The Elephantine Google Books Settlement

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IP Scholars Roundtable

26 March 2010
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
The settlement

• Original lawsuit: scanning and searching

• Settlement: sale of whole books
  • $60/book scanned; 63% of revenues

• Removal, Exclusion, and Specified Price
  • All require owners of OOP books to act

• Currently pending before Judge Chin
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 compulsory 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?
“... (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
And I’m done