

# CAN FORMALITIES SAVE THE PUBLIC DOMAIN? RECONSIDERING FORMALITIES FOR THE 2010S

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## I. INTRODUCTION

There is a wide consensus that copyright law has become a barrier for exploiting the full potential of the online environment in promoting creativity

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and creators.<sup>1</sup> Copyright, which was designed for an analog world, is making a slow and painful transition into the digital era. While many agree that some adjustments in copyright law are necessary, the more controversial question is what *kind* of adjustments are necessary?<sup>2</sup>

The recent calls to reintroduce formalities may provide a good example.<sup>2</sup> Advocates of formalities believe that reintroducing formalities would help avoid some of the barriers created by copyright law, and enable us to take full advantage of the opportunities for creation and use offered by digital technology.<sup>3</sup> Some of the arguments supporting formalities as a vehicle for promoting the public domain overlook the profound transformation of our cultural environment as it has shifted to the digital era. This Article revisits these arguments to show that formalities may shape the digital ecosystem in ways that may not necessarily serve the public domain.

Formalities as a precondition of protection prevailed in the U.S. copyright system for two centuries, until it was abolished after the United States joined the Bern Convention.<sup>4</sup> Some have suggested that the removal of

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1. See, e.g., *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2013) (statement of Maria A. Pallante, Register of Copyrights of the United States, United States Copyright Office); WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2012); Pamela Samuelson, Copyright Principles Project, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

2. The term “formalities” refers to the procedural mechanisms which are required for acquiring a valid copyright, such as registration, notice, deposit, or renewal procedures. See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487 (2004).

3. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 287–91 (2004); STEF VAN GOMPEL, *Formalities in the Digital Era: An Obstacle or Opportunity?*, in *GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE* 395–423 (Lionel Bently et al. eds., 2010); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 562–63; Sprigman, *supra* note 2, at 487.

4. Formalities existed under U.S. copyright law from the first copyright statute of 1790 until 1989, when the United States joined the Berne Convention. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). The United States is an interesting example of shifting from a formalities regime, where copyright was conditional upon satisfying certain procedures, to a regime where copyright applies automatically upon “fixation in any tangible medium of expression.” See 17 U.S.C. § 102 (2012). This change took place when the United States joined the Berne Convention in 1989, under which the copyright law was amended and formalities requirements were cancelled. Note that formalities were also common in Europe through the nineteenth century, when the Berne Convention for the Protection of Literary and Artistic Works was revised in 1908 to prohibit signatory nations from requiring formalities as a precondition for protecting foreign works from other Berne signatory nations. See Stef van Gompel, *Les Formalités Sont Mortes, Vive les Formalités! Copyright Formalities and the Reasons for Their Decline in Nineteenth*

formalities in the United States, in the early 1990s, expanded copyright to cover works that were not intended to be protected by copyright law, and consequently seriously shrank the public domain.<sup>5</sup> It is therefore assumed that reintroducing formalities will restore some of the benefits generated by the old regime, and address some of the problems caused by their removal.<sup>6</sup>

In essence, formalities advocates argue that current copyright law protects too many works, and shifting back to an opt-in regime would help restore the balance in copyright law between incentives and access.<sup>7</sup> Restoring formalities would arguably expand the public domain by increasing the number of works in which copyright is not affirmatively claimed. It has been further suggested that works of unknown authorship are underused.<sup>8</sup> This is due to uncertainty about whether they are protected by copyright or not, which creates a chilling effect. A notice requirement would signal to potential users which works are protected by copyright. A notice would also generate the information necessary for licensing, thereby facilitating the clearance of rights and reducing the problem of orphan works.<sup>9</sup>

At first sight, it looks like reintroducing formalities could fix many deficiencies of the current copyright regime and restore the public domain. Formalities presumably offer a rather simple, somewhat technical, answer to the set of complex legal issues that eventually led to the enclosure of the

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*Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 159 (Ronan Deazley et al. eds., 2010).

5. See David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 705 (2012) (“The costlessness with which copyrights arise has led to an unchecked increase in copyrighted works of authorship, accompanied by a critical scholarship arguing that this increase is socially harmful and that it should be cabined by the imposition of various screening devices.”).

6. See, e.g., LESSIG, *supra* note 3; Sprigman, *supra* note 2, at 490; Van Gompel, *supra* note 4.

7. See *infra* Section II.A.

8. A classic example is the problem of orphan works. The cost required for determining whether a work is still protected under copyright, to trace the rightholder or even to identify a work as an orphan work, might be too high, leading potential exploiters of the work, such as archives and libraries, to avoid the use altogether. See IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 38 (2011), available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf> (“The problem of orphan works—works to which access is effectively barred because the copyright holder cannot be traced—represents the starkest failure of the copyright framework to adapt. The copyright system is locking away millions of works in this category.”); see also Giuseppe Colangelo & Irene Lincesso, *Law Versus Technology: Looking for a Solution to the Orphan Works’ Problem*, 20 INT’L J.L. & INFO. TECH. 178 (2012).

9. See Sprigman, *supra* note 2, at 502; JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 184 (2008); VAN GOMPEL, *supra* note 4, at 401–03.

public domain.<sup>10</sup> But formalities, which served copyright in the past centuries, may generate different outcomes in a digital era. Over the two decades since formalities were abolished in the United States, the creative landscape has been shaken by the digital revolution.<sup>11</sup> Digital technology clearly offers more efficiency in registration, notice, and renewal, improving accessibility, and lowering administrative costs. Yet digital technology has also transformed the way we create, share, and enjoy cultural works, bringing users to the forefront of creative processes and facilitating new types of collaborative production. The rise of online intermediaries and the growing role of online platforms are also shaping the way we generate, share, and use copyrighted materials. These transformations are not only changing the economics of the cultural environment, they are also affecting political rights, social structures, access to knowledge, and freedom. In this emerging environment the public domain becomes ever more necessary. Nevertheless, examining formalities in light of these changes may call into question the wisdom of reintroducing formalities for the purpose of promoting the public domain. Restoring formalities in the current digital ecosystem may carry some unintended consequences. Paying more attention to the potential effect of formalities on user-generated content (“UGC”), collaborative production, and the role of mega-platforms in implementing a formalities regime might help us imagine the possibilities and risks in the digital ecosystem and design the legal tools that are necessary to align the law with the digital era.

The purpose of this Article is to revisit some of the arguments supporting formalities as a vehicle for promoting the public domain. Part II critically analyzes the justifications for reintroducing formalities. Part III describes the fundamental shifts in generating and sharing digital content that may call for some caution in restoring formalities. Part IV reexamines the rationale of formalities in light of these changes. Part V concludes with a

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10. See, e.g., Pallante, *supra* note 1.

11. One of the first calls for reintroducing formalities was made by Christopher Sprigman, who argued in 2004 that copyright law should move back to a conditional regime, “but in a way that accounts for developments in technology.” Sprigman, *supra* note 2, at 488. Sprigman argues that while the elimination of mandatory formalities might have been justified given the circumstances at the time, those circumstances have changed. The growth of the Internet, and more broadly, of digital technologies, has opened up new possibilities for public access to and use of creative works that did not exist when Congress was removing formalities from copyright law. Before the digital age, the cost of copying and distribution had more effect on the ability of most people to access, use, and transform creative works than did the copyright laws. But now digital distribution is cheap and digital copyright is essentially free. Therefore, Sprigman concludes that copyright law has become the principal barrier to new creative practices. *Id.* at 489–90.

brief discussion of some policy implications, focusing on the legal challenges in promoting a voluntary strategy of formalities for the digital ecosystem.

