

# Google Books: Inside the “No”

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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 ...