

THE CURIOUS CASE OF COPYRIGHT FORMALITIES

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Thank you very much and good afternoon everyone. I want to thank Professor Samuelson and all the great people at Berkeley Law School for inviting me to be here today. This is the second time that I have had the privilege to deliver the David Nelson lecture. I understand that Mr. Nelson was a passionate and visionary attorney, and it is an honor to contribute to his legacy.

As you would imagine, I participate in quite a few copyright discussions as Register, but I have to say that I find the focus of this particular meeting to be both remarkable and curious—and not only because we are in Berkeley, California talking about the need for more rules. During the course of the twentieth century, many policy experts worked tirelessly to eliminate formalities from U.S. copyright law.¹ And yet here we are, just a few decades later, discussing not only the relative advantages and disadvantages of formalities, but also to some degree lamenting a bygone era—rather curious.

In my remarks, I would like to share some of the recent thinking of the Copyright Office regarding formalities, particularly those that are permissible under the Berne Convention, but in doing so I would like to start from the premise that the copyright law is over-stressed and requires some attention. It is difficult to make the case that authors are adequately protected, that the law provides clear guidance to courts, that it is respected by the public, that investors have a clear blueprint or sound ecosystem, or that it is flexible enough to sustain the current and projected realities of a planet consumed by

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1. The United States made registration optional in 1976, removed the condition of copyright notice in 1989, and removed the requirement to renew registration in 1992. Copyright Act of 1976 § 408, 17 U.S.C. § 408 (2012); Berne Convention Implementation Act of 1988 § 7, 17 U.S.C. § 401 (2012); Copyright Renewal Act of 1992 § 102, 17 U.S.C. § 304(a) (2012).

technology. Today, most anyone who spends time on the Internet will interact with the copyright system, but for many if not most, the rule of law will be more unclear than clear.

I have noted before that to address twenty-first century challenges we need twenty-first century solutions. Any discussion of reformalizing copyright for the digital age cannot be stuck in time. I therefore agree with those who say that the formalities discussion today must consider the state of contemporary content creation and dissemination, and associated business models and technology platforms. In other words, the question is not whether the rules of the nineteenth and early twentieth centuries should be reintroduced, but rather, whether new rules might serve the policy objectives of the digital age. Chasing history will not do us any good—we must remake the law.

One of the reasons I find the subject of formalities in U.S. law to be so curious is that we as a nation seem so ambivalent about them. Did we get it right in 1909 (and earlier) when we made formalities such a central part of our copyright law? Or did we get it right in 1976 and then 1989 and then 1992 when we gradually relaxed and removed them? Are formalities as problematic, if not indefensible, as we all once thought they were? Or are they the future? Or are we a legal community that just cannot make up our mind?

In any event, the topic of copyright formalities is a legitimate one today, and it is likely to generate more interest, not less, in the years ahead, with all of the passion, dispassion, dissent, and nostalgia that befits a topic that is at once both democratic and arcane. It reminds me of a rather charming local debate where I live, in the District of Columbia, regarding the historic Georgetown trolley system. These trolleys, which ran from 1897 to the 1960s, were either the greatest or the worst thing ever to grace the Nation's capital, depending on one's perspective. People today remain so divided on the issue that there are civic groups devoted to retaining and repairing the abandoned tracks.² These tracks have not been used in fifty years. Why are people drawn to them? Is it merely the tie to history? Or do the tracks point us somewhere?

The old trolleys are not coming back, as far as I know, but that does not mean we have solved the transportation problem in that neighborhood. Thus while some are content to debate the history and politics of the historic trolley system, others pose a different set of questions, perhaps more

2. *Georgetown, DC Trolley Ghosts*, FORGOTTEN NEW YORK (Apr. 2, 2008), <http://forgotten-ny.com/2008/04/the-trolley-tracks-of-georgetown-dc/>.

compelling and certainly more pragmatic for the twenty-first century. Why does Georgetown lack a subway stop? How do we begin to build one? What should be the points of access? How should it connect to the broader Metro system? And of course the perennial Washington question: who should pay for it?

As in many metropolitan areas, convenience and cost drive many decisions for Washingtonians, including the highly personal decision about whether to live in the city or in the suburbs. Many who initially settle in the city choose to leave for a more idyllic lifestyle—less noise, less crime, cleaner air, leafy streets, and larger homes—even if it means a longer trip to work.