## II. REINTRODUCING FORMALITIES TO RESTORE THE PUBLIC DOMAIN

The policy debate regarding the reintroduction of formalities often sounds like a ready-made solution that is in search of a problem. Many advocates of copyright formalities believe that copyright is out of balance, and call to restore this balance by reintroducing formalities.<sup>12</sup> The formalities discourse often treats formalities as a unified package, when, in fact, it includes several legal arrangements that aim to achieve a wide range of (sometimes conflicting) goals. The treatment of formalities as a single category blurs the policy analysis. Therefore, it is necessary to first clarify the different goals and functions of formalities before deciding whether formalities should be reintroduced and in which format. Formalities advocates focus on three functions of formalities that are likely to enhance the public domain and improve access to creative materials: first, filtering out works which are not worthy of protection by shifting to an opt-in regime; second, signaling the works to which copyright protection applies, thereby enhancing legal certainty; and third, generating data to facilitate licensing and rights clearance.<sup>13</sup> The following Sections briefly introduce the main arguments made by formalities advocates, and outline some of their weaknesses.

### A. FILTERING BY FORMALITIES: EXPANDING THE PUBLIC DOMAIN

One purpose of reintroducing formalities is to design efficient incentives for acquiring copyright protection.<sup>14</sup> Copyright currently applies automatically to any original work of authorship, from the moment of creation.<sup>15</sup> Since it is

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12. See sources cited *supra* note 3.

13. These intended functions for formalities are described in the House Report for the 1976 Act: “(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting; (2) It informs the public as to whether a particular work is copyrighted; (3) It identifies the copyright owner; and (4) It shows the date of publication.” H.R. REP. NO. 94-1476, at 143 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5759.

14. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 252 (2001); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003); Samuelson, *supra* note 1, at 1198–99; Sprigman, *supra* note 2, at 502–23.

15. Creation occurs at the moment of fixing an original expression in a tangible media. See 17 U.S.C. § 102 (2012).

rather difficult to opt out of copyright,<sup>16</sup> copyright may sometimes apply even when authors do not seek protection.<sup>17</sup> Consequently, copyright law ends up covering too many works, some of which were not intended to be protected by law, or by their authors, and arguably are not worthy of protection.<sup>18</sup>

Formalities are proposed as a prerequisite for copyright protection, thus shifting copyright from an opt-out regime to an opt-in regime. Presumably, requiring authors to take possibly costly affirmative steps would ensure more efficient protection. Authors would make an initial assessment of whether the work is sufficiently valuable to warrant protection. Rational authors will make efficient choices; they will only register works when the expected benefits (e.g., revenues, reputation, and potential advantage in legal proceedings) exceed the cost of applying for registration.<sup>19</sup> Consequently, sufficiently valuable works will be registered and acquire copyright protection, while works with low commercial potential will not justify investing the extra registration fees and subsequently will remain in the public domain. Thus, by reintroducing formalities, the law will filter out works that are not worthy of protection, and consequently will expand the public domain.

The filtering effect of formalities may become even stronger when protection lasts for a shorter period of time and renewal is required before that initial period is extended to its full duration.<sup>20</sup> Thus, owners may opt out of copyright by default simply by failing to renew copyright when works are no longer commercially valuable.<sup>21</sup>

Overall, it is assumed that formalities will result in an efficient outcome, leading to fewer protected works (only when expected benefits exceed the cost of registration), covering the “right” works (only those that are commercially valuable),<sup>22</sup> and protecting works for a shorter period of time (opting out by failing to renew).

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16. See *About CC0—“No Rights Reserved,”* CREATIVE COMMONS, <http://creativecommons.org/about/cc0> (explaining some of the difficulties involved in dedicating a copyrighted work to the public domain).

17. See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 124 (2002).

18. See Sprigman, *supra* note 2, at 489–90.

19. *Id.*

20. LESSIG, *supra* note 3; Landes & Posner, *supra* note 14, at 489.

21. See LESSIG, *supra* note 13, at 251–52; Landes & Posner, *supra* note 14, at 489.

22. See Sprigman, *supra* note 2, at 489 (“The majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted. For work that are not producing revenues, continued copyright protection serves no economic

The main flaw in the attempt to use formalities to weed out works that should be in the public domain is the commercial bias. *Filtering by formalities* measures the gap between the cost of registration and the expected commercial value in the eyes of the beholder. This standard assumes that the owner's assessment of the commercial value of the work is a proper criterion for granting copyright protection. This standard might be systematically biased, however, toward the content industry, giving commercial players extra incentives to register and win copyright protection, while at the same time putting other players in the digital ecosystem at a serious disadvantage.<sup>23</sup>

#### B. SIGNALING: RAISING LEGAL CERTAINTY

Another function of formalities, which could serve the public domain, is signaling.<sup>24</sup> A notice may inform the public which works are covered by copyright, thereby helping potential users to easily distinguish between protected works and the public domain.<sup>25</sup> A high level of uncertainty regarding which works are protected by copyright creates inefficiencies. Potential users, who cannot easily tell a copyrighted work from an unprotected work, are forced to undertake costly inquiries or pay a licensing fee even when a license is unnecessary. Uncertainty regarding copyright coverage also carries a chilling effect on legitimate use, as risk-averse users will sometimes avoid legitimate uses altogether.<sup>26</sup> The notice requirement could enhance legal certainty, thereby promoting a more efficient use of works in the public domain.

A notice requirement is far from being a magic solution to the problem of uncertainty. The reliance on formalities to increase certainty assumes that one can neatly define the boundaries of a copyrighted subject matter. Mandatory notice may serve as a “no trespassing sign,” alerting potential users that a license is necessary unless the intended use is considered fair use. An important advantage of a mandatory notice is to free users from the need

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interest of the author.”); *see also* Samuelson, *supra* note 1, at 1199 (observing that protecting commercially “dead” works imposes only social costs).

23. *See infra* Sections IV.A–C.

24. *See, e.g.*, Gibson, *supra* note 3, at 221–26; Samuelson, *supra* note 1, at 1185–86.

25. The notice requirement under the pre-1976 U.S. Copyright Act required authors to put a copyright notice on their work within a certain time period following the publication of the works in order to gain protection.

26. A classic example is the problem of orphan works. For instance, the mass digitization of printed books for the Google Books project involved two major costs: scanning the books and copyright clearance. It was difficult to determine the number of orphan works and the cost of obtaining the individual licenses for large-scale digitization projects of that sort. *See* Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227 (2009).

to undertake precautions every time a work lacks a notice. But a notice requirement does not offer sufficient certainty. For one, if notices are only voluntary they do not enhance certainty, as users will always remain in doubt. Even if notices are made mandatory, however, some inquiries would still be necessary to determine whether a work is protected. For instance, the current notice requirement under U.S. copyright law includes the publication date and identifies the owner.<sup>27</sup> Yet the duration of copyright is life plus seventy years, thus requiring more information on the author of the work for the purpose of determining whether a work is still under copyright (e.g., author's date of birth and possibly the date of death).<sup>28</sup>

Moreover, notices and deposits cannot fully address legal uncertainty, as it stems from the nature of copyright law and its fundamental principles. Legal uncertainty regarding the scope of protection arises from the fact that copyrighted works are often composed of both protected expression and unprotected ideas. Consequently, determining what is covered by copyright and what is in the public domain involves legal analysis, which takes place in court *ex post*.

### C. GENERATING INFORMATION TO FACILITATE LICENSING

A third function of formalities is to generate information that could foster wide exploitation of copyrighted materials by facilitating licensing.<sup>29</sup> While the reuse of creative content becomes much easier, more accessible, and more common, the need to acquire a license creates serious barriers to the reuse of copyrighted materials.<sup>30</sup> Potential users must determine whether a work is under copyright, identify the different rightholders, and locate the owners to negotiate a license.<sup>31</sup> Identifying and locating the owners might become prohibitively expensive when there is no indication of the author of the work and when there is no registry to record changes in copyright ownership. In such cases, the transaction costs of licensing could prevent a use that might otherwise be beneficial.

