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The Rebirth of Copyright As an Opt-In System?

Prof. Jim Gibson, University of Richmond School of Law

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For most of the history of Anglo-American copyright law, copyright was an opt-in system: Authors had to jump through certain regulatory hoops if they wanted to prevent others from copying their works without consent. These threshold formalities included registering their works with a government agency, affixing a notice to published copies, depositing exemplars with a centralized library, and more. A failure to comply with the requirements usually meant a diminution in the authors' copyright entitlement – and in some cases a wholesale forfeiture, under which the works would pass immediately into the public domain.

After some 200 years, however, U.S. copyright abandoned its formal requirements. Beginning in 1976 and culminating in 1989, Congress responded to complaints from authors (who had sometimes lost protection due to what they viewed as a technicality) and to pressure to join the international copyright community (which forbade most formalities). Copyright law accordingly underwent a conversion from opt-in to opt-out.

As a result, copyright protection now arises by operation of law, without any action by the author. As long as a work contains a modicum of originality and is fixed in some tangible form, copyright automatically protects it, and authors must affirmatively disclaim the entitlement if they don't want its protection. And these threshold requirements of originality and fixation are incredibly minimal, such that every reader of this essay is probably the owner of hundreds, and quite possibly thousands, of copyrights – in everything from diary entries to doodles.

Yet today's most famous copyright controversy, the [Google Books](#) litigation, has renewed interest in the role that opt-in requirements can play in copyright law. Google Books seeks to make every book in the English language text-searchable. To realize this goal, however, Google has to scan the text of each such book – and scanning means making a copy. So when the company failed to get permission from all the copyright owners, a class action lawsuit was filed on behalf of the owners of the books' copyright. A [proposed settlement](#) currently awaits court approval.

The idea of copyright as an opt-in system has reared its venerable head twice in the Google Books controversy. First, ever since the scanning got underway, Google has allowed authors to remove their books from the project by [notifying the company of their objection](#). Second, the proposed settlement in the class action lawsuit will apply to all copyright owners in the class [unless they affirmatively decline to participate](#). In both cases, a user of copyrighted works claims an ability to exploit, without authorization, an entitlement that would usually belong to copyright owners – unless the owners affirmatively take action. This is the essence of an opt-in copyright system.

These developments are not necessarily notable for their impact on settled law. If Google's scanning were a fair use (as the company argued), then an author's refusal to acquiesce was neither here nor there; the whole point of fair use is that the user does not need the copyright owner's consent, and the opt-out option was therefore merely an act of largesse on Google's part. If Google's use were not fair, then it's hard to see why the company should expect brownie points simply because it allowed authors to tell it to stop breaking copyright law. As for the

proposed settlement, assent by silence is typical in class action cases, although the complexity of the proposal calls for intense scrutiny – and possible revision – before it is approved.

No, the real reason that the opt-in issues in Google Books are so interesting is that they highlight the difficulties that arise when transformative technologies meet established copyright principles. No one doubts the incredible value of making the text of every book in the English language searchable in an online database. The problem is the cost of finding the thousands (millions?) of copyright owners and negotiating the necessary licenses.

Whether or not these costs prove prohibitive with regard to Google Books, they are clearly prohibitive with regard to a more important transformative technology: the Internet. Every day, millions of copyrighted works are reproduced online without any clear permission from the appropriate rightsholder. I am not talking about file-sharing, or posting “The Daily Show” on YouTube without Viacom’s permission. I am talking about e-mails, websites, Facebook entries – the quotidian business of Internet users.

Remember, copyright today is an opt-out system, which means its protection attaches indiscriminately to even the smallest acts of originality. In the pre-digital era, when Congress got rid of the formalities, this low threshold and automatic propertization may have been reasonable. Back then, we still lived in a world dominated by print, when distribution of information goods was an expensive process. Those who engaged in it were therefore likely to want copyright’s protection.

With the rise of the Internet, however, the production and dissemination of original expression is no longer a privilege restricted to those few who can attract the attention of a publishing house. Instead, the Internet makes everyone an author, publisher, and consumer of information – and copyright dutifully protects all of our originality, even though most of us have no expectation of profit. This means that you probably copy copyrighted content whenever you forward a funny e-mail, or print out a web page. No one would expect you to seek a license to accomplish these tasks, but a license is precisely what copyright law demands. Everyday tasks thus become laden with copyright meaning, and lawyers must concoct an intricate set of implied licenses, user policies, and fair-use arguments to excuse admittedly harmless but technically infringing conduct.

Again, opt-out might have made sense back when information distribution was a costly enterprise reserved for those serious about making money from their originality. Today, it is anachronistic.

Of course, if most people don’t care about enforcing their copyrights, then most of these infringements are indeed technical – no harm, no foul. But in that case, why even bother to protect such content in the first place? In an age where the vast majority of copyrighted works will never be exploited for profit, why should copyright protection automatically attach? Why not have an opt-in system instead? The opt-in threshold need not be high; the idea is simply that a copyright claimant should affirmatively make his or her interest known, so as to free up millions of works that copyright protects for no good reason.

Of course, any opt-in proposal would face a number of political obstacles, including the fact that predicating copyright protection on any formality (at least for foreign works) is inconsistent with the international copyright conventions to which the United States is a party. But the Internet

does not stop at the border; if opt-in makes sense here, it will make sense abroad as well. When the United States and its trade partners are done figuring out what to do with Google Books, then, they should consider a return to copyright's roots. Make copyright opt-in once more.

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