This is an experience that many people have in common, but it is not necessarily without stress, including the traffic, gas prices, and a workday punctuated on each end by lengthy commutes. More importantly, there are strains on the larger ecosystem. It turns out that the sum of all those people moving to the suburbs, stretching their finances, and overburdening the beltway creates gridlock, pollution, and long-term damage to the environment. And so the problem is no longer about the frustrations of a few, but about future sustainability of the overall system.

Now some people may take it upon themselves to create a degree of balance in the equation, by making certain pragmatic adjustments in their own lives. Thus in communities in Maryland and Virginia, many people start their workdays very early in the morning, often before sunrise, allowing them to return home at a reasonable hour. Some buy hybrid cars and join car pools to alleviate the cost and the stress of the commute. They interact with their offices through smart phones and tablets, and seek out employers (such as the Copyright Office) who offer telework arrangements.

Do these kinds of voluntary actions help the broader problem? I am sure they do help some, but they are not enough to solve systemic traffic problems. (If you do not believe me, then you may want to consider that Washington was recently awarded the dubious honor of having the worst traffic in the nation).³ The fact is that some people do not care—or do not have time to care—about the greater public interest. They have come of age in a certain culture and have become set in their ways. They will not change their driving patterns or work hours. They operate on their own terms, and without rules or rewards, nothing will improve.

3. See Ashley Halsey III, *Washington Rated the Worst for Traffic Congestion—Again*, WASH. POST (Feb. 5 2013), http://articles.washingtonpost.com/2013-02-05/local/36751062_1_traffic-congestion-tim-lomax-new-index.

Thus in Washington, the government offers some very tangible incentives to alleviate the collective stress. The highways have special express lanes for vehicles with multiple passengers, not to mention hefty fines in the event of violations. There is also an extensive mass transit system—the Metro system of rail and bus lines, that is reaching ever more deeply into the suburbs. In fact, Metro’s forthcoming Silver Line, perhaps intended as a silver bullet, will eventually stop nearly thirty miles outside the city at Dulles Airport and nearby communities—an expansion that could change the quality of life in the greater Metropolitan area.⁴

Still, even convenience may not be enough to change behavior. And so the federal government offers another very tangible incentive—money. Most federal agencies pay transit subsidies to federal workers who abandon their cars and commute to work using public transportation. They underwrite use of the transit system because doing so is in the public’s interest.

What do any of these examples have to do with the role of formalities in copyright law? Consider that formalities are one way to bring order to a system that is otherwise confusing to many people. Formalities are interesting because, if implemented fairly, they have the capacity to alleviate frustrations, incentivize good behavior, and create a more rational administration of the law, all of which is good for authors. It is for these reasons that the Copyright Office is interested in the discussion.

I. REGISTRATION

In the Copyright Office, we are particularly interested in assessing how registration and recordation should evolve. Regarding registration, I recently observed, both in a lecture at Columbia Law School⁵ and in testimony before members of the House Judiciary Committee,⁶ something that is rather obvious: the term of copyright law is long and that length has consequences,

4. See generally WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *Silver Line Update*, <http://metroservicechange.com/Silver%20Line%20Fact%20Sheet%20English%20Spanish.pdf> (last visited Apr. 10, 2013). Some long-term plans also call for a Metro stop in Georgetown. See *All You Need to Know About the Georgetown Metro Stop*, THE GEORGETOWN METROPOLITAN (Jan. 24, 2011 10:00 AM), <http://georgetownmetropolitan.com/2011/01/24/all-you-need-to-know-about-the-georgetown-metro-stop/>.

5. Maria A. Pallante, *The Next Great Copyright Act*, 37 COLUM. J.L. & ARTS 315 (2013).

6. *The Register’s Call for Updates to U.S. Copyright Law*, Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. (Mar. 20, 2013) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hrg80067/pdf/CHRG-113hrg80067.pdf>.

and moreover, that a formal registration requirement near the end of term may be beneficial to the larger legal framework.

To be very clear, the Copyright Office supports a term of protection that achieves the underlying Constitutional purpose of copyright.⁷ We also respect our international obligations. A sufficiently long term provides the necessary economic incentive for authors who want to make a living from creating, and who often have the daily, material needs of their families to consider. It also has the capacity to reward latent success; for example, when one's previous works are made more valuable because of the critical or commercial success of a later work.