Advocates of formalities argue that registration and notice could make it much easier for potential users to identify the rightholder and acquire a proper license for a particular use. Identifying the copyright owner may lower

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27. 17 U.S.C. § 401 (2012).

28. *See id.*

29. *See, e.g.,* LESSIG, *supra* note 3, at 252; Landes & Posner, *supra* note 14, at 477–80; Sprigman, *supra* note 2, at 500–02.

30. *See* STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES, AND POSSIBLE FUTURE 5–7 (2011).

31. *See, e.g.,* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 23–28 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.



transaction costs and help potential users to contact the rightholder and negotiate a license. Recoding the assignments of rights may further help track the owner of works (i.e., tracking the chain of title). Overall, it is assumed that formalities will facilitate transactions, thus encouraging the reuse of copyrighted materials and promoting copyright goals.

Yet the obstacle to the use of copyrighted materials is not just lack of information regarding the copyright owners. Acquiring a license also involves the cost of locating the owners, contacting them, negotiating a license, and paying a license fee. This may become especially burdensome for mass digitization projects of libraries and archives, as well as for more ordinary practices, such as preparing reading materials for students or clearing rights in copyrighted materials for a documentary film. The 2012 U.K. Hooper Report identified barriers to licensing primarily in noncommercial sectors, listing the following as the main obstacles: identifying the parties, negotiating a license, and paying a license fee in the absence of a business model.<sup>32</sup> These obstacles to using copyrighted materials also affect individual users, especially when the costs are higher than the anticipated benefits from the use of copyrighted work. Moreover, even when considerable information about the author and ownership is available, there could be other barriers to efficient licensing, such as reaching an agreement on the terms and conditions of the license. These obstacles do not stem from the absence of formalities, but rather from the fact that copyright law, which is a property rule, requires a license in advance.<sup>33</sup>

### III. THE DIGITAL ECOSYSTEM

At first sight, digital networks make it easier to implement formalities as tagging content, monitoring, and tracking become more efficient. But the shift to digital does not simply lower transaction costs. It also brings about more fundamental changes, transforming the way we create, disseminate, and consume cultural works. Indeed, formalities advocates believe that these changes make the case for formalities even stronger. Formalities, they argue, would adjust copyright to the digital challenges, keeping more works in the

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32. RICHARD HOOPER & ROS LYNCH, COPYRIGHT WORKS: STREAMLINING COPYRIGHT LICENSING FOR THE DIGITAL AGE (2012), available at <http://www.ipa.gov.uk/dce-report-phase2.pdf> (identifying the need for simpler copyright licensing in the digital environment).

33. See *Authors Guild, Inc. v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). A possible strategy for addressing this problem is to offer works with a “license inside,” such as Creative Commons licenses. See Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* 325 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006).

public domain and making it easier to set copyrighted works apart from works in the public domain.<sup>34</sup> Yet as the means of generating new works and the tools for self-mass communication become available at low cost to every user connected to the Internet, the intended function of formalities, and its unintended consequences, must be reconsidered.

The following Sections briefly discuss the emerging digital ecosystem, focusing on the transformation of creative practices and distribution structures. Part IV analyzes the implications of these processes for the reintroduction of formalities.

A. CREATIVE PRACTICES: THE RISE OF UGC AND COLLABORATIVE PRODUCTION

One important aspect of the digital environment, which distinguishes it from the markets of cultural works where formalities were implemented in the past, is the rise of UGC. A dramatic reduction in the cost of producing and mass distributing cultural works, and the popular availability of tools which make this possible, have turned many individuals into both authors and users of creative content.<sup>35</sup> Using a simple camera phone and sharing pictures on Picasa,<sup>36</sup> Flickr,<sup>37</sup> or Instagram,<sup>38</sup> users often generate high-quality content and make it publicly available worldwide. Users blog, tweet, edit, and comment, generating news reports, reviews, and analyses that are widely read.<sup>39</sup> These new capabilities of mass self-communication evolve alongside the major media channels.<sup>40</sup> Overall, the industrial production of content, which dominated the twentieth century, has now been displaced by a mixture of both commercially produced content and creative content, which is generated, and made available, by individual users and groups.<sup>41</sup> Commercial players and user-authors may be affected differently by a formalities regime.<sup>42</sup>

UGC may take many shapes and forms. It is sometimes generated by amateurs, though it might also be produced by professionals outside the

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34. See VAN GOMPEL, *supra* note 30, at 3–8.

35. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921 (2009).

36. PICASA, <http://picasa.google.com> (last visited July 6, 2013).

37. FLICKR, <http://www.flickr.com> (last visited July 6, 2013).

38. INSTAGRAM, <http://www.instagram.com> (last visited July 6, 2013).

39. See, e.g., Florence Le Borgne-Bachschmidt et al., IDATE, TNO & IVIR, *USER-CREATED-CONTENT: SUPPORTING A PARTICIPATIVE INFORMATION SOCIETY* 50–53 (2008).

40. See MANUEL CASTELLS, *COMMUNICATION POWER* (2009).

41. See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATION* (2008).

42. See *infra* Sections IV.A–B.

scope of their employment agreement.<sup>43</sup> Content is often generated for a variety of reasons: self-expression and creative satisfaction, affiliation and connection with others, building an online reputation, or strengthening self-esteem.<sup>44</sup> Nevertheless, amateurs may also have financial expectations. For instance, software developers may contribute to free software and photographers may post their pictures on Flickr, hoping they will be able to cash in on their online reputation.<sup>45</sup> The different motivations may affect the response of user-authors to the formalities regime.

The digital environment is also transforming the creative process, blurring the distinction between authors and users, consumers and producers, exploiters and creators. Works in digital format can be easily mixed and matched, cut and pasted, or edited and remixed. The ease of changing and adapting enables users to appropriate cultural icons to express new meanings<sup>46</sup> and to aggregate existing works into new content. This shift is strengthening the need to secure sufficient access to preexisting materials so as to facilitate these new creative practices. Under current copyright law, some of these transformative uses might be considered fair use, while others might be considered derivative works worthy of protection. These dynamic creative practices, and the instant use of preexisting materials, warrant a more instant approach to signaling.

Similarly, the rise of collaborative production may require adjustments in any system of formalities. Digital content is often the outcome of the micro-efforts<sup>47</sup> of many contributors, which merge into a single outcome that is often greater than the sum of its parts. Wikipedia is a classic example.<sup>48</sup>

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43. Niva Elkin-Koren, *User-Generated Platforms*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 111, 116–17 (Rochelle C. Dreyfuss et al. eds., 2010); Steven Hetcher, *User-Generated Confusion: The Legal and Business Implications of Web 2.0*, 10 *VAND. J. ENT. & TECH. L.* 863, 871 (2008).

44. Users may choose to share their content online for a variety of reasons: they may choose to post a book review on Amazon in order to share their opinion or connect with peers, comment on a blog, or dispute an op-ed on NYT.com to simply express themselves or promote a political agenda.

45. See, e.g., Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 *J. INDUS. ECON.* 197 (2002).

46. For example, adapting movie scenes and fictional characters, parodying brands, or modifying the words or style of popular songs.

47. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005) (arguing that digital networks facilitated the reuse and dissemination of small fragments of expression).

