



UNC  
SCHOOL OF LAW

University of North Carolina School of Law  
Carolina Law Scholarship Repository

---

Faculty Publications

Faculty Scholarship

---

2017

## Claiming the Copyright

Amanda Reid  
areid@unc.edu

Follow this and additional works at: [https://scholarship.law.unc.edu/faculty\\_publications](https://scholarship.law.unc.edu/faculty_publications)



Part of the [Law Commons](#)

Publication: *Yale Law & Policy Review*

---

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

---

## YALE LAW & POLICY REVIEW

---

### Claiming the Copyright

*Amanda Reid\**

INTRODUCTION .....	425
I. WHY CLAIM.....	429
II. HISTORY OF CLAIMING .....	434
III. CLAIMING TODAY .....	444
IV. A MODEST PROPOSAL: CLAIM THE COPYRIGHT .....	451
CONCLUSION .....	469

#### INTRODUCTION

Our modern world is filled with a dizzying number of copyrights.<sup>1</sup> The texts, tweets, and selfies created each day are automatically copyrighted, as are home movies, diary entries, and Play-doh<sup>®</sup> sculptures. All original works of authorship fixed in a tangible medium of expression are protected for seventy

---

\* Associate Professor of Law, Florida Coastal School of Law. Ph.D., University of Florida, College of Journalism and Communications, 2004; J.D., University of Florida, Levin College of Law, 2004; M.A., Florida State University, Speech Communication, 1999; B.A., Florida State University, Communication and Philosophy, 1998. Participants at the 2015 Works-in-Progress Intellectual Property Colloquium (WIPIP) provided valuable insights for which I am grateful. And special thanks to Victoria Pasculli, Elizabeth Willis, and the other thoughtful editors of the *Yale Law & Policy Review*.

1. See Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2240 (2014) (“Every day, millions of emails, tweets, and messages are sent; blog posts and online articles are posted; still photos and videos are taken with cameras and cellphones; the vast majority of all of these are likely copyright protected. Yet, the vast majority of these are not registered, be it because many are not created for profit, or because the cost and trouble of registration outweighs the creator’s expected benefit.”).

years after the author's death.<sup>2</sup> This protection attaches automatically whether or not the author knows it or wants it.<sup>3</sup> And this protection not only includes verbatim copying but also adaptations. The dimensions of copyright protection have incrementally expanded since our first Copyright Act in 1790. One wonders if today we have too many copyrighted works and too much copyright protection.

Copyright offers a limited exclusive right in response to the market failure of public goods. Without a way to protect the investment in nonexcludable, nonrivalrous products, authors and inventors might not create.<sup>4</sup> The classic incentive theory posits that limited term, exclusive rights—and the corresponding supracompetitive prices—are tolerated, as a way to encourage the creation of new works.<sup>5</sup> Authors are therefore granted exclusive rights as a way to promote socially beneficial goods.<sup>6</sup> But if these exclusive rights are not calibrated correctly, they can impose more costs than public benefits.<sup>7</sup> In other words, copyright can end up suppressing more communicative activity than it encourages.<sup>8</sup>

2. 17 U.S.C. § 302(a) (2012). For works made for hire and for anonymous or pseudonymous works, the duration of copyright is ninety-five years from first publication or 120 years from creation, whichever is shorter. *Id.* § 302(c).
3. *Id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).
4. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164 (2002) (“A ‘public good’ is a good that can be shared non-rivalrously by many, and from whose use non-payors are not easily physically excluded. Goods with these characteristics are susceptible to free riding, and thus difficult to produce in a normal competitive market. Inventions and works of authorship are ‘public goods’ whose creation is stimulated by the limited private exclusion rights known as patent and copyright. Lighthouses and public defense are ‘public goods’ for which governments usually provide direct support.”).
5. See, e.g., Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 131 (2004).
6. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are . . . a means by which an important public purpose may be achieved.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.”).
7. See Wendy J. Gordon, *Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 858 (1992).
8. See Gordon, *supra* note 4, at 167.

