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# Too Many Copyrights

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Pamela Samuelson

## Legally Speaking Too Many Copyrights?

*Reinstating formalities—notice of copyright claims and registration requirements—could help address problems related to too many copyrights that last for too many years.*

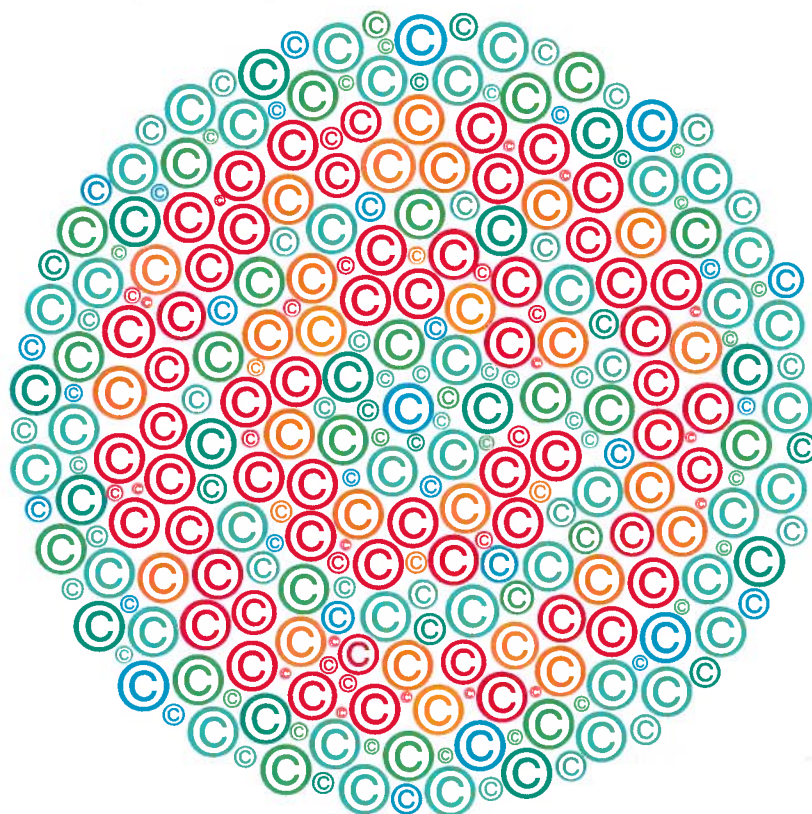
**V**IRTUALLY ALL OF the photographs on flickr, videos on YouTube, and postings in the blogosphere, as well as routine business memos and email messages, are original works of authorship that qualify for copyright protection automatically by operation of law, even though their authors really do not need copyright incentives to bring these works into being. Yet, copyrights in these works, like those owned by best-selling authors, will nonetheless last for 70 years after the deaths of their authors in the U.S. and EU (and 50 years post-mortem in most other countries).

Are there too many copyrights in the world, and if so, what should be done to weed out unnecessary copyrights? Some copyright scholars and practitioners who think there are too many copyrights are exploring ways of limiting the availability of copyright to works that actually need the exclusive rights that copyright law confers.<sup>1,3,4</sup>

### Copyright Formalities as an Opt-In Mechanism

One obvious way to eliminate unnecessary copyrights is to require authors who care about copyright to register their claims, put copyright notices on copies of their works, and/or periodically renew copyrights after a period of years instead of granting rights that attach automatically and last far beyond the commercial life of the overwhelming majority of works.

Copyright lawyers speak of such re-



quirements as “formalities,” for they make the enjoyment or exercise of copyright depend on taking some steps to signal that copyright protection is important to their creators.<sup>4</sup>

Conditioning the availability of copyright on formalities is not exactly a new idea. For most of the past 300 years, copyright was an opt-in system. That is, copyright protection did not commence when a work was created; authors had to opt-in to copyright by registering their works with a central office or by put-

ting copyright notices on copies of their works sold in the market. When authors failed to comply with formalities, the works were generally in the public domain, freely available for reuses without seeking any permission. This enriched culture because these works were available for educational uses, historical research, and creative reuses.

While many countries abandoned formality requirements in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the U.S. maintained notice-on-copies and registra-

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tion-for-renewal formalities until 1989. The U.S. still requires registration of copyrights as a precondition for U.S. authors to bring infringement actions, as well as for eligibility for attorney fee and statutory damage awards.

