THE END OF FORMALITIES: NO MORE SECOND-CLASS COPYRIGHT OWNERS

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No one argues with the Supreme Court's recent statement that the purpose of copyright is to "[enrich] the general public through access to creative works."[1] However, what possible impediment to the public benefit is there by eliminating two formalities in the law[2] that serve solely to deprive copyright owners of effective remedies?

I represent both copyright owners and copyright users. I do not represent any organized association with any particular interest in this question. I do know from representing both plaintiffs and defendants (or potential plaintiffs and defendants) that requiring registration as a condition for bringing an action for statutory damages and attorney's fees—particularly attorney's fees—inhibits the ability of a copyright owner to enjoy the full fruits of her work.

The history of copyright law in the United States reflects the gradual elimination of formalities. In the nineteenth century, a person had to file notices with the district court before she had copyright protection.[3] There are some, perhaps, who would like to go back to that system. Under the 1909 Copyright Act, registration was a condition of copyright.[4] If a person failed to register, she could lose her copyright.

Another formality which many believed was central to copyright was the copyright notice. There were some who believed that the sky would fall if the requirements of a copyright notice were eliminated. The Berne Implementation Act did indeed eliminate the copyright notice as a requirement for maintaining copyright protection, and the sky remains intact. People are not suffering in

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[1] Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1030 (1994).

[2] These are the requirements of registration as a precondition to maintaining an infringement action, 17 U.S.C. § 411(a) (1988), and the requirement of early registration in order to be entitled to statutory damages and attorney's fees, 17 U.S.C. § 412 (1988).

[3] Copyright Act of May 31, 1790, ch. 15, 1 Stat. 125 § 3; Wheaton v. Peters, 33 U.S. 591, 612 (1834).

[4] Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, *repealed by* the Copyright Act of 1976, Pub. Law. No. 94-553, 90 Stat. 2451 (codified as amended in scattered sections of 17 U.S.C.).

any way from uncertainty whether a work is protected under copyright law or not simply because of the presence or absence of a copyright notice. They will not suffer if the remaining formalities are eliminated. The only purpose of sections 411 and 412 is to induce registration.[5] There is no benefit to authors. In fact, it is surprising to hear concerns that without registration new authors are going to be at risk if they want to use sources. I do not perceive the difficulty because if authors are using sources that infringe, they should not use those sources; if they are using sources that do not infringe, then they should continue to use those sources. Sections 411 and 412, however, should not act as impediments to copyright owners enjoying their copyright rights. Even if there is some truth to the argument that eliminating copyright registration may place a difficult burden on users, this additional burden does not warrant leaving a copyright owner with no effective remedy simply because she failed to register the work.

An example from a report prepared by the Advisory Committee on Copyright Registration and Deposit[6] illustrates this problem. Assume that a publisher hires a photographer to photograph floods in the Midwest. The photographer and the publisher agree on a set fee for the photographs. Obviously, the publisher wants the photographs immediately, so the photographer sends them to her. The publisher uses five photos and leaves fifty or seventy-five of them sitting on a desk. Some unscrupulous employee steals the photographs and has them published around the country in different newspapers. What is the photographer to do?

Infringement of the unpublished works took place before the photographer had an opportunity to register her claim to copyright. In fact, the photographer could not register her claim to copyright because she sent the film to the publisher and did not have copies of the copyrighted works. She wants to sue and seeks legal advise. What can she do? All of the photographs are gone. The photographer can sue that careless small town newspaper, but the paper's circulation is limited, and its profits are probably small. The photographer will probably win if she sues, but her legal fees will be X dollars, and the court will probably award one-tenth of X if she attempts to get the newspaper's profits. There is no reason why the law should be this way.

5 17 U.S.C. §§ 411(a) and 412 reads in pertinent part:

§ 411. Registration and infringement actions.

(a) Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States, and subject to the provisions of subsection (b), no action shall be instituted until registration of the copyright claim has been made in accordance with this title . . . .

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

6 ROBERT WEDGEWORTH & BARBARA RINGER, ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT, THE LIBRARY OF CONGRESS, REPORT OF THE CO-CHAIRS (Sept. 1993) [hereinafter ACCORD].

