Rebirth of Opt-in System in Copyright: Analysis in the Light of ‘Google Books’ Controversy

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The recent copyright controversy, the Google Books litigation, has revived interest in the role that opt-in requirements can play in copyright law. Google Books sought to make every book in the English language text-searchable. To realize this goal, however, Google intended to scan the text of each such book – thereby making a copy – the right to which was vested in different persons around the world. This number of persons amounted to millions and gaining access to all was an onerous task. So, when the company failed to get permission from all the copyright owners, it gave two options to the authors either to opt-out of the copyright or agree to it by as per the result of a class action litigation. In both these circumstances, the user of the copyright had the right to exploit, without authorization, unless the copyright holder took affirmative action. It is the essence of opt-in system in copyright which reared its head once more along with this controversy. This paper critically examines the protection regime in copyright law and the philosophy of protection given to any author over his/her original creation in the light of the above mentioned controversy bearing a potential impact over the fair use doctrine in copyright law. In the present context of highly digitalized society, the dilemma is whether an opt-out system is the need of the hour or the opt-in system should regain its place.

Keywords: Opt-in, opt-out, Google, takedown, copyright

The key assumption that sustains copyright law is that authors have a natural right over their works of intellectual labour, and copyright protection is required to incentivize creation of intellectual works while maintaining a balance by means of a limited term of protection and the option of fair use. However, with increasing use of the online medium, copyright is facing its greatest challenge. Determining the boundary between private and public usage, distribution and reproduction and enforcement of liability are key challenges in copyrightable works in cyberspace. Copyright law has long placed the burden on authors to assert their rights. The formal notice, deposit and registration requirements demand that authors affirmatively act in order to enjoy the full benefit of their copyright.

Although these requirements have been diluted since their inception, they still place a duty on those interested in defending their copyrights. Copyright in recent years has certainly become too strong for its own good. It protects more content and outlaws more acts than ever before. It stifles individual creativity and hampers the discovery and sharing of culture and knowledge.1 But the Google Library Project is so far beyond the scope of traditional copyright that it threatens the very foundation of the law. Google aims to exploit- the instability of the copyright system in a digital age. It hopes to rest a huge, ambitious, potentially revolutionary project on the most rickety, least understood, most provincial, most contested perch among the few remaining public interest provisions of copyright, namely, fair use.

Opt-in System

An opt-in system is one where an individual must choose to participate in the system. By default, an individual is not a part of the system and remains outside the system until choosing to become a part of it.2 According to this system, the creator of a work first has to register his/her work or take affirmative action to avail protection under copyright law. This system gives prime importance to the motive or intention of the author to protect his/her work and once the person opts in to the system, the protection for a definite period is granted so that the creation cannot be copied without permission.

Opt-in systems have several important benefits. First, an opt-in system preserves personal autonomy-
the individual is not included unless he wants to be. This allows him the freedom to balance the costs and benefits of joining the system and make the choice of whether to join on his own. Second, opt-in systems place the burden on the system itself to gain individual participation. This is beneficial where the automatic inclusion of individuals would be intrusive or unfair, or where the system itself is valuable enough to make it worthwhile for people to take the time to opt in.

The scenario of copyright registrability changed with the US Copyright Act, 1976 and culminated in successive legislation like the Berne Convention Implementation Act, the Copyright Renewal Act, and the Copyright Term Extension Act. These changes in the statutory field have entirely altered the registration process in US and transformed the no formalities era in copyright. Although the opt-in system remains in place, the requirement stands revised; as in common law, fixation becomes primary to ownership and thus the author becomes an owner after a valid publication. Pre-1976 works could however, obtain statutory copyright under the 1909 Act, without the necessity of registration, simply by the act of publishing copies of the work bearing a proper notice. As to such works, the registration did not create the copyright, but merely recorded it. But there was a requirement under Section 13 of the 1909 Act that once copyright had been obtained by publication with notice, ‘these shall be promptly deposited’ along with the required copies and registration claim. The term ‘promptly’ was not defined to explain how long a period might elapse after publication of the work with proper notice till the deposit and registration of the work by the author with the copyright office. The implications were that if the demanded affirmative action regarding the registration was not taken, the work may go into the public domain, and hence become ineligible for copyright under the act.

