

# Books, Computers, and the Law

James Grimmelman

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

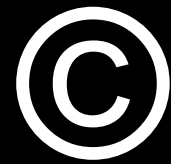
# Who gets to object?

- 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?



# 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?