The concept of early registration as a condition of remedies did not exist in U.S. copyright law prior to the 1976 Act. Under the 1909 Copyright Act, copyright owners were entitled to statutory damages and attorney's fees even if the copyrighted work was not registered at the time of the infringement,[7] yet somehow people managed to know what works to use and when to use them.

Eliminating the registration requirement, however, may effect the number of registrations. The intent of ACCORD, and Congress in adopting some of the recommendations of ACCORD, was to simplify copyright registration. They aimed to separate deposit and registration so that the Library of Congress's collections would continue to be enhanced. Expanding the Library of Congress's collections is one of the primary purposes behind the entire registration system.[8]

As stated earlier the current system functions without a copyright notice requirement. Today, if an author does not wish to claim copyright to a published work, she must do something affirmative. Merely failing to put a notice in the work will not suffice. Jay Frank Dobie's book entitled, *Guide to Life and Literature in the Southwest*[9] demonstrates this type of affirmative notice. Dobie includes a notice in the front of his book that states, "not copyrighted in 1942, again not copyrighted in 1952." Everyone is welcome to help themselves to the book's contents in any way. This is the type of affirmative action an author must take if she does not want copyright protection.

At the opposite extreme are certain copyright notices that prohibit all use. An example of this type of notice reads, "No part of this work may be reproduced, stored in, or introduced into a retrievable system or transmitted in any form or by any means elec-

7 17 U.S.C. §§ 2, 116 (1909).

8 *See generally* ACCORD *supra* note 6, at 15-16.

9 JAY FRANK DOBIE, GUIDE TO LIFE AND LITERATURE IN THE SOUTHWEST (1981).

tronic, mechanical, photocopying, recording or otherwise, without prior written permission." The assertion is daunting, but it does not quite accurately state the law. There is, after all, something called "fair use" in copyright law.[10] A person is allowed to use portions of material for fair use purposes and, perhaps, for other purposes. The book entitled, *Fair Use and Free Inquiry: Copyright Law and the New Media*[11] contains this type of restrictive copyright notice. This book purports to encourage broad use of copyrighted material, but its own copyright notice says, "All rights reserved. No part of this book may be reproduced in any form by photostat, microfilm, retrievable system, or any other means without the prior permission of the publisher." This is a classic case of the front not knowing what the back is doing.

These publishers' notices, though, are not nearly as tough as the one Mark Twain used in *Huckleberry Finn*.[12] This notice reads, "Persons attempting to find a motive in this narrative will be prosecuted. Persons attempting to find a moral in it, will be banished. Persons attempting to find a plot in it, will be shot."[13] So far, no one else has put that threat in the front of a book. We may find this use of an *in terrorem* notice amusing, but we must recognize that it does not comply with the law. It may present some problems for the publishers and authors who use it.

The Fourth Circuit developed an interesting doctrine called "copyright misuse." The *Lasercomb America* case suggests that copyright misuse is very much alive in the Fourth Circuit.[14] Assume a case in which there is clear copyright infringement. How will a court rule if the defendant argues that the publisher misused its copyright by placing an *in terrorem* notice on the work? Would a court rule that a notice that overreaches by precluding lawful copying is a "copyright misuse"?

History has shown that formalities in copyright law, viewed with the benefit of hindsight, are just plain wrong. An example of

[10] 17 U.S.C. § 107 (1988). Section 107 provides that a "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." *Id.* The statute sets forth four factors to determine when the use of copyrighted subject matter will qualify as "fair use" and thus would be privileged against judicial sanction: (1) the purpose and character of the use, including whether such use is a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.*

[11] JOHN S. LAWRENCE & BERNARD TIMBERG, FAIR USE AND FREE INQUIRY: COPYRIGHT LAW AND THE NEW MEDIA (Ablex Publishing Corp. 1980).

[12] MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1887).

[13] *Id.*

[14] Lasercomb America, Inc. v. Job Holliday, 961 F.2d 211 (4th Cir. 1992).

this is the rigid registration requirements of the nineteenth century. When people look back fifty years from now at sections 411 and 412 as conditions which impinge authors' rights in the 1980s and 1990s, will they not look at us as we looked back to the last century and say, "boy, those folks had it all wrong."