THE FUTILITY OF A FUTURE WITHOUT FORMALITIES

BERNARD R. SORKIN*

If we were to focus on how copyright formalities are viewed by most of my colleagues on this panel, I could best use Irwin Karp's suggestion that formalities are a terrible trap for authors.[1] Notwithstanding my colleagues views, I submit to you that there is nothing unusual about formalities. Like other legal areas there is no black and white, and very little bright line distinction. There are formalities and *formalities*: Some serve no useful purpose; others are arguably, at least in my view, very useful and should be continued. The manufacturing clause,[2] for example, is in the former category. However, what Professor Shira Perlmutter called "markings"[3]—the notice of copyright, or registration—demonstrates that there are socially useful purposes to be served while there are also disadvantages. In my view, if we were to balance them, we would come out in favor of maintaining formalities. I will expand from there and conclude with a word about section 412.[4]

Mr. Eric Schwartz[5] of the Copyright Office asked the question

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* Mr. Sorkin is Senior Counsel to Time Warner, Inc., and a former attorney for Columbia Pictures Corporation. Mr. Sorkin participated in *Cardozo Arts & Entertainment Law Journal's* symposium, "Copyright in the Twenty-First Century."

[1] Irwin Karp, Esq., Counsel, Committee for Literary Property Studies Copyright Commission participated in *Cardozo Arts & Entertainment Law Journal's* symposium, "Copyright in the Twenty-First Century." *See* Irwin Karp, *A Future Without Formalities*, 13 CARDOZO ARTS & ENT. L.J. 519, 520 (1995).

[2] 17 U.S.C. § 601(a) reads in pertinent part:

> [T]he importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title [17 U.S.C. §§ 101 et seq.] is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

17 U.S.C. § 601(a) (1988).

[3] *See generally* Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 563, 580 (1995).

[4] Section 412 reads in its entirety:

> In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or 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-
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> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
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> (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.

17 U.S.C. § 412 (Supp. 1990).

[5] Eric Schwartz, Esq., Policy and Planning Advisor for the Copyright Office partici-

this morning: "How do you know who the author is in a formality-less society?"[6] Michael Scott[7]—speaking of the new world of digitization and electronic transmission suggested that it is difficult to determine ownership, because rights are divided by media, as well as geographically."[8] Merely searching the copyright office does not answer the question. A formal system is clearly necessary, and it is that which we utilize today and which I believe, should not be destroyed.

The paradigm of the frequently suggested formality-less future is that of Europe and particularly France—ironically the source of most formalities as well as excellent wine and cheese. My experience with European lawyers is that after the obligatory "how do you do,"—in whatever applicable language spoken or in my poor English—I generally ask how one deals with copyrighted works if one wants to use them. How does one find out who the owner is? The general reply has been, "We have no problem; we are not as litigious as you Yanks are." Such is the unsatisfactory response I receive all the time.

My experience in France is that if one requires legal advice as to the unknown rightholder of a particular work, one can go to one of four places. First, *Centre Nationale du Cinema* provides and registers certificates of ownership regarding French and foreign films upon French distribution. These documents are proof of rights in the particular work.

Second, the *Institute Nationale de La Propriete du Industrielle* provides and registers certificates of ownership regarding trademarks. Third, the *Institute Nationale de la Recherche Agronomique* maintains all information regarding agricultural matters and ownership. Finally, the *Bibliotheque Nationale* is a necessary starting point for books, for under French law all books must be deposited there.[9]

Professor Perlmutter drew a sharp distinction between copying, (piracy being the extreme example), on the one hand, and fair use as a small taking or minimal appropriation on the other.[10] If that dichotomy were permitted to set the metes and bounds of

pated in *Cardozo Arts & Entertainment Law Journal's* symposium, "Copyright in the Twenty-First Century."

6 Eric Schwartz, *Introduction*, 13 CARDOZO ARTS & ENT. L.J. 16 (1994).

7 Michael Scott, Esq., Vice President and General Counsel, Sanctuary Woods Corporation participated in *Cardozo Arts & Entertainment Law Journal's* symposium, "Copyright in the Twenty-First Century."

8 *See* Michael D. Scott, *Frontier Issues: Pitfalls in Developing and Marketing Multimedia Products*, 13 CARDOZO ARTS & ENT. L.J. 411, 431 (1995).

9 *See* Jane C. Ginsberg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

10 *See* Perlmutter, *supra* note 3, at 581.

our problem, it could perhaps be manageable in a formality-less world. But that is not all that occurs. There are derivative works: Musicals to be arranged from plays; motion pictures to be adapted from novels; upon a director's whim, there are pictures on the wall to be used if found useful or aesthetically desirable. How does one ascertain if the intended use is permitted? Where does one go?

It is true, Professor Perlmutter said, that one can search. However, ask yourself about the burdens and transaction costs of such a search. Compare this to the burden imposed upon the hypothetical author—of whose behalf complaint has been made—of getting a copyright notice onto the work that indicates ownership and date of first publication.