## CLAIMING THE COPYRIGHT

Copyright has historically been a limited right.<sup>9</sup> Yet today these limits have expanded to an unprecedented scope. The concern with rights accretion is that as more creative works are within the private domain, fewer are in the public domain from which others can draw for new creative expressions.<sup>10</sup> New works build upon prior works, yet there are fewer building blocks for new creations.

One way to check and re-balance the interests of copyright holders and users is with formalities. For nearly two centuries, U.S. copyright law relied on statutory formalities to balance the public interest with the interests of copyright holders.<sup>11</sup> These formalities historically included affixing a copyright notice on the work and filing a registration with the government. Today no formalities are necessary for an original work of authorship to secure protection for seventy years after the author's death. Copyright attaches automatically. This watershed change was spurred by a desire to harmonize U.S. copyright law with the laws of other developed nations.<sup>12</sup> Our obligations under international treaties require that copyright attach automatically and without constitutive formalities.<sup>13</sup> But accepting the proposition that copyright now attaches at the moment of fixation in a tangible medium of expression does not necessarily lead to the conclusion that a copyright holder should be relieved of all responsibility to publicly claim her work.<sup>14</sup> Copyright protection gives an author an ex-

- 
9. As detailed in Part II, historically copyright has been limited in duration and scope. The U.S. Constitution prescribes that copyright protection be for "limited Times." U.S. CONST. art. I, § 8, cl. 8. And the first copyright, in 1790, was for a renewable, fourteen-year term and applied only to maps, books, and charts. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790).
  10. See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 13-16 (2004).
  11. See Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L.J. 1459, 1460-62 (2013); see also Catherine Seville, *Copyright's Bargain: Defining Our Terms*, 3 INTELL. PROP. Q. 312, 312 (2003) (noting that legislatures around the world have "struggled to reconcile the needs of all those whom copyright law is intended to serve").
  12. See *Eldred v. Ashcroft*, 537 U.S. 186, 264-65 (2003) (Breyer, J., dissenting) ("[T]he 1976 Act thoroughly revised copyright law and enabled the United States to join the Berne Convention . . .").
  13. See Berne Convention for the Protection of Artistic and Literary Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1886) [hereinafter Berne Convention].
  14. Cf. Gervais & Renaud, *supra* note 11, at 1470 ("The United States' adherence to Berne marks an apparent acceptance of the principle that copyright should vest upon creation, whence a rule prohibiting mandatory formalities seems eminently logical.").

clusive right in the work,<sup>15</sup> in essence a monopoly right, in exchange for promoting the progress of science and learning.<sup>16</sup> This instrumental view of copyright sees the limited monopoly right as a means to encourage original works of authorship.<sup>17</sup> As the Supreme Court has emphasized, “the Framers intended copyright itself to be the engine of free expression.”<sup>18</sup>

Public claiming has been part of the bargained-for exchange with the public.<sup>19</sup> The balance of copyright’s quid pro quo is fundamentally upset when a copyright holder is relieved of all obligations to claim an interest in her work. The monopoly is now given indiscriminately to all original works. Exclusive rights are now given to holders that may neither know nor want the protection. Rather than creating simple and easy formalities, we abandoned formalities altogether. We should certainly not return to the cumbersome registration and protectionist manufacturing clause formalities of the past.<sup>20</sup> But that does not mean we cannot construct a reasonable system that balances the interests of authors and content users.

Historically, a copyright holder had to claim. And today there is no doctrinal reason to exempt copyright from claiming. I offer a modest proposal that seeks to balance these interests: a copyright holder should have to claim an interest in her work, and if she doesn’t, users of the work should be able to rely on an innocent infringer defense when facing a claim for infringement.

To explore more fully the proposition that a copyright holder should have to claim an interest in her work, this Article progresses in four parts. Part I ex-

---

15. The modern copyright holder has six statutory rights, including the exclusive right to make copies, prepare derivatives, publicly distribute, publicly perform, and publicly display the work. 17 U.S.C. § 106(1)-(6) (2012).

16. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (“The rights of a patentee or copyright holder are part of a ‘carefully crafted bargain,’ under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.”) (internal citation omitted).

17. See Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 332 (2005) (“On this [instrumental] view, copyright promotes the progress of ‘science’ by encouraging authors (and publishers) to create (and publish) works of authorship, at a greater rate or lower social cost than would be the case in the absence of a copyright system.”).

18. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

19. Cf. Jeffrey L. Harrison, *Copyright As Contract*, 22 J. INTELL. PROP. L. 279, 281 (2015) (“Copyright is essentially a contract between the author and the public with the government acting as the agent of the public.”).

20. See *infra* notes 77-82 and accompanying text.

## CLAIMING THE COPYRIGHT

plores the foundations and reasons for public claiming of the intangible copyright. Part II traces the history of formalities in the United States. Part III outlines the problems that have arisen because we no longer require claiming. And Part IV contextualizes and discusses my proposal to incentivize copyright holders to claim their works and to reinvigorate the innocent infringer defense.

### I. WHY CLAIM

Claiming serves important functions to signal ownership interests, filter out undeserving and commercially dead works, and facilitate licensing of commercially valuable works. Notice and registration signal an ownership claim to the world.<sup>21</sup> Ownership means that certain protections apply and that an owner exists to enforce those protections.<sup>22</sup> Ownership of property interests comes with the right to exclude.<sup>23</sup> An exclusive right empowers an interest holder to prevent others from copying and using a work.

Public claiming of an ownership interest is particularly important for intangible resources.<sup>24</sup> Protection of copyright, like other forms of “property,” is not absolute and should be tailored to balance the benefits and burdens of protection.<sup>25</sup> Copyright should be cabined by its purpose, and copyright should balance public and private interests.<sup>26</sup> Without someone claiming the intangible copyright, it can be exceedingly difficult to identify its owner. Without an identifiable owner to benefit from the monopoly, copyright protection is a net social loss.<sup>27</sup>

The long-term purpose of copyright is to create a public benefit. This purpose is achieved by according short-term monopoly benefits to the copyright holder.<sup>28</sup> But without an owner to claim short-term monopoly benefits, the ex-

---

21. Gervais & Renaud, *supra* note 11, at 1460–61.

22. See, e.g., Stephen L. Carter, *Does It Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108 (1990).

23. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

24. See Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1, 2 (2013).

25. See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 510 (1945).

26. See *id.* at 506.

27. See *Promoting the Use of Orphan Works: Balancing the Interest of Copyright Owners and Users: Hearing before the Subcomm. on the Courts, the Internet, and Intellectual Property of H. Comm. on the Judiciary*, 110th Cong. 19–20 (2008) (statement of Marybeth Peters, Register of Copyrights).

28. See Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 247

clusive rights of the monopoly create a burden on users without a corresponding benefit to an owner. Excluding the public from works that do not have an identifiable owner is inefficient, wasteful, and creates deadweight losses.<sup>29</sup> Inadequate claiming thus raises the social costs of offering copyright protection.<sup>30</sup>

Public claiming would ameliorate the difficulty in identifying a copyright holder. Claiming signals the identity of the owner to the world and that enforceable restrictions apply. As Professor James Gibson has noted, “the familiar c-in-a-circle, followed by the year of publication and the name of the copyright owner, served to inform the public that it was dealing with something laden with legal restrictions, that there were certain things it could and could not do with the work.”<sup>31</sup> The Constitution prescribes that copyright protection is only for “limited Times,” and claiming historically signaled whether the temporary protection had yet expired.<sup>32</sup> Public claiming helps distinguish between works for which you need permission and works that you are freely able to use.

