. 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 orphan works, no alternative sellers
- 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
IV. 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.
Class action $\Rightarrow$ antitrust

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