The Copyright Act of US operates by first granting specific exclusive rights to copyright owners and then by enumerating a set of exceptions to those exclusive rights. It states that ‘the owner of copyright under this title has the exclusive rights to [exercise] and to authorize others to exercise any of the enumerated rights, including the rights of reproduction, preparation of derivative works, distribution, public performance, and public display’ (17 USC Section 106). If one acts without the permission of a copyright owner in violation of any of the exclusive rights, the copyright owner has a strong case for infringement. This statute is what makes the system an opt-in system: without the copyright owner choosing (opting in) to allow others to exercise the exclusive rights granted under the statute, anyone exercising those rights is infringing the owner’s copyright. In short, nobody can legally exercise the owner’s exclusive rights without the owner’s permission or a statutory exception.

After the Berne Convention and Universal Copyright Convention (UCC) came into force, many countries amended their laws. Since civil law countries such as France and Germany did not have any procedure for registration of copyright, these countries were frontrunners in adopting a no formalities rule. Under the UCC, all formalities imposed by national copyright law are regarded as complied with if, at the time of its first publication, the work bears a copyright notice comprising the ‘©’ symbol, the name of the copyright owner and the year of first publication. The word ‘copyright’ or its abbreviation ‘Copr’ may be used instead of the symbol © while the year of first publication is not required for certain pictorial, graphic and sculptural works. In contrast to the UCC, under the Berne Convention, copyright vests automatically on the creation of the work and can be enforced. There are no formalities to be complied with. Failure to put the © symbol on a work or subject matter first published in a Berne Convention country will not prejudice copyright in the other Berne Convention countries. However, it may result in the work losing copyright and going into the public domain in UCC countries which are not Berne Convention countries.

Securing copyright protection was not always so simple. For most of copyright’s history, authors had to meet certain formal requirements if they wanted copyright to protect their works. Copyright did not cover works (i) that were unpublished, (ii) were not registered and deposited with the government, or (iii) that failed to include a notice indicating their protected status.

The Change of Opt-in System

Under the traditional system of opt-in copyright, an overwhelming majority (as much as 90 per cent) of published works were neither registered nor noticed, and thus passed immediately into the public domain, where they were freely usable by others. Of the minority of works that were registered and noticed,
and therefore protected by copyright, over 85 per cent were not renewed after a relatively short (28 years) initial period of protection. Berne Convention has long required that the enjoyment and exercise of copyright in the works of the convention should not be subject to any formality. This meant that registration or notices cannot be made prerequisites for protection [Article 5(2)]. Since international protection was to be automatic, there was no need for international bureaucratic regimes to simplify registration process.\(^7\)

In the US, in order to obtain copyright protection, authors of creative works were required to take certain steps, often referred to as ‘formalities’. For instance, authors needed to put a copyright notice on any published work, the absence of which would result in forfeiture of the work into public domain. In addition, authors had to register their work with the United States Copyright Office. After registering their works under the old system, owners of copyrights received an automatic initial term of protection, followed by a renewal term if requested by the author. After 1978, the laws no longer stipulated registration as a condition to obtaining copyright. Instead, copyright automatically inhered in a work the moment it was created.\(^8\) In 1989, US Congress did away with the notice requirement in compliance with the Berne Convention Act, which eliminated the need for formalities. The registration requirement is no longer a prerequisite to copyright protection. Also, renewal terms became automatic instead of optional in 1992 with the passage of the Copyright Renewal Act. Currently, the US has a copyright system where any work containing a certain minimal amount of creativity automatically receives copyright protection from the moment it is fixed, extending through an automatic term of at least seventy years. An author cannot decline copyright protection; the closest he might be able to get a copyrighted work to public domain status is to grant everyone in the world a nonexclusive irrevocable licence.

Although the opt-in system was a concept prevalent in the US, it was much the same throughout the world in the sense that the author has to show some commitment to protecting his work. However, after signing the Berne Convention and UCC, this practice has been dissuaded throughout the world. In India which is a signatory to the convention, although the Copyright Act, 1957 provides for registration of works (Section 44), it is voluntary and optional and not a condition for copyright protection.\(^9\) The registration only raised a presumption that the person shown is the actual author. The presumption is not conclusive but where contrary evidence is not forthcoming, it is not necessary to render further proof to show that the copyright is vested in the person mentioned in the register (Section 48). As the Indian copyright law is newer than US and a replication of UK copyright laws where there is no provision for registration of copyright, it can be presumed to be a derived copyright law. Here the opt-in procedure although not strictly highlighted is present, since in case of litigation one has to show registration as a conclusive proof of authorship.