48. See *infra* note 90 and accompanying text. Different kinds of collaborations have emerged in this context, each of which may require a different regulatory approach. Collaborations may be ongoing and last over long periods of time, but they can sometimes be ad hoc, where it is easier for users to opt in and out. Collaborative initiatives may involve

Legal policy should take account of collaborative practices of generating content and mitigating the individual interests of original contributors, and the mutual interest of the community of authors engaging in social production as a whole. For instance, rules regarding notices may apply to the outcome of a collaborative work as a whole, or may be attached to each separate micro-effort that meets the originality threshold.<sup>49</sup>

#### B. DISSEMINATION STRUCTURES: THE RISE OF MEGA-PLATFORMS

Much has been written about online dissemination in digital networks.<sup>50</sup> In essence, network communication and web publishing replaced the “one-to-many” distribution mode, which characterized the publishing world of the twentieth century, with a “many-to-many” mode of distribution, where every user is capable of mass self communication.<sup>51</sup> Yet the direct communication among users is facilitated by a variety of online platforms, such as online service providers (e.g., AT&T, Verizon), search engines (e.g., Google, Yahoo!), social media platforms (e.g., Facebook, Twitter), or hosting facilities

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different types of investments of time and resources and may establish different bonds among the contributors. Some communities are very intimate and close together, and some are massive large-scale collaborations; some initiatives are focused on an immediate goal and some involve long-term interests and greater interdependency among the participants. From a legal perspective, attention should be given to the special characteristics of each collaborative community.

49. See Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 THEORETICAL INQUIRIES L. 309 (2011).

50. See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008); Jessica Litman, *Sharing and Stealing*, 26 HASTINGS COMM. & ENT. L.J. 1 (2004).

51. “One-to-many” refers to mass medium (e.g., radio, television, newspapers) where the speaker (e.g., broadcaster, editor) communicates a unified message to the general audience. The audience is simply a passive receiver of the communicated message. “Many-to-many” refers to Internet communication, new media, and social media that are based on two-way communication within a mass audience, thereby facilitating unmediated direct communication among users. See generally Manuel Castells, *Communication, Power and Counter-Power in the Network Society*, 1 INT’L J. COMM. 238, 246 (2007). As described by Professor Castells:

The diffusion of Internet, mobile communication, digital media, and a variety of tools of social software have prompted the development of horizontal networks of interactive communication that connect local and global in chosen time. The communication system of the industrial society was centered around the mass media, characterized by the mass distribution of a one-way message from one to many. The communication foundation of the network society is the global web of horizontal communication networks that include the multimodal exchange of interactive messages from many to many both synchronous and asynchronous.

*Id.*; see also CASTELLS, *supra* note 40.

(e.g., Apple, Amazon, YouTube). Online platforms have shown a high level of growth, consolidation, and market concentration.<sup>52</sup> These mega-platforms<sup>53</sup> are changing the way in which content becomes available, with some important implications for competition and consumer welfare, as well as access to knowledge and civil liberties.

One aspect of distribution by mega-platforms is the shift from copies to services. Music, movies, and books are increasingly being made available to users online through streaming rather than distribution in printed copies, records, or CDs. Netflix,<sup>54</sup> Spotify,<sup>55</sup> and Google Books<sup>56</sup> are just a few examples. This shift is weakening the users' control over the content they access.<sup>57</sup> As content becomes available as a service, and not as copies of copyrighted works, there is no need to separately signal copyright protection on each copy of the work. In fact, it becomes easier to facilitate signaling at the infrastructure level.<sup>58</sup>

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52. Since much of the cost of producing a platform (design and technological innovation) is unrelated to the number of users of the service, the average cost of providing service to each additional user may fall as the number of users increases. But economies of scale reduce the level of competition. Cost of entry is rapidly rising as the Internet continues to grow and as competition becomes more sophisticated. A strong network effect gives advantages to large-scale intermediaries such as Google's search engine, and to global social networks such as Facebook and Twitter, which attract the most traffic by users on a global scale. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites Up 82% Year over Year*, NEILSEN (Jan. 22, 2010), <http://www.nielsen.com/us/en/newswire/2010/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year.html>.

53. The term "mega-platforms" is used to describe online intermediaries that mediate online traffic and access to online content. Mega-platforms include intermediaries such as social media, search engines, and online content providers, as the distinction between their different functions is increasingly blurred. For instance, mega-platforms such as Amazon, Google, and Apple have become publishers, producers, distributors, and marketers of digital content. *See* Darcy Travlos, *Importance of Being a Platform (Apple, LinkedIn, Amazon, eBay, Google, Facebook)*, FORBES, Feb. 26, 2013, <http://www.forbes.com/sites/darcytravlos/2013/02/26/importance-of-being-a-platform-apple-linkedin-amazon-ebay-google-facebook/>.

54. NETFLIX, <http://www.netflix.com> (last visited July 6, 2013).

55. SPOTIFY, <https://www.spotify.com/int/> (last visited July 6, 2013).

56. GOOGLE BOOKS, <http://books.google.com/> (last visited July 6, 2013).

57. A striking example of the lack of consumer control over their eBooks is the Orwellian saga, 1984, of which Amazon.com remotely removed purchased copies of George Orwell's book from Kindle due to copyright concerns. Brad Stone, *Amazon Erases Two Classics from Kindle. (One is '1984.'*), N.Y. TIMES, July 18, 2009, at B1.

58. *See, e.g., Flickr: Creative Commons*, FLICKR, <http://www.flickr.com/creativecommons> (last visited July 24, 2013) (offering self-licensing services and facilitating Creative Commons licenses); *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited July 24, 2013); *see also infra* notes 64, 96 and accompanying text.

Another aspect of dissemination by mega-platforms is the convergence of control over access, content, and users.<sup>59</sup> Mega-platforms are not simply offering new distribution channels, they are also playing a growing role in publishing. They have become publishers, producers, distributors, and marketers of music, movies, eBooks, and apps, thus blurring the distinction between online retailers and publishers.<sup>60</sup>

Furthermore, mega-platforms exercise extensive control over prospective users of content.<sup>61</sup> By establishing direct contact with each user through the access service (e.g., search, display, Internet access, or a playing device) mega-platforms may monitor the use of content by individual users on an ongoing basis. Platforms can collect data on users' reading habits or taste in music, and may also enable access or disable access, either by removing or blocking the content or by terminating the user account altogether.<sup>62</sup>

The shift to digital dissemination would make mega-platforms a focal point for implementing any system of formalities.<sup>63</sup> Any technical application of formalities would depend on implementation by facilitating platforms and should take into account the way in which platforms reshape the relationship between copyright owners and the users of content. The implementation of formalities through mega-platforms may also call for some caution. It may raise new concerns that did not previously exist. Once formalities are

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59. See Niva Elkin-Koren, *The New Convergence: Securing the Freedom to Read in the eBooks Era*, N.Y.L. SCH. L. REV., <http://www.nylslawreview.com/the-new-convergence> (last visited Aug. 20, 2013).

60. For example, Amazon's Kindle Direct Publishing ("KDP") offers authors a whole range of self-publishing options through the Amazon Kindle Store. See *Kindle Direct Publishing*, AMAZON, <https://kdp.amazon.com/self-publishing/signin> (last visited Feb. 12, 2013). Authors can earn seventy percent of the royalties from the sale of such books. See also *Authors & Book Publishers: Frequently Asked Questions*, APPLE, <http://www.apple.com/itunes/content-providers/book-faq.html> (last visited July 24, 2013).

61. Control over the playing devices (e.g., MP3 players, eBook readers, tablets, and PCs) enable control over the format in which content becomes available (i.e., whether it could be read in privacy, whether surveillance can be switched off, whether its format is interoperable with other playing devices, and what license restrictions will apply).

62. See Elkin-Koren, *supra* note 59.

63. The partnership between dissemination platforms and copyright owners is also reflected in the Copyright Alert System ("CAS"), which is based on a voluntary agreement between ISPs and rightholders, to act against users suspected of infringing copyright. See Nate Anderson, *Major ISPs Agree to "Six Strikes" Copyright Enforcement Plan*, ARS TECHNICA (July 7, 2011, 8:06 AM), <http://arstechnica.com/tech-policy/2011/07/major-isps-agree-to-six-strikes-copyright-enforcement-plan>.

integrated into the system, monitoring, collection, and enforcement could become easily available.<sup>64</sup>

The dual role of platforms, in providing voluntary notice (e.g., YouTube Content ID) and enforcing compliance with it (removing or blocking content), may require legal scrutiny.<sup>65</sup> Monitoring the use of content to enable licensing by rightholders, raises a serious concern regarding the privacy of content users and their freedom to access content without surveillance. Similarly, the merging interest of content owners and mega-platforms may also require some checks and balances to prevent misuse and guarantee freedom in accessing content.