Of course, the benefits of a lengthy term are meaningless if the current owner of the work cannot be identified or cannot be located. Oftentimes, this is complicated by the fact that the current owner is not the author or even the author's children or grandchildren. As the Copyright Office recognized in one of its key revision studies of the 1950s, it seems questionable whether copyright term should be extended to benefit remote heirs or assignees, "long after the purpose of the protection has been achieved."⁸

In order to offset some of these consequences, we wonder whether Congress could shift the burden of the last twenty years of protection (the Berne-plus years) from the user to the copyright owner, so that at least near the end of the term, the copyright owner would have to file with the Copyright Office as a condition of continued protection. Otherwise, the work would enter the public domain. A registration requirement at the tail end of protection would not be a burden on authors (who will be deceased), and to the extent it is a burden on more remote heirs or corporate successors, it would seem to be a rational one.

It is unclear how many would register with the Office under such a provision, keeping in mind that that renewal in this context might occur 100 years after the creation of the work or later. Looking to the history of renewal registrations, we know that while some copyright owners would assert their interests, most would not. For example, a 1961 Copyright Office Study showed that, of copyrights registered during 1931–1932 under the 1909 Act, one-third of musical compositions, 7% of books, and 11% of periodicals had been renewed.⁹ A 2007 Stanford University study of

7. See U.S. Const., art. I, § 8, cl. 8.

8. U.S. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION, STUDY NO. 30, DURATION OF COPYRIGHT 80 (1961), available at <http://www.copyright.gov/history/studies/study30.pdf>.

9. See STAFF OF S. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION, STUDY NO. 31,

published books during a broader period found that copyright owners renewed the registrations for an average of 30.8% between 1923 and 1963.¹⁰ Keep in mind, however, that in these cases, renewal was required after only twenty-eight years, when the creator or his immediate family members may well have been alive. At the very least, we can agree that a registration requirement that is set fifty years after the author's death would eliminate any concerns that authors themselves would be unduly harmed.

II. RECORDATION

Turning to the topic of recordation, I would like to share a passage that any one of us might embrace today, but which was actually written in 1958 by the late practitioner and professor Alan Latman¹¹ in another Copyright Office revision study. He wrote:

The key to an effective recording system is its completeness, and ideally all links in a chain of title should be placed on record. In the absence of a basic copyright registry system, identifying the work, the first owner of the copyright, the date from which the term is computed, and other pertinent information, the recording of transfers would often fail to identify the work covered by the transfer, the term of the copyright, and especially the derivation of the transferee's claim to ownership. On the other hand, it may be contended that it is asking too much of an assignee not only to record his own assignment but also to register the initial claim and to record any intervening assignments.¹²

Today, I think the problem with respect to copyright recordation is clear: we have trolley tracks where we sorely need a Silver Line. Thus we have some familiar questions: Why is the recordation function stuck in time? How do we begin to remake it? What should be the points of access? How should it connect to the broader legal system? And again the perennial Washington question: who should pay for it?

RENEWAL OF COPYRIGHT 220 (1961), available at <http://www.copyright.gov/history/studies/study31.pdf>.

10. See STANFORD UNIVERSITY LIBRARIES & ACADEMIC INFORMATION RESOURCES, COPYRIGHT RENEWAL DATABASE, 23-'64 *Imprint Copyright Determinator: Final Report 4* (2007), http://collections.stanford.edu/copyrightrenewals/files/FinalNarrative_18Sept07.pdf.

11. Mr. Latman was a founding partner of the law firm Cowan, Liebowitz & Latman and Walter J. Derenberg Professor at New York University Law School.

12. Alan Latman, U.S. COPYRIGHT OFFICE, STUDY NO. 19, THE RECORDATION OF COPYRIGHT ASSIGNMENTS AND LICENSES 124-25 (1958), available at <http://www.copyright.gov/history/studies/study19.pdf>.

The leadership and staff of the Copyright Office are keenly aware that recordation will require improvements to administrative infrastructure as well as the statute. In a public inquiry published last month (which I encourage all of you to read and respond to) we have asked a series of important questions about technology, design and related resources.¹³ For example, we seek information on the nature of the capabilities of the Office's public portals (such as those used for electronic registration); the nature and scope of the information captured during the course of the registration and recordation process (and considering ways we might obtain additional information through metadata harvesting for digital works); metadata standards in particular industries that the Office might adopt; new ways of searching and accessing registration information (such as image or music search technologies); and the technical ways we might integrate Office data with the many databases already available in the private sector (such as those managed by collecting societies).