While the removal of formalities from copyright law and the lengthening of copyright terms have made obtaining and maintaining copyright protection easier for rights holders,\(^10\) formality-free and lengthened copyright terms are largely to blame for the increasing woes of potential users of copyrighted works in locating right holders, and thereby creating the problem of orphan works.

**The Basics of Google Book Search**

In December 2004, Google announced its plans to digitize millions of bound paper books from five major English-language libraries. Then, in August 2006, the University of California system announced its partnership with Google to scan its books.\(^11\) Of these libraries, only the University of Michigan and the University of California were to allow Google to scan their complete collections. The others were to allow Google to scan part of their collections on an experimental basis. Google planned to add more than 17 million library volumes to its electronic index at an estimated cost of US$ 10 per book, or US$ 170 million. In return as payment for access to the books, the libraries were to be provided with an electronic copy of the works contributed by them to the project.\(^12\)

In case of Google Book Search, the books published before 1923 and well into public domain can be read in full but in case of books published after 1923, the user could only see bibliographic elements and few text snippets around the search term. The information could only be read, not printed, copied, saved, etc. As with the ‘authorized partner’ content, Google provides links to buy the book from numerous vendors.
Google worked on two projects simultaneously merged as one under the umbrella of this whole concept of Google Books. The two seemingly separate but connected projects are:

(1) The Partner Program
The Partner Program is the component which works directly with publishers and authors, digitally copying books with the express consent and participation of the copyright holders. Google encourages copyright holders to participate in the Partner Program by appealing to their financial interests, promoting the program as an ‘online book marketing program’ and ‘free worldwide sales and marketing system’. Interested parties who hold the rights to the books could apply and send books to the program.

The Partner Program seeks to maximize accessibility to books while simultaneously protecting copyrights. Hence, only a limited number of pages are viewable and users are required to log in. To view the entire book, the user will have to buy the book. Google integrates its advertising business model into the Partner Program as well, and participants gain a source of revenue from contextual ads that appear on pages displaying their works in addition to potential increased sales of the scanned books.

(2) The Library Project
The Library Project expands upon the Partner Program by including books from participating libraries in its searchable database, with or without the copyright holder’s permission. The Library Project, however, operates on passive consent, rather than express consent; all books in the participating library collections are scanned unless copyright holders opt out of the Project.

It is important to remember that Google serves its own masters: its stockholders and partners. It does not serve the people of the State of Michigan or the students and faculty of Harvard University. The real risk of privatization is simple: companies could fail, libraries and universities last. Should heritage and collective knowledge be entrusted to a company that has been around for less than a decade?

One of the main concerns of this controversy was that this process will hamper the potential markets of the original work. Many of the enthusiastic supporters of this initiative believe that it will not hamper the potential market rather enhance it, suggesting that ‘snippets’ as used by Google is operative use of the work. They argue that the snippet based interface is ‘transformative,’ thus invoking the magic word that Justice Souter employed in his ruling of Campbell v Acuff Rose. Tranformativeness now stands as a process distinct from derivativeness. If a work is derivative of a copyrighted work, it is under the control of the copyright holder. If the work is considered transformative, it is considered fair use.

The Elements of Controversy
The announcement of the project by Google in 2005 caused a public furore as authors, publishers, librarians, and others weighed in on the Library Project’s potential copyright infringement. In August 2005, Google temporarily halted scanning copyrighted library books to allow copyright holders to opt out of the Library Project. Despite Google’s scanning hiatus, on 20 September 2005, three outraged authors and the Authors Guild filed suit against Google in the United States District Court in Manhattan followed by lawsuits from other American publishing companies. On 1 November 2005, Google announced its intention to continue scanning copyrighted works in addition to public-domain works. Google stated that ‘its program is covered by the fair use provision of copyright law and that it therefore does not need permission of the copyright holders for the library project.’ Google resumed scanning, albeit with a focus on scanning out-of-print titles no longer subject to copyright protection.

At the heart of this controversy is the inherent conflict underlying US copyright law. The issue is a proper balance between protecting the rights of authors to promote creative production, and a democratic society’s need for access to information and ‘a free flow of ideas, information, and commerce.’ Books are synonymous with learning. Therefore, it is seemingly unthinkable that the authors of those books would seek to restrict public access to them. However, authors themselves are creators of that learning and innovation, and must not be deprived of their statutory rights. Regardless of the potentially enormous social benefit, literary community members have challenged the Library Project, and it is up to Google to prove that it has the legal right to continue and to establish in court that its activities are exempt from copyright infringement laws; protected by the ‘fair use’ exception. The crux of the matter lies in the basic fact that the Internet has
revolutionized modern life—the way one does business, communicates, speaks, and carries out research. It has done so by providing faster and greater access to information. The Internet has been likened to an enormous copying machine—misappropriation and unauthorized distribution of protected digital works have never been easier. It tests the copyright law and challenges a doctrine of equity which has been described as ‘so flexible as virtually to defy definition,’ and as ‘the most troublesome in the whole law of copyright.’

