Orphans need no guardians

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INRIA : Institut National de Recherche en Informatique et en Automatique

AFUL : Association Francophone des Utilisateurs de Logiciels Libres

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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

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

http://www.istockphoto.com/
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

<table>
<thead>
<tr>
<th>Display Uses of digitized works</th>
<th>United States work</th>
<th>not a United States work</th>
<th>legal solution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unregistered with © office</td>
<td>Registered with © office</td>
<td></td>
</tr>
<tr>
<td>public domain</td>
<td></td>
<td></td>
<td>no problem</td>
</tr>
<tr>
<td>Unregistered with settlement Registry</td>
<td>Orphan</td>
<td>non-orphan</td>
<td>Impractical exception or limitation</td>
</tr>
<tr>
<td>Registered</td>
<td>excluded from GBS agreement</td>
<td></td>
<td>explicit agreement</td>
</tr>
<tr>
<td></td>
<td>protected against formalities by Berne art.5(2)</td>
<td></td>
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</tbody>
</table>

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

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

or as a single page document at

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

This presentation is based on:


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

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