



D is for Digitize

October 8-10, 2009, New York City

Institute for Information Law & Policy at New York Law School

Panel : O is for Orphan

Orphans need no guardians

Bernard Lang

INRIA – AFUL

INRIA : Institut National de Recherche en Informatique et en Automatique

AFUL : Association Francophone des Utilisateurs de Logiciels Libres

produced with the free software  **OpenOffice.org**



A **phase change** in the culture ecology

- [Digitization + Internet] changes its economic and social laws
- This enables new economic, social, and legal engineering
- It also disables former economic, social and legal devices

copy + send = \$0



<http://www.istockphoto.com/>

Copyright Engineering must be consistent with
underlying technical, economic and social physics



Indexation and Digital Access to **all** Books will happen

- it makes economic sense in a digital world
- it is desired by nearly all concerned
- The real **issue is modalities** : access, control, profit

The actors : authors publishers libraries **public**
... bookstores ?



The Status of Books in the GBS Settlement

Display Uses of digitized works		United States work		not a United States work	<i>legal solution</i>
		Unregistered with © office	Registered with © office		
public domain					no problem
Unregistered with settlement Registry	Orphan			Impractical	exception or limitation
	non-orphan			no solution	no exception or limitation
Registered					explicit agreement
<i>legal solution</i>		excluded from GBS agreement		protected against formalities by Berne art.5(2)	
		Formalities may be imposed by U.S. legal system			



Initial issues in GBS Settlement

Books at issue: **Unregistered non U.S. books**

Partial Solution : **exceptions and limitations**

- for indexation and search of all books
- for access to orphan books (subset of unregistered books)

Diligent search: economically untractable on large scale

- to identify orphan books
 - to find (unregistered) rights holders
- ==> orphan and non-orphan are in the same boat

Exceptions and limitations do not apply to non-orphan



Alternative: up-to-date Registry

National Registry :

incompatible with the "no formalities" requirement
of Berne 5(2)

International Registry + standardized metadata:

- formerly impossible technically
- now possible in the digital / Internet world
i.e., the world that is raising all these issues
- **compatible with the intent** (not the letter) **of Berne 5(2)**



What of unregistered books ?

The **three-step test** remains a **guiding principle**

1) special case: changes should be minimal to achieve the stated policy purpose: **make books available**

2) no conflict with normal exploitation of works:

- Internet has **new normal mode of exploitation:** open access
- Access control and payment enforcement are exclusive rights
- ==> enforcement by others is unwarranted further infringement (**minimality principle**) without benefit to absent rights holders

[Copyright Collectives no longer representative (must include CC, ...)]

3) no unreasonable prejudice to interests of ... ?



What third step ?

3)no unreasonable prejudice to interests of . . .

- **authors** (Berne 1979, WCT 1996) - access restrictions prejudice the only remaining interest of (unreachable) authors:
to be read and known
- **right holders** (TRIPS 1994) - they are not exploiting the work ... and are often authors



Does it matter ?

- Treaties are not self-executing
- But Congress has chosen to join them and implement them
- Hence they have to be considered as
 "fair, reasonable, and adequate"
 as required for a class action settlement
 FRCP (2007), §23(e)(2)
- especially when stakes and parties are international



Pragmatics

- Orphan / Unregistered works should be freely accessible by the public
- Any obstacle (payment, DRM) is an unwarranted **infringement on the exclusive right to prohibit**
- Setting a price to be paid to resurfacing rights holders may be acceptable for those uses requiring a significant investment : it will not be a determinant factor in the decision to use the work.



Evolution: rough outline

- International registry + standardized metadata
- Copyright remains with rights holders as now, but not enforceable unless correctly registered.
(e.g. 17 U.S.C. § 411 and § 412)
- Possible modalities to be analyzed:
 - **Free access to registry** (advertising support ?)
 - digital copies only
 - (not) for profit uses
 - registration delays etc.



Conclusion

Books will be digitized - The Registry will exist

Not necessarily through the settlement agreement

It has to be an International Endeavor

Authors are entitled to their rights
and to be provided the means to assert them
but should not impose on society
the burden of looking for them



In the copyright battlefield

"It is forbidden [...] to mutilate or steal from corpses"

The contemporary law of armed conflict

Leslie C. Green, page 144

do not despoil dead authors of their public



Thank You

This presentation is available at

<http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-sld-091010.odp>

<http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-sld-091010.pdf>

or as a single page document at

<http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-txt-091010.odt>

<http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-txt-091010.pdf>

This presentation is based on:

Orphan Works and the Google Book Search Settlement – an International Perspective.

<http://www.datcha.net/ecrits/liste/orphan-gbs.pdf>

With my thanks to all the people who helped or supported this work