**Orphan Works**

Orphan works are those works whose copyright owners cannot be identified or located by individuals who would like to use the work in a manner which requires the permission of the copyright owner. Since the Copyright Act stipulates that original works are protected by copyright law the moment they are fixed in tangible form, a potential user must assume that the work he seeks to use is protected by copyright. A copyright owner may permit use of the work, permit use subject to conditions, permit use subject to a licence fee, or deny use of the work. When a potential user cannot identify or locate a copyright owner, he is faced with the choice of either using the work at the risk of incurring liability for copyright infringement should the copyright owner discover the user, or not using the work at all.

When faced with the dilemma of whether to use an orphan work, a potential user will most likely decide against using the work. Potential users often work with limited resources. A copyright owner may recover damages for the actual value of lost profits he incurs from an infringer’s use of the work or statutory damages which range from US$ 750 to US$ 150,000 per infringement. The risk of such liability and the potential that the search for a copyright owner will become excessively time consuming and costly often dissuade potential users from using orphan works. The legal consequence of this issue is that historically and culturally valuable works are not being disseminated to the public. To make matters worse, such works are at risk of becoming unknown to the public before ever entering the public domain.

In 2006, the United States Copyright Office issued a Report on Orphan Works (Report). The Report addressed the orphan works problem and its causes, considered proposed solutions to the orphan works problem, and recommended legislative action to Congress. The Copyright Office also recommended that a search of non-governmental resources for an author’s copyright ownership information should be a factor for a reasonable search. The Report expressed that privately-operated registries would be much more efficient and nimble, able to change more easily in response to the demands of the marketplace and its participants, and to changes in technology surrounding the works and their uses than formal, government-operated registries. The Report further recommended that ‘interested parties develop guidelines for searches in different industry sectors and for different types of works.’

The same recommendations were later incorporated into the Orphan Works Act of 2008, which proposed that a new section be added to the Copyright Act to limit remedies for cases involving orphan works if the user of the orphan work met certain conditions. The conditions include that the user perform a good faith search to locate the copyright owner, file a ‘notice of use’ with the Register of Copyrights, provide attribution to the copyright owner, and mark the work in which the orphan work is used with a notice of use. These initiatives clearly aimed at bringing the concept of opting in once again into the copyright law heightened by Google Books controversy. However, the Act was not passed by the House of Representatives.

**Google Books and the Inevitable Lawsuit**

In 2005, the Author’s Guild of America and Association of American Publishers filed a class action lawsuit against Google for copyright infringement via unauthorized copying of their books in libraries. The plaintiffs’ complaint alleged that Google reproduced, distributed, and publicly displayed copyrighted books in violation of the Copyright Act. This lawsuit evolved into a class action and a settlement agreement that extended Google service into actual sale of (access to) digital versions of works, mainly books or book inserts. While this obviously causes no problem for works in the public domain, or for works actually exploited by known rights holders who can decide on the terms of this exploitation, it leaves open the question of whether works can be included without explicit permission from the right holders, when these right holders are not known. The settlement may change Google’s use of the digitized books since it plans several different services later on.
The settlement is also likely to bind Indian authors in US, UK, Canada and Australia since a book published in the US or any other country which is signatory to the Berne Convention can own a copyright under the US law. This has compelled the Indian Reprographic Rights Organization (IRRO) and Federation of Indian Publishers (FIP), which represents Indian publishers, to file objections to the settlement process in the New York Court as it is in direct violation of the Indian Copyright Act, 1957 which specifically provides that an online version is a ‘reproduction’ by way of scanning and reproduction of any work without the consent of the copyright owner is prohibited with the exception of ‘fair use’ or ‘fair dealing’ as in other parts of the world.