The use of the copyright notice was the subject of Study No. 17 by the Copyright Office in connection with the scholarly and extensive copyright revision exercise of some years ago.[11] After carefully marshalling the arguments for and against the requirement of notice as a condition for protection, the study concluded that a mandatory notice requirement should be retained for published works. It was said there that even if the United States is out of step with most of the international community, the notice requirement does not preclude international cooperation, as exemplified in the Universal Copyright Convention.[12] The historic conception of copyright in this country, as a legal monopoly, seems to require that some assertion be made by those who wish to benefit from the monopoly. Notice seems most appropriate for this purpose; it can be easily accomplished by the author, and directly warns the would-be copier or adapter that a copyright claim exists with respect to such work.

I sympathize with Charles Ossola's clients and their problems with respect to notice and registration.[13] I suggest, however, that this is an administrative problem that can be remedied. Copyright regulations can be changed to accommodate the needs of people like Mr. Ossola's clients. It should not take a tremendous amount of ingenuity to do that. Moreover, it should not require a drastic change in the copyright law itself.

In 1987, the Copyright Office commissioned a study making a

11 General Revision of the Copyright Law, Study No. 17, *Uses of the Copyright Notice*, Copyright Office, The Library of Congress (Apr. 1959).

12 For a discussion of the text and history of the Universal Copyright Convetnion, see generally Stanley Rothenberg, COPYRIGHT LAW, § 15, at 166 (1956).

13 Charles Ossola, Esq., of Lowe Price LeBlanc and Becker, participated in *Cardozo Arts & Entertainment Law Journal's* symposium, "Copyright in the Twenty-First Century." *See generally*, Ossola, *Registration and Remedies: Recovery of Attorneys Fees and Statutory Damages Under the Copyright Reform Act*, 13 CARDOZO ARTS & ENT. L.J. 557 (1995).

cost benefit analysis of U.S. copyright formalities.[14] One of the conclusions that emerged from the study was that although European copyright laws are largely formality-free, businesses involved with copyright use systems of registration and recordation are somewhat similar to those found in the United States.[15] Europe, you will recall, is the exemplar of a formality-less system. Thus, a traditional system of registration or recordation emerges as pragmatic and logical nonetheless.

The existence of notice and registration does not necessarily tie in with the existence of section 412. Moreover, as suggested by my colleagues on the panel, section 412 was not in its inception instituted in order to inhibit lawsuits. However, it has been suggested that the law of unintended consequences as Mr. Ossola described, has resulted in sad and dire consequences for so-called unwary authors.[16]

My view, however, is that the existence of section 412 performs a very valuable service; its elimination would be a serious disservice to authors who want to use existing works or small portions thereof in their own works. Such sentiments have also been articulated by a representative of a number of groups who recently wrote to the Chairman of the House Subcommittee.[17] One concern relates to the firmly-held belief that the repeal of section 412 would hamper and discourage the reasonable and proper use of certain preexisting unregistered materials.[18] That representative offered three examples in support of this proposition.

The first example is that of the prototypical case of a large company that seeks extraordinary remedies—i.e., statutory damages and attorney's fees—in a suit against a newspaper or weekly magazine which reprints an internal memorandum as part of an expose of corporate wrongdoing.[19]

14 Cost-Benefit Analysis of U.S. Copyright Formalities, Submitted to Register of Copyrights, Copyright Office, Library of Congress, Washington D.C., Submitted by King Research, Inc. (Feb. 1987).

15 *Id.* at iii.

16 *See* Ossola, *supra* note 13.

17 Letter from President Nicholas A. Veliotes, Association of American Publishers, Inc., to the Honorable William J. Huhes, Chairman, Subcommittee on Intellectual Property and Judicial Administraiton, House Judiciary Committee (April 8, 1994) (on file with the author).

18 *Id.* Examples of such materials include letters, memoranda, diaries, notes, and archival photographs (one such example is the famous Dita Beard memo of the Watergate Scandal in 1972, which formed the heart and substance of fast-breaking news reporting, in-depth investigative journalism, critical biographical writing, and penetrating historical analysis. *See generally* Tony Kornheiser, *Jack Anderson and His Crusading Crew*, WASH. POST, August 7, 1983, at F1.

19 *See* Letter to Chairman, Subcomittee on Intellectual Property and Judicial Administraiton, *supra* note 17.

Secondly, an author who secures from a family member the right to use a photograph in a well-researched biography could be exposed to a lawsuit stimulated by the availability of attorney's fees and statutory damages, filed by another family member who actually took the photo and disapproves of the book.[20] This example focuses on the recurrent situation in which the copyright law is used not to protect a work that was made for purposes of exploitation—as a work of authorship, or any other work protected by copyright—but rather in order to protect a perceived right of privacy or to protect against perceived defamation.[21]

The third illustration is that of a former key cabinet member who, after leaving office, writes a letter that exposes the wrongdoing of the prior administration, and now disapproves of the use of that letter in a critical biography.[22] In such situations, the production of works with potentially great social value would be inhibited by the threat of expensive litigation.[23]

I maintain that there are substantial questions on both sides of this issue. In some cases, the burden of registration and notice is so minuscule as to require no consideration whatsoever. On the other hand, as in the case of some of Mr. Ossola's clients, there is room for improvement in our procedures. These concerns are, essentially, logistical and procedural problems that can be resolved without discarding the very important protection that exists today.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*