

**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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<http://www.datcha.net/>

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			<b>no solution</b>	<b>no exception or limitation</b>
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.