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

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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
I. Just the facts
A quick timeline

• 2004: Google starts scanning books
• 2005: Authors and publishers sue
• 2006: (Secret) negotiations begin
• 2008: Settlement 1.0
• 2009: Settlement 2.0
• 2010: Fairness hearing
The structure of the settlement

- Google pays $60/book scanned already
- And 63% of the Revenue Models
- Split between authors and publishers
- Google released from past liability
- And authorized to offer Revenue Models
- With some wiggle room for error
Revenue Models

- Preview up to 20% (with ads)
- Consumer Purchase of online e-books
- All-you-can-eat Institutional Subscription
  - Public Access: one free terminal
- Research Corpus for the machines
- Plus, possibly, print-on-demand & download
Claiming & opt-out

• The class action opt-out deadline has passed
  • ~6,000 class members opted out
• Settlement also allows “internal” opt-outs
  • Removal, Exclusion, and Specified Price
• Requires claiming books with Google
• Metadata quality has been controversial
Where are we now?

- Settlement delayed twice, revised once
  - Opt-out/objection deadline in January
- Fairness hearing in February
- Judge Chin hasn’t hinted at his timing
- Jonathan Band’s flowchart
II. Individual areas
CLASS ACTION!
Procedural hurdles

- Notice to foreign © owners sucked?
- Settlement 2.0 is nationally narrower
- Opt-out and objection
- By class action standards, this one is good
- Google’s database has bad metadata
- Commitment to improve it
Substantive fairness

- Is 63% a good deal?
- Who owns the electronic rights?
- Are Insert owners at a disadvantage?
- Complex industry, complex settlement
- Internal opt-outs go a long way here
Jurisdiction and future claims

- *Amchem*: future claims are problematic
- And these involve future conduct, too
- “identical factual predicate”
- *Shutts* gives jurisdiction over the class
- But *Shutts* assumed (?) a damage action
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
Opt-out and opt-in

• Turning copyright on its head?

• Berne dogma is that © allows only opt-in
  • But what about collecting societies?

• Authors Guild then: opt-out unacceptable

• Authors Guild now: opt-out acceptable
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?
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 many works, no alternative sellers
- Settlement doesn’t license others
- 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
III. 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.
• Orphans can’t exercise internal opt-outs
Class action ⇒ antitrust

- Could class action license competitors?
- Settlement grants Google market power
  - Why precisely is this troubling?
- How could DOJ intervene?
  - Could it sue the plaintiff class?
  - Noerr-Pennington issue has been averted
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 ∞, 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?