Abstract:

The Perfect is the Enemy of the Good: 
The Antitrust Objections to the Google Books Settlement

Marina Lao

A district court in 2011 rejected a proposed settlement agreement in the high-profile Google Books case that had triggered objections based on class action, copyright and antitrust issues. Setting aside the class action and copyright questions, this paper examines the assertions that the settlement agreement would likely violate Section 2 of the Sherman Act. The controversy surrounding the settlement mainly revolves around the so-called “orphan” or “unclaimed” books—books whose copyright holders cannot be identified or located. The primary antitrust objection was that the settlement would give Google a de facto monopoly over the digital distribution of these books, and also arguably further Google’s dominance in the online search market. This paper questions the implicit assumption that unclaimed books or their digital distribution constitute the relevant market such that having de facto exclusivity over them would provide a significant source of market power to Google. It also looks broadly at the potential competitive effects of the settlement and suggests that they seem procompetitive, and not merely non-anticOMPETITIVE. While de facto exclusivity may not be ideal, having one provider is better than none, and the exclusivity is the quirky consequence of the copyright laws, rather than the terms of the settlement itself. Lastly, this paper examines the alternatives that some objectors seem to prefer over the Google “monopoly” that they fear, and suggests that it seems unwise, from a competition law and policy perspective, to oppose the good for the “perfect” alternative when the perfect is, at best, conjectural and, at worst, not better at all.