Books, Computers, and the Law

James Grimmelmann

Drexel iSchool

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The road here
The *first* book scanning revolution

- Consider the printing press
- First use: printization
- Transforms our relationship to text
- Transforms our legal technology
Copyright 101

- Original expression is copyrightable
- Specific exclusive rights
  - incl. “to reproduce the work in copies”
- Fair use defense
- Life + 70 = 1923
Google

• “To organize the world’s information and make it universally accessible and useful.”

• “Don’t be evil.”
Google’s scanners

- Partner with libraries
- Nondestructive photography
- OCR
- Full-text search, text+image display
- Public-domain books
The Rubicon

• Google starts scanning in-© books
  • Full-text search
  • Shows “snippets,” links to bookstore
  • Eventually, lets © owners opt out
• Looks a lot like the Web, where Google has been winning its fair-use fights
Outbreak of hostilities

- Late 2005, authors and publishers sue
- Opt-out isn’t acceptable to them
- Potential damages astronomical
- Very important: they sue in a class action
The settlement
Deal of the century

- Google pays $60/book to settle past claims
- Going forward:
  - Scanning and search still on
  - Opt-out requests still honored
  - Snippets off (by default) for in-© books
Revenue models

- Preview up to 20% online, with advertising
- Consumer Purchase of online e-books
- Institutional Subscription
  - Public access: one free terminal
- Research Corpus for the machines
Handling the money

• © owners can set their own prices for sales
• Google keeps 37% of all the revenues
• The 63% goes to a new Registry, which pays © owners and coordinates with Google
  • Authors and publishers split the 63%
• Unclaimed funds eventually redistributed
Claiming books

- Online database for © owners to sign up
- Only as good as its metadata
  - And libraries have a lot of bad metadata
- Isn’t this just another opt-out system?
  - And there are some © owners we expect not to show up
Orphan works

- Copyright owners who can’t be found
- Books end up unavailable
- Congress worried but inactive
- Settlement = stealth orphan legislation?
Objections
Who gets to object?

- Objections allowed b/c class action
- Technically, class members, but anyone can seek to file a brief *amicus curiae*
- Deadline to file in September 2009
- In response, settlement redrafted
- New deadline: January 28, 2010
Civil procedure

- How good was the notice?
- Especially outside of the U.S.
- Who are these authors and publishers?
- Do they speak for, e.g. academic authors, who want open access rather than $$$?
- What kind of a class action is this …
“© is opt-in” is dogma in most of the world
• (Perhaps not the best rule, but …)
• Technically, © owners are “agreeing”
• But U.S. class action law is sui generis
• Lots of controversial over publishing-industry details
Information policy

- Huge centralization of books in Google
- Libraries burnt by journal pricing
- Reader privacy
- Equitable access, pro and con
- Is Google a library?
Antitrust

• Coordinated algorithmic pricing (but constrained to look like competition)

• Blanket pricing for subscriptions (but looks a lot like BMI/ASCAP)

• What about them orphans?
  • Good luck trying to compete!
Ends and means
The heart of the deal

• The settlement makes many orphaned books available again because it’s opt-out
• If you like books, that’s good
• But is this a legitimate use of a class action?
A nutshell of trouble

- Class action as end-run around Congress
- Class action as danger to class members
- Class action as anticompetitive edge
- What kind of a precedent would it set?
Constraints on class actions?

- Notice
- Adequacy of representation
- Fairness
- Past claims only?
• 0 and $\infty$ make sense, but 1?

• If we think orphan works are valueless, then they should be public-domain

• If we think these rights are worth respecting, then they should be respected

• I’m still looking for the limiting principle
Questions?