

D is for Digitize – October 8-10, 2009, Institute for Information Law & Policy at New York Law School.
slide: <http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-sld-091010.pdf>
text: <http://www.datcha.net/ecrits/Exposes/d4d-nyc/d4d-txt-091010.pdf>

Orphans need no Guardians

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Full paper (still a draft):
Orphan Works and the Google Book Search
Settlement – an International Perspective.
<http://www.datcha.net/ecrits/liste/orphan-gbs.pdf>

A phase change in the culture ecology : copy + send = \$0

(Digitization + Internet) changes the economic and social laws of the culture and copyright ecology. This **enables new** economic, social, and legal engineering and devices and **disables former** ones.
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 ?

Books at issue in GBS settlement: *Non U.S. unregistered books*

Partial Solution: exceptions and limitations

- for indexation and search of all books
- for access to orphan books only – only a subset of unregistered books

Diligent search is economically untractable on a large scale

- to identify orphan books
- to find (unregistered) rights holders

Exceptions and limitations do not apply to non-orphan ... and orphan cannot be separated

The alternative : **an 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** of exceptions and limitations remains a **guiding principle**

- special case: *changes should be minimal* for the stated policy aim: **make books available**
- 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*)
[Copyright Collective are no longer representative unless including Creative Common, etc.]
- no unreasonable prejudice to legitimate 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 ... 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*" FRCP (2007), §23(e)(2)
as required for a class action settlement, especially when stakes and parties are international

Pragmatics

- Orphan / Unregistered works should be freely accessible by the public
- Obstacle (payment, DRM) are unwarranted infringements 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 (hence will not unreasonably prejudice authors interests).

Rough outline of evolution

International registry + standardized metadata – with *free access* (advertising support ?)

Copyright still belongs to rights holders as now, but not enforceable unless correctly registered.

(e.g. 17 U.S.C. § 411 and § 412)

Possible modalities to be analyzed: digital copies only – (not) for profit uses – registration delays ...

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**

The Status of Books in the GBS Settlement regarding display uses

Display Uses of digitized works		United States work		not a United States work	legal solution
		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
legal solution		excluded from GBS agreement		protected against formalities by Berne art.5(2)	
		Formalities may be imposed by U.S. legal system			

First line : status with respect to legal classification

First column : status with respect to the settlement agreement

(though the agreement does not distinguish orphans)

Note that each classification has its own registry and registration procedure.