Overall, the rise of UGC, the new creative practices, and access by mega-platforms all merit a reexamination of the formalities analysis. All in all, reintroducing formalities into this new creative environment may lead to unintended consequences for the public domain. This is the subject of Part IV.

#### IV. RETHINKING FORMALITIES IN THE DIGITAL ECOSYSTEM

A central drive behind the pro-formalities campaign is the wish to reinstate a robust public domain.<sup>66</sup> Arguments supporting formalities as a vehicle for promoting the public domain rest on several assumptions. One assumption is that efficient protection should only apply to works of commercial value. Only those works, it is assumed, can benefit from copyright protection.<sup>67</sup> Another assumption is that an efficient standard of protection would be based on measuring the gap between the cost of registration and the owners' assessment of the commercial value of the work. These assumptions make screening by formalities systematically biased towards the content industry, giving industrial players extra incentives to acquire copyright protection. This commercial bias suggests that if mandatory formalities are reintroduced, it may strengthen existing commercial players and marginalize individual creators and collaborative

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64. YouTube Content ID is a classic example. YouTube has entered into a partnership with copyright owners where the YouTube Content ID system enables rightholders to monetize their content on Google. *See Content ID, YOUTUBE*, *supra* note 58.

65. *See infra* Section IV.E.

66. *See supra* Section II.A.

67. Sprigman, *supra* note 2, at 491 (proposing a system of formalities that is capable of “filtering commercially valueless works out of copyright and focusing the system on those works for which it could potentially do some good.”); *see also* Gibson, *supra* note 3, at 216; Samuelson, *supra* note 1, at 1199. For a formal analysis of commercial expectations, *see* Fagundes & Masur, *supra* note 5.

initiatives. There are several reasons for this bias towards commercial players. The following Sections discuss the implications of reintroducing formalities for the digital ecosystem and the public domain.

A. BIASES TOWARDS COMMERCIAL CONTENT

The screening potential of formalities is based on the assumption that rational authors will make efficient choices and will acquire copyright protection if, and only if, the expected benefits exceed the cost of registration.<sup>68</sup> Often, rightholders may find it difficult to assess the value of their work ahead of time. For example, publishers and record companies often claim that the unpredictable nature of commercial success makes the content industry a high-risk investment and requires greater surplus to compensate for the risk.<sup>69</sup> Estimating the potential value of a work may be especially difficult for individual authors. This is due to the major differences in how user-authors and industrial producers reach a decision on whether to engage in the creative process. Industry generates content for profit, based on a business plan that is prepared prior to production. Consequently, it is better positioned to assess the commercial potential of content. User-authors often operate outside a market scheme, and the creative output is often a byproduct of activities done for fun, for social or political purposes, or for the sake of experience, experimentation, or self-expression. In such cases user-authors are unlikely to have any structured procedure for evaluating the commercial potential of a work. Bloggers, self-publishing online critics, and users who upload pictures to Instagram, tweet, or post in social media, all create streams of potentially protected works. Such a stream cannot be reasonably evaluated in advance for potential commercial value.<sup>70</sup> Consequently, user-authors are likely to respond differently to a formalities requirement.

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68. See *supra* notes 18–21 and accompanying text.

69. Publishers often seek to lower the risk by recouping their loss from unsuccessful titles by collecting royalties for bestsellers over a longer period of time. See generally Frederick van der Ploeg, *Beyond the Dogma of the Fixed Book Price Agreement*, 28 J. CULTURAL ECON. 1 (2004); Theo Papadopoulos, *Are Music Recording Contracts Equitable? An Economic Analysis of the Practice of Recoupment*, 4 MEIEA J. 83 (2004).

70. See Elkin-Koren, *supra* note 49, at 318–23. A similar point is made by Brad Greenberg, arguing that formalities do not scale, as “[o]nline authors may publish copyright-protected content several times each day, quickly making adherence to formalities impracticable and infeasible.” See Brad A. Greenberg, Comment, *More Than Just a Formality: Instant Authorship and Copyright’s Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1048 (2012). Greenberg concludes, however, that instant authorship makes the case for reintroducing formalities even stronger. *Id.*



Indeed, much of the creative activity that is carried out by users occurs without any expectation of remuneration.<sup>71</sup> Consequently, user-authors are less likely to be concerned with losing their copyright for failing to register their works.<sup>72</sup> Users often generate content in a social context rather than in a market framework. The creative activity itself might not aim at producing a work for sale or establishing a business, but rather at expressing oneself, creating for one's own pleasure, or engaging in a conversation.<sup>73</sup> At the same time, UGC is not necessarily nonprofit. User-authors may seek to profit from the content they have created, either up front or later on, if it becomes popular. Commercial media often cite UGC or otherwise integrate it into their stream, taking advantage of its authentic, casual, and instant nature.<sup>74</sup> In these cases, authors may resent the unjust benefits extracted from their works even though their initial motivation was unconnected to profit.

Users face rising costs for online marketing, building an online reputation, and managing their online presence in different social media platforms: these functions may require large investments in search enhancement, website optimization, and viral promotion.<sup>75</sup>

What makes UGC different, however, is the fact that, in contrast to industrialized content, it is not produced for the sole purpose of maximizing profits even though it could be distributed in a commercial setting, and may, in fact, generate revenues. Formalities assume that content producers will

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71. See Pamela J. McKenzie et al., *User-Generated Online Content 1: Overview, Current State and Context*, FIRST MONDAY (June 4, 2012), <http://firstmonday.org/ojs/index.php/fm/article/view/3912/3266> (“Most UGC production, however, must be motivated by other factors, since significant financial gain is an uncertain reward reserved for a very small minority of producers.”).

72. Therefore, it is also unlikely that user-authors will generate less content or refrain from any creative activity simply because they might not be entitled to copyright. For a different view, see Greenberg, *supra* note 70.

73. The creative practices of user-authors are better understood as engaging in a conversation rather than performing a market transaction. Posting a remix or a mash-up are communicative acts rather than acts of consuming content or reselling an added value.

74. See Søren Mørk Petersen, *Loser Generated Content: From Participation to Exploitation*, FIRST MONDAY (Mar. 3, 2008), <http://firstmonday.org/article/view/2141/1948>. For example, online aggregators and screen scrapers may create new value by searching, copying, and retrieving users' travel reviews or political opinions and generating indexes, directories, or useful guides. See Sean O'Reilly, Note, *Nominative Fair Use and Internet Aggregators: Copyright and Trademark Challenges Posed by Bots, Web Crawlers and Screen-Scraping Technologies*, 19 LOY. CONSUMER L. REV. 273 (2007).

75. Moreover, as individuals become independent units of production, they may suffer increasing financial pressure. User-authors must compete with commercial players for online exposure and users' attention, and must adopt costly promotional techniques formerly used only by commercial entities to develop their “brands,” control their identities, and monetize the informational value they add.

make rational choices based on their assessment of the commercial potential of their content and will generate an efficient level of copyright protection. Since users' choices regarding content are not governed by the same logic of the market, this standard of protection does not seem to fit.

Consequently, screening by formalities raises an issue of timing. Whereas the commercial value of industrialized content is evaluated up front, the commercial value of UGC may occur during different stages of its life span, and may be extracted by different players at different times. Users may profit from a variety of sources such as advertising, services, peer promotion, sponsorship, or sales of copies. Commercial exploitation in these instances does not involve an advance choice as to whether the content should be produced commercially, or a copyright sought for that purpose.