Opting-in vs Opting-out

Google announced that it would honour a request from a copyright owner not to scan its book. The owners, however, insist that the burden should not be on them to request Google not to scan a particular work; rather, the burden should be on Google to request permission to scan the work. According to Pat Schroeder, AAP President, Google’s opt-out procedure shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear. The owners assert that under copyright law, the user can copy only if the owner affirmatively grants permission to the user and that copyright is an opt-in system, rather than an opt-out system. Thus, as a practical matter, the entire dispute between the owners and Google boils down to who should make the first move: should Google have to ask permission before it scans, or should the owner have to tell Google that the work should not be scanned.

Recently, the settlement process between Google and the Authors Guild has been rejected in the Court because the Judge quoted as saying the project has gone too far with the amended settlement agreement and the digitization of books and the displaying of snippets have been implemented in a manner that will be a forward looking business arrangement for Google Inc. But most of the authors and publishers are happy with the settlement procedure because the obvious consequence is that most of what has been said about orphan works, applies to unregistered works as well. Although an author of an unknown work is unlikely to generate public interest yet he is entitled to the settlement money as well as the opting-out option. This is certainly true of the conclusion that the best interest of rights holders is to have a larger public, even a non-paying public, when they do not want to be paid. On the other hand, the parties to the class action settlement will want to preserve the revenue expected from unregistered works. The obvious way is to make it unsafe for would-be users of unregistered works by restraining access to the books database, so that they will not be able to know whether works are registered or not, nor even whether they are in the public domain. Consequently, the class action parties would all have a vested interest in limiting significantly the accessibility of the books database, thus severely curtailing its usefulness to the cultural and academic ecology.

In a recent judgment given by US 9th Circuit Court in Kahle v Gonzales, the Court rejected Constitutional challenge to the change from opt-in system to opt-out system of US Copyright Law. The Court relied entirely upon Supreme Court’s decision in Eldred v Ashcroft, although the Eldred case did not deal with the constitutional implications of the shift from opt-in to opt-out copyright. Nevertheless, the Court in Eldred did say something potentially very important to that question; it held that changes to the copyright laws which do not alter the traditional contours of copyright protection are unlikely to burden speech in a way that might offend the First Amendment. However, whether shifting from the opt-in to opt-out system is one such change was a question that remained unanswered. Such questions are once again rearing their head in the Google case, highlighting the importance of formalities.

Anti Commons Scenario

Property rights are allocated to prevent the so-called ‘tragedy of the commons’, where resources are misallocated because no one is motivated by ownership interests to maintain the resource. But an ‘anti-commons’ can potentially occur in situations where permissions from multiple property holders are necessary to complete a project and where the transactions cost of obtaining such permissions becomes prohibitive. In a way, the Google database solves this problem by scanning the books, but giving publishers and authors the option of requesting that their work not be scanned into the database. This approach effectively shifts the burden of determining...
and asserting exclusive rights to copyright holders, requiring them to come forward and opt out of the project. The catch here is whether Google has the right to scan the books at all without the permission of right holders.

Testing under the Fair Use Doctrine

The ‘fair use’ doctrine which is more prevalent in US is regularly applied in case laws and is a more robust vehicle for users. It contains a set of factors to help in decision making process whereas its distant cousin ‘fair-dealing’ which is a concept in UK and India has got with it set of enumerated purposes. The fair use offers flexibility at the expense of certainty (17 USC Section 107), fair-dealing on the other hand is said to offer certainty but with very rigid consequences. As Google project is located in US, it is more preferable to test the project under the more flexible fair use doctrine. The doctrine requires a court to consider:

(1) Purpose and character of the use, whether it is of a commercial nature or for nonprofit educational purposes;
(2) Nature of the copyrighted work;
(3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) Effect of the use upon the potential market for or value of the copyrighted work (17 USC Section 107).

These factors point to fairness in substance, but do not account for fairness in procedure. With no legislative framework in place, the danger exists that courts will ignore opt-out or opt-in, treating the procedure inconsistently, or as an afterthought. Fair use is a privilege, not a right. More specifically, it is ‘an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would undermine the purpose of copyright’. Since Google is taking advantage of the fair use doctrine as an affirmative defence to a claim of copyright infringement, it is worthwhile to examine whether the use is actually ‘fair use’. If one were to test the entire scenario under the fair use doctrine an interesting picture is expected to emerge.

Purpose and Character of the Use

The obvious argument is that Google’s project is commercial in nature, one of the considerations of this first fair use factor. Google aims not only to sell more books, but also to boost traffic to its web site from people drawn to the large archive. This, in turn, increases the sale of advertising. In fact, even those who argue that Google’s activity is covered by fair use do not really dispute that Google will profit from the project. As a commercial use, Google Book Search is therefore presumptively unfair.

