Books, Computers, and the Law

James Grimmelmann

Archivists Round Table of Metropolitan New York

12 January 2010
The road here
The *first* book scanning revolution

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

- Original expression is copyrightable
- Specific exclusive rights
  - incl. “to reproduce the work in copies”
- Fair use defense
- Life + 70 = 1923
Copyright 102: orphan works

• Some books are in print and being actively managed: yay!
• Some books are now out of copyright: yay!
• But many millions are in copyright but out of print …
  • And many of those have unfindable copyright owners
• These books aren’t doing anybody any good
• And their status is a failure of the copyright system
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 for libraries, schools, etc.
  - 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
The settlement game

● Original opt-out deadline: May 5, 2009
● Pushed back to September 4
● Fairness hearing scheduled for October 7
● DOJ files a skeptical but optimistic “statement of interest”
● Parties ask for a chance to renegotiate
● Amended settlement proffered late on November 13
• Opt-out / objection / amicus deadline: January 28
• DoJ deadline: February 4
• Parties file responses: February 11
• Fairness hearing: February 18
• Judge Chin rules: ?
• Case finally resolved: ???
Objections
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 controversy 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!
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?
Closing thought

• 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?