Overall, the rise of UGC warrants a more sophisticated approach to the commercial value of copyrighted materials that is attentive to the different preferences of authors and to changes in preferences that may occur over time. A formalities regime which ties copyright protection to the commercial potential of works may result in protecting industrialized content and excluding the vast majority of UGC.

#### B. A BIAS TOWARDS REPEAT PLAYERS

Screening works worthy of protection based on the gap between commercial value and the cost of registration may lead to further distortions. Screening by formalities is likely to generate greater incentives to acquire copyright protection among repeat players. One reason is that the expected commercial value from acquiring protection in each additional work may increase with the expansion of the portfolio. Another reason relates to the cost of registration: the marginal cost of applying formalities is likely to decrease as the volume grows.

The perceived commercial value of the same work may be different for individual authors and content providers. As argued by Parchomovsky and Wagner in the case of patents, the commercial value of each patent may increase when combined into a portfolio.<sup>76</sup> The portfolio theory may also apply to copyright where the value of a comprehensive protection is greater than its separate parts.<sup>77</sup>

Screening by formalities may further favor repeat players due to the differences in the actual cost of registration. The marginal cost of formalities

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76. See Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1 (2005) (“the true value of patents lies in their aggregation into a collection of related patents—a patent portfolio”).

77. For example, where works are traded in bulk, such as books offered to libraries.

is likely to be lower for repeat players, who have already established a mechanism for registration, monitoring the works in which copyright is about to expire, and activating renewals.<sup>78</sup> Indeed, in the digital environment the cost of formalities may go down. Fees for online registration are about half the fees for paper application.<sup>79</sup> The registry could be accessed online and be set in a user-friendly manner. Yet even as some costs are going down, they are still more easily managed by industries.<sup>80</sup> Individual authors are less likely to register their copyright simply because they lack awareness of the legal requirements.<sup>81</sup> Registration fees are likely to be prohibitively high for user-authors who often lack a well-defined fee structure or organizational structure for managing proprietary rights and handling right clearance.

All in all, the financial threshold should be set so that it would weed out those works that are not worthy of protection.<sup>82</sup> In fact, if acquiring protection would simply involve a technical procedure (e.g., clicking on an icon, registering online), then registration would become the default, bringing it closer to automatic protection.

### C. MARGINALIZING UGC AND SOCIAL PRODUCTION

A legal policy that is biased towards corporate players makes it more difficult for users to obtain copyright. But copyright may be important for user-authors where large commercial players are exercising it. User-authors may use copyright to achieve noncommercial goals. For instance, over the

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78. The filtering standard is based on comparing two figures: the cost of registration and the authors' self-assessment of the commercial value of the work. The perceived costs of registration would include the cost of learning the procedures, filling out forms, and keeping track of applications and renewals. Such costs are likely to be lower if they performed routinely, and in large volume, so that costs are spread across many works.

79. See *Fees*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last visited July 24, 2013). The registration fee in the U.S. Copyright Office is \$35 (effective August 1, 2009) for electronic filing of a basic claim in an original work of authorship. *Id.*

80. Consider, for example, the adoption of Creative Commons's licenses: even though Creative Commons licenses have gained some popularity, they are still not used by most online authors, despite being available at no cost. See *Creative Commons Metrics/License Statistics*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Metrics/License\\_statistics](http://wiki.creativecommons.org/Metrics/License_statistics) (last visited Aug. 13, 2013) (providing data on the adoption of Creative Commons licenses).

81. For the concern that formalities might be too burdensome for individual authors, see Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 *COLUM. J.L. & ARTS* 311, 342–43 (2010).

82. The efficiency of a registration requirement, in filtering out the works that are not worthy of protection, would greatly depend on the ability of governments to set the registration fee at precisely the right level. Setting the threshold too high would lead to fewer protected works for shorter periods, while setting the threshold too low might lead to over protection. Defining an efficient fee standard might not be trivial and could require differentiating between different types of works and different types of authors.

past decades, copyright was used to push against intellectual property and to promote values such as free software, access to knowledge, open access, and free speech.<sup>83</sup> A classic example is the Free Software Foundation (“FSF”), which facilitates the exercise of copyright to secure freedom in software by using the General Public License (“GPL”).<sup>84</sup>

Moreover, copyright may prove useful for protecting against misuse, unfair exploitation, and unjust enrichment by commercial players.<sup>85</sup> Much of the content generated by users is commercially exploited by online aggregators, search engines, and social media platforms.<sup>86</sup> For instance, commercial players may use UGC to extract profits by playing user-generated videos on television shows or using user-generated songs in commercial advertisements. Simply disregarding UGC as noncommercial, while at the same time creating financial barriers for obtaining copyright protection, may legitimize commercial abuse of authors’ rights and put user-authors at a disadvantage vis-à-vis commercially produced content.

Overall, filtering by formalities may create a systematic bias favoring industrial producers of commercial content. This could marginalize UGC. A user-author who wishes to use copyrighted materials for noncommercial purposes will be required to obtain a license, while the content generated would be freely available for others to exploit. This outcome is not only likely to be experienced as unjust, but might also make it harder for individual authors and creative communities to sustain nonmarket creative practices.

Reintroducing formalities as screening may end up incentivizing user-authors to work in corporate settings. Consider, for instance, a photograph of a man walking on the roof directly overlooking one of the blasts at the

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83. See generally Lucie Guibault, *Open Content Licensing: From Theory to Practice—An Introduction*, in OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE 7–20 (L. Guibault & C.J. Angelopoulos eds., 2011); Elkin-Koren, *supra* note 33.

84. The GPL is a *copyleft* license, which has a viral effect: it applies automatically to any new copy of the software and any derivative program based on the original one. See *GNU General Public License*, GNU OPERATING SYSTEM (June 29, 2007), <http://www.gnu.org/licenses/gpl.html>.

85. See, e.g., *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734 (2012) (dismissing a lawsuit brought by bloggers against Huffington Post, claiming that the value created by their contributions had made the blog popular and seeking a share in the of the selling price, after the blog was acquired by AOL Inc. for \$315 million).

86. See Petersen, *supra* note 74. Reviews of books and movies, for instance, are routinely shared by users as a matter of social practice, but when such reviews are posted online, they become economically valuable for platforms such as Amazon.com, which use reviews to improve the services provided to their customers.

Boston Marathon terrorist attack.<sup>87</sup> This picture, taken by a spectator at the Boston Marathon, was first posted on Twitter, spread to Instagram, Facebook, and other social media outlets, and finally displayed by thousands of commercial media outlets around the world. If formalities had been a precondition for protection, that picture would likely not have acquired copyright. By contrast, pictures taken by a freelance photographer working for the Associated Press (“AP”) or commissioned by any other newsgathering companies would have been copyrighted, enabling the AP to commercially exploit the pictures and collect damages in case of an unlicensed use. Such an outcome seems unjust and would encourage amateur photographers to work with intermediaries for the sole purpose of gaining copyright registration and protection.

A legal regime that is systematically biased towards commercial players puts corporate content producers at an advantage, and thus may end up replicating the current power structures and pushing against the disintermediation trends we have been witnessing in the past decades. The declining role of the media, publishers, studios, and industrial producers of cultural goods, and the rising power of UGC, have raised hopes for democratizing public discourse and making it more participatory.<sup>88</sup> Digital networks enable the organization of content production in a new way: not by corporate producers, nor by individual authors working alone, but through mass collaboration by individuals.<sup>89</sup> The dramatic cut in the cost of communicating and coordinating with others enables large groups of individual users to synchronize their actions with those of other users and to coordinate efforts to reach a particular outcome, without any corporate structure.<sup>90</sup> Nonmarket production of cultural goods and wide participation is not simply economically efficient but also politically significant. It has the

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87. See Cavan Sieczkowski, *Photo of Mystery Man on Roof During Boston Bombings Causes Stir on Twitter (PHOTO)*, THE HUFFINGTON POST (Apr. 16, 2013), [http://www.huffingtonpost.com/2013/04/16/mystery-man-on-roof-boston-bombings-photo-\\_n\\_3091189.html](http://www.huffingtonpost.com/2013/04/16/mystery-man-on-roof-boston-bombings-photo-_n_3091189.html).

88. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 213 (2006) (describing how digital networks have created new opportunities for nonmarket more participatory production of culture); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 235–67 (1996) (arguing that the democratic potential of cyberspace lies in its capability to decentralize the production and dissemination of knowledge); Halbert, *supra* note 35, at 927–30 (describing the rise of user-generated content and the democratization of cultural production); Litman, *supra* note 50, at 5–13 (describing the power of distributed dissemination by users).

89. BENKLER, *supra* note 88, at 59–90.

90. Wikipedia is a classic example, where each editor can work on her original contribution, and concurrently take part in constantly editing and revising the contributions of others. See WIKIPEDIA, <http://www.wikipedia.org> (last visited July 24, 2013).

potential of strengthening the authenticity and diversity of political speech. When users can freely express themselves without any commercial filtering, expression is likely to reflect a more authentic voice. Disintermediation can level expressive power.<sup>91</sup> Reintroducing formalities for screening works that might not be commercially valuable may weaken the forces that facilitated the rise of UGC, and impede the emergence of new innovative creative practices.

#### D. CAN FORMALITIES SECURE THE PUBLIC DOMAIN?

Screening by formalities presumes to use a neutral standard for defining the boundaries of the public domain. In fact, it applies a standard that is biased towards commercial content. It assumes that the total value of the work, and therefore whether it is worthy of copyright protection, depends entirely on its commercial value. This is not necessarily consistent, however, with copyright principles and their fundamental goals.

Assuming that the purpose of screening by formalities is to serve the public domain, one needs to ask whether commercial value is the right standard to evaluate worthiness of protection. Put differently, does noncommercial value provide a good standard for keeping works in the public domain?

Copyright law seeks to promote progress by securing limited rights to authors in their respective works. Enabling authors to extract commercial value from their works is only one mechanism through which copyright law promotes its goal. The public domain is another mechanism through which copyright seeks to achieve progress, namely, promoting creativity and innovation by facilitating access and dissemination.<sup>92</sup> The public domain should be fueling innovation by providing the raw materials for further inventions and new creative works. The public domain is a mirror image of copyright. It is a legal regime that seeks to secure some space for nonmarket exchanges of information, such as learning, innovating, self-expression, and self-determination.<sup>93</sup>

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91. See, e.g., BENKLER, *supra* note 88, at 215; Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in *THE COMMERCIALIZATION OF INFORMATION* 79, 103–05 (Niva Elkin-Koren & Neil W. Netanel eds., 2002).

92. As Jessica Litman aptly explained as early as 1990, the public domain has to be viewed as a source of creativity. Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 968 (1990) (“The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”).

93. The significance of securing such space derives from the special characteristics of copyrightable subject matter. Therefore, when courts hold that copyright law sufficiently

Consequently, the public domain should be understood as an integral part of copyright policy, and not as a residuary.<sup>94</sup> For the same reason, the public domain should not consist solely of works that are not commercially valuable. It should consist, instead, of those aspects of intangible goods that are necessary for securing further innovation and creativity, and fundamental freedoms. The public domain should consist of those aspects that must be freely available for use, no strings attached.

When only works of noncommercial value end up in the public domain, we cannot guarantee that the public domain will be capable of serving the purposes that it ought to promote.

#### E. THE PUBLIC DOMAIN AND PRIVATE FACILITIES

As we debate whether or not to reintroduce formalities, formalities are already here. Digital networks facilitate distributed solutions not simply for fixing a notice, but also for declaring more efficiently the terms of use.<sup>95</sup> Online intermediaries, such as search engines, social media platforms, and access providers, are becoming a focal point for implementing formalities. Formalities could be easily integrated into the design of such platforms, enabling signaling, monitoring, managing, and enforcing rights in copyrighted materials.

YouTube Content ID is a classic example. The Content ID system generates digital files for audio or visual content. When a video is uploaded, the system searches for a match on the database of Content IDs. Once a match is found, the system automatically applies the policy defined by the rightholder. The Content ID system offers rightholders a choice among the following options: block the content, license the materials, or simply use the

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balances incentives to authors and freedom of speech, they assume that copyright doctrines (e.g., idea expression, originality, and fair use) sufficiently safeguard the public domain. This reflects a substantive analysis rather than a technical standard: some things (ideas) should remain in the public domain and provide the breathing space for users and future authors. If we shift to a regime in which formalities, presumably a technical/neutral standard, distinguish between protected and non-protected works simply on the basis of their perceived commercial potential, the public domain—in its substantive meaning—may not be served.

94. Indeed, the public domain is not a graveyard of intellectual property laws, but rather its ultimate purpose. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991). Over the past two decades scholars have emphasized the role of the public domain as a vehicle for promoting the goals of innovation and technological progress. *See* BOYLE, *supra* note 9.

95. *See, e.g.*, CREATIVE COMMONS, <http://creativecommons.org> (last visited Aug. 20, 2013).

statistics generated by the system regarding the use of the copyrighted materials.<sup>96</sup>

The YouTube Content ID system has been publicly criticized for failing to verify rights, thus making it vulnerable to misuse.<sup>97</sup> It has also been criticized for automatically blocking content without exercising any human discretion, where discretion is necessary for determining liability and analyzing fair use.<sup>98</sup> Much of the criticism of the Content ID system has been focused on the lack of transparency and due process.<sup>99</sup> Content detected by the system is often blocked before it is even uploaded and made available to the public. In the case of error, a user whose content has been removed often has insufficient recourse. In the past, if a user challenged the blockage, his contesting notice was forwarded to the rightholder for final decision.<sup>100</sup> Content ID did not include any procedure for counterarguments or legal challenges.<sup>101</sup> The absence of any rights for due process was especially worrisome as the automatic process of detection and execution did not involve any human review. In response to these charges, YouTube revised the process. Now, a user who believes the display is lawful may dispute the removal by filling a counter notice, which will be processed within the DMCA Notice and Takedown standard procedure.<sup>102</sup>

From the perspective of the public domain, the rise of private mechanisms for implementing formalities raises several concerns. One issue

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96. See *Content ID*, *supra* note 58.

97. See, e.g., Andy Baio, *Copyright Kings Are Judge, Jury and Executioner on YouTube*, WIRED (Feb. 29, 2012 1:29 PM), <http://www.wired.com/business/2012/02/opinion-baiodmcayoutube>; Patrick McKay, *YouTube Copyfraud & Abuse of the Content ID System*, FAIR USE TUBE (Nov. 23, 2011, 3:22 PM), <http://fairusetube.org/youtube-copyfraud>.

98. Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L.R. 912, 938–44 (2010) (describing how content ID procedures may compromise fair use); Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 388–90 (2009) (discussing fair use implications of automated filtering).

99. See, e.g., Nathenson, *supra* note 98, at 945–47; Elizabeth Gotham, *Lessons from Content ID: Searching for a Balance Between Editorial Discretion and Free Expression on Application Platforms* (Apr. 30, 2013), available at <http://ssrn.com/abstract=2258861>.

100. See Baio, *supra* note 97.

101. Users were unable to force the reposting of content that had been removed. In the absence of any legal procedure to deal with bad faith claims, users might not even have a proper claim against the copyright owner. Also, hardly any claim is available against the platform, as it is difficult to establish a legal right to post materials on a particular hosting site, and the platform's Terms of Use will often reserve the right of the platform to deny access or remove content at its full discretion. Patrick McKay, *YouTube Refuses to Honor DMCA Counter-Notices*, FAIR USE TUBE (April 4, 2013, 1:24 PM), <http://fairusetube.org/articles/27-youtube-refuses-counter-notices>.