Nature of the Copyrighted Work

This factor recognizes that ‘some works are closer to the core of intended copyright protection than others.’ Creative works are more than fact-based and ‘closer to the core of intended copyright protection’ with the result that fair use is more difficult to establish for creative works. However, even within works based on facts, there are gradations on protection depending on the amount of expressive language incorporated into the work. Google is making exact copies of many works; there will be a mixture of fact-based works, entirely fictional works and works with every gradation in between. Since these works include works at the core of copyright protection, this factor will likely come out against Google.

Amount and Substantiality of the Portion Used

Another way to understand this is to see whether the ‘quantity and value of the materials used’ are ‘reasonable in relation to the purpose of the copying.’ Usually, copying the entire work precludes a finding of fair use. On the other hand, copying only as much as is necessary for the intended use can be deemed fair use. In this case, Google must copy the entire book in order to implement full-text indexing.

Effect of Use upon the Potential Market

The Supreme Court has stated that this factor is ‘undoubtedly the single most important element of fair use.’ This factor encompasses both the actual and potential effects on the market. When deciding this factor, courts must consider both the extent of the market harm caused by the actual infringement and the potential harm to the market. On this factor,
Google and the publishers are engaged in an argument reminiscent of the one between the recording industry and online music sites. Google asserts that the Book Search system, far from harming the market of any author or publisher, actually promotes the purchase of the underlying works. Snippets are in this sense like thumbnail images: they only provide a small piece of the picture. If, upon finding a book in the Book Search, the user wanted to read the entire book, he would have to actually go out and purchase it. In addition, even more than Arriba’s image index, Google’s Book Search potentially creates a public good that is beneficial to society. On the other hand, publishers and authors complain that Google is preempts a potentially valuable licensing opportunity.

The Choice Available to Rights Holders

**Opting-out**

All class members, including non-United States owners, had until 4 September 2009, to opt out of the settlement. A publisher or author who did not formally opt out of the settlement by that date was bound by the settlement (provided it is approved by the court). As a result, the right holder will release Google from copyright claims relating to the Library Project, and will not be able to pursue his or her own litigation against Google in the US. Conversely, if a right holder opts out, then he can pursue copyright claims against Google. However, he can still participate in the Partner Program Google offers copyright owners wherein he grants Google a licence to make his books available to the public on mutually agreed terms.

**Control over Titles**

If a right holder stays within the settlement, he can exercise significant control over Google’s use of individual titles in which he may have a copyright interest by varying the default rules. The rights holder can remove a specific title from all uses, while allowing Google to display other titles. For example, for an out-of-print book, the right holder can instruct Google to exclude a title from consumer purchase or to display less under the preview service. The right holder can also vary the price of a book available for consumer purchase from the price set algorithmically by Google; indeed, the right holder can require Google to make the book available for free. To exercise these choices, and to receive revenue from the Registry for Google’s uses, the rights holder must register with the Registry.

**Filing of Comments with the Court**

Right holders that did not opt out of the settlement also had the option to file comments with the court urging approval or rejection of the settlement.

**Conclusion**

The concerns expressed by scholars and commentators about the power the Google Book Search Settlement endows Google over the digitized book market, are well-warranted. There is no denying that Google’s method of scanning in-copyright books from libraries without permission from the copyright owners and with the expectation that the copyright owners assert their rights to save Google the trouble of contracting with each one was a brazen move. The real reason that the opt-in issues in Google Books are so interesting 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 millions of copyright owners and negotiating the necessary licences. Of course, if most people do not care about enforcing their copyrights, then most of these infringements are indeed technical – no harm, no foul. 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.

The irony is that although the opt-in system has arisen into being on the Google controversy, it cannot come into its true self due to the no formalities requirement of Berne Convention. As US is a party to both Berne Convention and TRIPS, it has to provide a no formality regime for the authors as a utilitarian approach because the reason behind the no formality rule is to provide the incentives to an author which cannot be curtailed on the basis of registration formalities.
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3. This Act is part of the larger Copyright Amendments Act of 1992.
18. Time Inc v Bernard Geis Assocs, 293 F Supp 130, 144 (SD NY 1968), a case that was decided before the Copyright Act, however, the Act incorporates the existing common law of fair use; Harper & Row Publishers Inc v Nation Enter., 471 US 539, 549 (1985) which explained the Copyright Act’s approach as ‘intend[ing] to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.’