Formalities do a good job weeding out who really cares about copyrights and who doesn't. So why did the U.S. abandon formalities?

### Formalities Abandoned

The U.S. had no choice but to abandon copyright formality requirements in the late 1980s because it wanted to exercise leadership on copyright policy in the international arena.

Then and now the only significant international forum for copyright policy discussions was the Berne Union. It is comprised of nations that have agreed to abide by provisions of an international treaty known as the Berne Convention for the Protection of Literary and Artistic Works. Article 5(2) of this treaty forbids member states from conditioning the enjoyment or exercise of copyrights on formalities, such as those long practiced in the U.S.

The Berne Union was first founded in the late 19<sup>th</sup> century, at a time when the U.S. had little interest in international copyrights. By the mid-1980s, however, U.S. copyright industries were the strongest and most successful in the world. They had become not only significant contributors to the gross domestic product, but also a rapidly growing exporter of U.S. products. This made them care about the copyright rules adopted in other countries.

In the late 1980s, these industries persuaded one of their own—President

Ronald Reagan—that the U.S. needed to join the Berne Convention in order to exercise influence on international copyright policy. And so in 1989, under Reagan's leadership, the U.S. joined the Berne Convention and abandoned the notice-on-copies and registration requirements that had served the nation well since its founding.

### Why Is Berne Hostile to Formalities?

In the late 1880s when the Berne Union was first formed, each of the 10 participating countries had its own unique formality requirements for copyright protection. One of the goals of the Berne Union was to overcome obstacles to international trade in copyrighted works such as burdens of complying with multiple formalities.

The initial solution to the problem of too many formalities was a Berne Convention rule that provided if an author had complied with formalities of his/her own national copyright law, other Berne Union countries would respect that and not insist on compliance with their formality requirements.

That was a reasonably good solution as far as it went, but it created some confusion. It was sometimes unclear, for instance, whether works of foreign authors sold in, say, France, had complied with the proper formalities in the works' country of origin. If a work was simultaneously published in two countries, was the author required to comply with two sets of formalities or only one of them? It was also difficult for a publisher to know whether a renewal formality in a work's country of origin had been satisfied.

In part because of such confusions, the Berne Convention was amended in 1908 to forbid Berne Union members from conditioning the enjoyment and exercise of copyright on compliance with formalities.

While the main reason for abandoning formalities was pragmatic, another factor contributing to the abandonment of formalities was the influence in Europe of a theory that authors had natural rights to control the exploitation of their works. Sometimes this theory was predicated on the labor expended by authors in creating their works, and sometimes on the idea that each work was a unique

expression of the author's personality that deserved automatic respect from the law.

In the absence of organized constituencies in favor of preserving formalities, the natural rights theory of copyrights prevailed in much of Europe, and with it, the idea that formalities were inconsistent with the natural rights of authors in their works.

Because the Berne Convention's ban on formalities has been incorporated by reference into another major international treaty, the Agreement on Trade-Related Aspects of Intellectual Property Rights (widely known as the TRIPS Agreement), it would seem the world is now stuck with a no-formality copyright regime. But should it be so?

### Has Technology Changed the Formalities Equation?

In recent decades, two major changes have contributed to a renewed interest in copyright formalities.

One is that advances in information technologies and the ubiquity of global digital networks have meant that more people than ever before are creating and disseminating literary and artistic works, many of which are mashups or remixes of existing works.

A second is that the Internet and Web have made it possible to establish scalable global registries and other information resources that would make compliance with formalities inexpensive and easy (at least if competently done), thereby overcoming the problems that led to the Berne Convention ban on formalities.

Lawrence Lessig, among others,<sup>1,3</sup> has argued that reinstating copyright formalities would be a very good idea. This would enable free reuses of many existing commercially fallow works that would contribute to and build on our cultural heritage. It would also help libraries and archives to preserve that part of our cultural heritage still in-copyright and to provide access to works of historical or scientific interest now unavailable because of over-long copyrights. Many innovative new services could be created to facilitate new insights and value from existing works, such as those contemplated in the Google Book Search settlement (for example, nonconsumptive research services to advance knowledge in hu-

**Are there too many copyrights in the world, and if so, what should be done to weed out unnecessary copyrights?**



manities as well as scientific fields).

Copyright formalities serve a number of positive functions.<sup>4</sup> They provide a filter through which to distinguish which works are in-copyright and which are not. They signal to prospective users that the works' authors care about copyright. They provide information about the work being protected and its owner through which a prospective user can contact the owner to obtain permission to use the work. And by enabling freer uses of works not so demarked, formalities contribute to freer flows of information and to the ongoing progress of culture.

