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

James Grimmelmann

The Google Book Search Project and Canada: Cross-Border Legal Perspectives

28 May 2010
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