Search Engines & Transaction Costs

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The Problem

- Search engines use third party IPRs without permission...
- ...but often let rights owners opt-out
- Concerns
  - 3rd party republishers
  - After opt-out, search engines still may infringe
  - Rights owners bear the burden...
  - ...in largely unprecedented manner
Coase Theorem (Pure Case)

- Coase Theorem: if bargaining costs = 0, parties will bargain to a single economically efficient outcome—regardless of initial entitlement allocation
  - Regulatory choice between opt-in and opt-out is irrelevant
  - But distributional effects
Coase Theorem & Bargaining Costs

- If bargaining costs > 0, initial allocation may be determinative
  - Ex #1: the Long Tail
  - Ex #2: Orphan works
  - Ex #3: Takedown notices

- Option #1: Allocate entitlement to minimize bargaining costs

- Option #2: Allocate entitlement to maximize social welfare
Search Engine Exceptionalism

**Pros:**
- Search engines rarely compete with rights owners
- Positive spillovers of keyword searching
- Multitudinousness of rights owners

**Con:** can’t define search engines