One recent report<sup>2</sup> has recommended that the U.S. Copyright Office should develop standards for enabling the creation of multiple interoperable copyright registries that could serve the needs of particular authorial communities, while also serving the needs of prospective users of copyrighted works by providing better information about copyright ownership and facilitating licensing. Perhaps unregistered works should receive protection against wholesale copying for commercial purposes, while registered works might qualify for a broader scope of protection and more robust remedies.

### Conclusion

Copyright industry representatives frequently decry the lack of respect that the public has for copyrights. Yet, in part, the public does not respect copyright because some aspects of this law don't make much sense.

An example is the rule that every modestly original writing, drawing, or photograph that every person creates is automatically copyrighted and cannot be reused without permission for 100 years or more (depending on how long the author lives after a work is created).

If too many works are in-copyright for too long, then our culture suffers and we also lose the ability to distinguish in a meaningful way between those works that need copyright protection and those that don't.

This column has explained that formalities in copyright law serve a number of positive functions and has argued that reinstating formalities would go a long way toward addressing the problems arising from the exist-

## Copyright industry representatives frequently decry the lack of respect that the public has for copyrights. Yet, in part, the public does not respect copyright because some aspects of this law don't make much sense.

tence of too many copyrights that last for too many years. Obviously the new formalities must be carefully designed so they do not unfairly disadvantage authors and other owners.

Although the obstacles to adoption of reasonable formalities may be formidable, they are surmountable if the will can be found to overcome them and if the technology infrastructure for enabling them is built by competent computing professionals. One intellectual obstacle to reinstating formalities is addressed in a forthcoming book,<sup>4</sup> which explains that formality requirements are more consistent with natural rights theories than many commentators have believed. Treaties can be amended and should be when circumstances warrant the changes. □

### References

1. Lessig, L. *The Future of Ideas: The Fate of the Commons in a Connected World*. Random House, New York, 2001.
2. Samuelson, P. et al. The Copyright Principles Project: Directions for reform. *Berkeley Technology Law Journal* 25:0000 (2010).
3. Springman, C. Reform(aliz)ing copyright. *Stanford Law Review* 57:568 (2004).
4. van Gompel, S. *Formalities in Copyright Law: An Analysis of their History, Rationales and Possible Future*. Kluwer Law International, Alphen aan den Rijn, The Netherlands, forthcoming 2011.

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## Calendar of Events

### July 17-21

**International Symposium on Software Testing and Analysis**, Toronto, Canada, Sponsored: SIGSOFT, Contact: Matthew B. Dwyer, Email: [dwyer@cse.unl.edu](mailto:dwyer@cse.unl.edu), Phone: 402-472-2186

### July 18-21

**International Conference on e-Business**, Seville, Spain, Contact: David A. Marca, Email: [dmarca@openprocess.com](mailto:dmarca@openprocess.com), Phone: 617-641-9474

### July 18-21

**International Conference on Security and Cryptology**, Seville, Spain, Contact: Pierangela Samarati, Email: [pierangela.samarati@unimi.it](mailto:pierangela.samarati@unimi.it), Phone: +39-0373-898-061

### July 18-21

**International Conference on Signal Processing and Multimedia Applications**, Seville, Spain, Contact: Mohammad S. Obaidat, Email: [obaidat@monmouth.edu](mailto:obaidat@monmouth.edu), Phone: 201-837-8112

### July 18-21

**International Symposium on Smart Graphics**, Bremen, Germany, Contact: Rainer Malaka, Email: [malaka@tzi.de](mailto:malaka@tzi.de), Phone: +49-421-21864402

### July 20-22

**Symposium on Geometry Processing 2011**, Lausanne, Switzerland, Contact: Mark Pauly, Email: [mark.pauly@epfl.ch](mailto:mark.pauly@epfl.ch)

### July 22-24

**International Conference on Advances in Computing and Communications**, Kochi, India, Contact: Sabu M. Thampi, Email: [smtlbs@in.com](mailto:smtlbs@in.com)

### July 25-27

**19<sup>th</sup> International Symposium on Modeling, Analysis, and Simulation of Computer and Telecommunication Systems**, Singapore, Contact: Cai Wentong, Email: [aswtcai@ntu.edu.sg](mailto:aswtcai@ntu.edu.sg)