102. See Gotham, *supra* note 99.



is the multiple roles of platforms. The convergence of digital signaling, automated detection and enforcement by design may involve intermediaries in a conflict of interests. To put it bluntly, an intermediary that profits from monetizing content based on formalities might not be impartial. This becomes a pressing issue as systems like Content ID strengthen the business partnership between online intermediaries that facilitate voluntary formalities and rightholders.<sup>103</sup> The shared interests of content owners and mega-platforms may require some checks and balances to guarantee freedom in accessing content. For instance, monitoring the use of content flagged by content providers may raise concerns regarding the privacy of content users and their freedom to read or view content without surveillance. The lack of transparency regarding these processes fails to facilitate public scrutiny and therefore raises serious doubts as to whether the process sufficiently safeguards access to knowledge.

A second concern related to implementing formalities by design arises from the power to automatically self-enforce formalities that are based on voluntary notice. Online platforms that integrate formalities in their design offer an automatic process of signaling, detecting, licensing, and often also executing the licenses. Digital signaling requires automated processing. In fact, this becomes a necessity in any system that is designed to process a large volume of data. However, the lack of legal oversight in such automated systems raises new concerns as it may compromise users' rights. While the notice and takedown procedures under the DMCA include some measures for validating ownership, automated procedures, such as Content ID, do not require any validation or authentication of rights. Consequently, there is no guarantee that only rightholders (and not third parties) are capable of denying access to works and that access is blocked for copyrighted materials only.

Similarly, formalities that are integrated into the design may facilitate perfect licensing. Users can efficiently identify the works that are public domain and distinguish between those works and others which are still under protection and therefore require a license. Yet, perfect licensing without substantiating the rights may threaten the public domain and compromise copyright goals. The concern here is that licensing may become "too efficient," forcing users to acquire a license even when it is no longer necessary or for uses exempted under fair use. Patricia Aufderheide and Peter Jaszi termed this "Clearance Culture," where it is expected that each and

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103. The partnership between rightholders and intermediaries is reflected in other contexts, too. *See, e.g.*, Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010) (discussing the settlement reached by Google and the publishers in the aftermath of the Google Books class action).

every use will be cleared.<sup>104</sup> The shift to a licensing culture may shrink the public domain as potentially fair users will nevertheless obtain a license.<sup>105</sup>

A third concern arises from the privatization of governmental functions and the blurring of the public/private divide.<sup>106</sup> On the one hand, online intermediaries are private companies, using their proprietary facilities to offer voluntary formalities. As private facilities that often offer their services for free, search engines, hosting sites, and social media platforms arguably enjoy editorial discretion to remove content or block access.<sup>107</sup> On the other hand, these online intermediaries concentrate a lot of power over access to content and over data related to end users. They often also exercise some control over the publication of content itself. This new convergence of power requires some checks and balances. This suggests that legal oversight is necessary where intermediaries are voluntarily implementing formalities by design.<sup>108</sup>

In sum, by making it easier for industrial players than for individual players to acquire copyright protection, reintroducing formalities may favor commercial production of content. Individuals may nonetheless be required to acquire a license to reuse any commercial materials in their UGC. Overall, reintroducing formalities may result in protecting content generated by the content industry and excluding UGC from protection. Yet, this may not end up releasing “lock-up” of works that formalities advocates sought to release. The copyright of user-authors never posed a significant threat to a vibrant copyright environment, as most users are not interested in enforcing their rights against other users, and at large have developed efficient mechanisms for signaling and licensing their works.<sup>109</sup>

Moreover, reintroducing formalities may put social production of content and non-market creative practices at a disadvantage, thus compromising

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104. PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 35 (2004), available at [http://www.centerforsocialmedia.org/sites/default/files/UNTOLD-STORIES\\_Report.pdf](http://www.centerforsocialmedia.org/sites/default/files/UNTOLD-STORIES_Report.pdf).

105. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (arguing that fair users frequently request licenses simply to avoid litigation, which in turn enlarges the scope of the right expected by copyright holders).

106. See Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003).

107. James Grimmelman, *Speech Engines*, 98 MINN. L. REV. (forthcoming 2014); Gotham, *supra* note 99, at 2.

108. See *infra* Part V.

109. The classic examples are Creative Commons licenses and Free Software. See, e.g., *supra* notes 84, 95 and accompanying text.

creative practices which are essential for keeping a vibrant public discourse and facilitating a participatory cultural environment.

## V. CONCLUSIONS

There are many reasons for the enclosure of the public domain in recent years; the removal of the formalities requirement is only one of them. Moreover, given the nature of the emerging players in the digital ecosystem, there is no guarantee that reviving formalities will properly secure the public domain. Indeed, some formalities may prove to be useful in facilitating access to content and enabling reuse of cultural works. Yet the devil is in the details: the types of formalities and the legal consequences attached to them.

The digital ecosystem poses new challenges to the implementation of formalities, and any initiative regarding formalities must be attentive to these special considerations. The analysis suggests that a rich and diversified body of creators, motivated by a variety of incentives, requires a legal regime tailored to the different needs of different creators. Legal policies for the digital ecosystem should therefore take account of the fact that UGC is driven by a mixture of motivations and protect the interests of the different players accordingly.<sup>110</sup>

Three principles should guide legal policy toward formalities in the digital era. First, legal policy should avoid introducing mandatory formalities as a prerequisite of protection. The analysis shows that it is not desirable to use formalities for screening and applying formalities as a prerequisite of copyright protection may end up marginalizing UGC and social production.

There are many other potential functions of formalities that could facilitate the public domain, making it easier for authors and users to transact and helping users to determine more easily whether a work is protected and whether a license must be obtained.

Taking advantage of the low cost of attaching and tracking notices in digital networks, voluntary formalities may generate more certainty regarding copyrighted works and the public domain. Digital networks not only facilitate notices but also make it easier to include a trackable license with each copy of the work. There is no need to require registration at a central registry.<sup>111</sup> The

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110. For instance, a legal regime might be tailored in a way that would encourage creators to create first and consider legal protection and commercialization at a later stage.

111. A deposit requirement (either physical or digital) may generate additional information regarding the boundaries of the work to which copyright applies, thus further enhancing legal certainty. Yet, deposit requirements might be contrary to the dynamic nature of digital content.

use of shared standards for identifying copyrighted materials might be sufficient, as long this standard is implemented by search engines, social media platforms, and other intermediaries.

Second, legal policies should be designed to encourage rightholders to take advantage of digital distribution, signaling copyright protection by using notices and licenses attached to copies. Incentives for voluntary signaling could be provided through remedies. For instance, recognizing a good faith defense in the absence of sufficient notice may enable courts to exempt users from liability for damages. This would also enable rightholders to begin using a notice at any point in time, alerting potential users that the work is under copyright from then on. The “good faith” exemption would cease to apply after a notice was fixed.

If notice is self-implemented without any validation processes, registration, or certification by a central registry, there is a risk of overuse. If fixing a notice is easy and involves no cost, notices will likely become the default, thus losing their distinctive meaning and the signaling effect that is important for facilitating the public domain. Therefore it is necessary to consider penalties for deceptive use of notice such as fixing a notice on a work no longer in copyright or on copyrighted materials that are owned by third parties.

Finally, online intermediaries may facilitate self-implementation of voluntary notices, making it much easier to implement formalities efficiently and effectively. At the same time, however, implementing formalities by design may require legal oversight of online intermediaries to protect the fundamental rights of users. Intermediaries should be subject to a legal duty to maintain the transparency of the process, secure due process, and handle all content and users equally without prejudice.