Policy changes are just as challenging. It goes without saying that we cannot build a robust and accurate database of copyright title unless copyright owners provide the necessary data. We therefore are intrigued by any number of ideas to make this happen. For example, we wonder whether downstream copyright owners (those who are assignees and exclusive licensees) should be required to both register their interests in the work (*even* if the work has been registered by the author or other transferees) and then record their licenses and assignments in a timely manner as a condition of eligibility for statutory damages.¹⁴

13. Notice of Inquiry, Technological Upgrades to Registrations and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013), *available at* <http://www.copyright.gov/fedreg/2013/78fr17722.pdf>.

14. The Copyright Act of 1976 offers some support for this notion. As originally enacted, section 205(d) required exclusive licensees to record their licenses with the Office as a prerequisite to filing an infringement action (much as section 411 requires a work to be registered as a prerequisite to suit). *See, e.g., Burns v. Rockwood Distributing Co.*, 481 F. Supp. 841, 847 (N.D. Ill. 1979). In *Burns*, the court found that:

This recordation requirement represents a change from the former law. The previous recordation provision did not make recordation a condition precedent to bringing an infringement action. In fact, because recordation was not mandatory, its scope and effect often was unclear. The words of section 205(d), on the other hand, explicitly mandate recordation of the transfer of rights in a copyright as a prerequisite for filing suit. From the plain language of Section 205(d), it is clear that an allegation of recordation is a jurisdictional prerequisite to the institution of a copyright infringement action. The plaintiff's failure to allege recordation, thus, also is fatal to her right to bring the present action.

For the downstream copyright owner who affirmatively proffers a formal and public record of copyright ownership, the possibility of enhanced remedies seems a fair bargain, a rational *quid pro quo*. However, where the downstream owner does nothing to contribute to the public record, the equation is arguably lopsided. Along the same lines, the law might also incentivize (if not require) copyright owners to keep basic data, such as contact information, up to date. A database of obsolete data serves no one.

III. CURIOSITY MOVES FORWARD

What next? If we agree that registration and recordation are important aspects of the copyright law, and if we agree, as well, that better administration of these provisions is essential, then we have only one thing left to discuss: money.

The Copyright Office, like many government agencies, is under increasing pressure to become more self-sufficient – that is, to charge fees that more fully cover the cost of providing services.¹⁵ Certainly, the more we can incentivize copyright owners to participate, the more potential there is for revenue. But in a legal framework where there are many kinds of beneficiaries, does it follow that copyright owners should fund the entirety of the public record? More to the point, if the creation, maintenance, indexing, design and presentation of copyright data is ultimately for the larger public good, then the government would seem to have an ongoing interest in underwriting some of the long-term costs.¹⁶ In any event, a meaningful

Id. The provision was removed when the United States joined the Berne Convention in 1989. *See, e.g.*, *N & D.E. Co. v. Gustings*, No. 90-4445, 1992 U.S. Dist. LEXIS 5062, at *13 (E.D. La. Apr. 9, 1992) (“the 1998 amendment to the Copyright Act repealed 17 U.S.C. § 205(d). The effective date of the amendment was March 1, 1989. Thus, claims based on infringements occurring before March 1, 1989, require recordation of the applicable transfer of copyright, but claims on later infringements do not.”).

15. The Copyright Office budget is approximately \$52 million, about one-third of which is derived from appropriations. *See* Legislative Branch Appropriations Act, 2012, Pub. L. No. 112-74 (2011); *see also* *Fiscal 2014 Budget Request*, Before the H. Subcomm. on the Legislative Branch, Comm. on Appropriations, 113th Cong. (Feb. 27, 2013) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office), *available at* <http://www.copyright.gov/regstat/2013/regstat02272013.html>. The Office is currently undertaking an evaluation of its costs and fees. *See* Copyright Office Fees, 77 Fed. Reg. 18742 (Mar. 28, 2012), *available at* <http://www.copyright.gov/fedreg/2012/77fr18742.pdf>.

16. This lecture occurs during the ongoing mandatory budget cuts affecting federal agencies throughout the government, which has led to the furlough of many federal staff, including at the U.S. Copyright Office and the greater Library of Congress. *See generally* Josh Hicks, *Days of Sequester: The Week-Two Roundup*, WASH. POST (Mar. 15, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/03/15/days-of-sequester-the-week-two-roundup/> (describing the impact of the sequester).

discussion of formalities must necessarily address the pragmatic issue of resources.

In closing, I will say again that formalities in copyright law are a rather curious subject, with their rise and fall and born-again popularity. However, to the extent a measure of formalities can make the law in the twenty-first century more navigable and effective for all involved, including for authors, they will be of continued interest to the Copyright Office.

Thank you. And may you never be in Washington, D.C. during rush hour.