Formalities historically have balanced public and private interests, but today, copyright is radically unbalanced in favor of private interests.<sup>33</sup> To exercise the statutory monopoly, a copyright holder historically had to claim her work.<sup>34</sup> The original purpose of formalities, as copyright scholar William Patry has noted, was two-fold: “(1) require those interested in obtaining copyright protection to take affirmative steps and (2) create a public record so that those wishing to use the work might be put on notice of the author or proprietor’s claim.”<sup>35</sup> At the inception of federal copyright protection in the late 1800s, only a small frac-

---

(1996) (“[The Framers of the Constitution] knew that the grant of exclusive rights would be a cost borne directly by the public, and they demanded a direct public benefit in return.”).

29. See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1209 (1996) (“Copyright creates the deadweight social loss associated with monopoly power over distribution of already-created works, it increases the cost of creating new works by making it costly to avoid infringing existing copyrights, and it requires an enforcement mechanism.”).
30. See Menell & Meurer, *supra* note 24, at 10-11 (identifying four types of costs on other resource developers cause by inadequate resource notice).
31. James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 207 (2005).
32. See *infra* notes 59-98 and accompanying text.
33. See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487, 490 (2004).
34. See Bernard R. Sorkin, *The Futility of a Future Without Formalities*, 13 CARDOZO ARTS & ENT. L.J. 589, 591 (1995) (“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.”).
35. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6:19 (2015).

## CLAIMING THE COPYRIGHT

tion of published works were registered, which meant the majority of works entered the public domain, and these works were available for all to use.<sup>36</sup>

Copyright is intended to balance users' interests in access to works with authors' interests in compensation for use of their works.<sup>37</sup> Copyright should balance supply-side incentives against demand-side realities. In other words, the ex ante incentives for creating works should be balanced against the public's need to use works.<sup>38</sup> Historically, formalities helped maintain this balance. Today, a simple notice provision coupled with an efficient registration procedure would be a reasonable way to balance the public's interest with the author's interest.

In addition to signaling an ownership interest, public claiming would help ensure that we are protecting the right types of works; otherwise, there is a chilling effect on free expression and deadweight losses on social creativity.<sup>39</sup> Formalities signal that a work is being claimed as valuable and help filter out those works that are not commercially valuable.<sup>40</sup> If an author is so unmoved by copyright that she is not willing to put minimal notice information on a work, why should the public be required to shoulder the cost of the monopoly?<sup>41</sup> There are costs for locking up materials with copyright protection. But there are also costs associated with requiring an author to publicly claim her work. Public claiming is either a cost on the author to comply with the formality, or it is a deadweight cost on society when notice is missing. In light of the broad protection offered by copyright today, notice failure externalities should be borne by

- 
36. 1 *id.* § 1:19 (“Records assembled by the Library of Congress indicate that more than 15,000 works were published in the United States between 1790 and 1800, but that only 779 copyright registrations were made in this same period.”). See also Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1063 (2001) (explaining that “tiny regulation of a tiny proportion of the extraordinary range of creative work in 1790 has morphed into this massive regulation of everyone who has any connection to the most trivial of creative authorship”).
37. Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176 (2010).
38. See Robert Spoo, *Ezra Pound’s Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1795 (2009); see also Lemley, *supra* note 5.
39. See Sprigman, *supra* note 33, at 489-90.
40. Pamela Samuelson, *Legally Speaking: Too Many Copyrights?*, 54 COMM. ACM 29, 31 (2011) (“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.”).
41. Dotan Oliar & Nicholas Matich, *Copyright Preregistration: Evidence and Lessons from the First Seven Years, 2005-2012*, 55 ARIZ. L. REV. 1073, 1121 (2013) (“An author’s failure to comply with a formality—which in the case of notice is as innocuous as adding the copyright symbol, ©, together with the author’s name and the date to the work—suggests that no copyright incentive was needed to induce its creation. If so, it makes no sense for society to bear the limitations that copyright protection puts on the work’s copying and distribution.”).



the copyright holder, rather than by the public. The copyright holder receives more copyright protection today. In exchange, a copyright holder should have to claim her work at a minimum.

Notice and registration can facilitate finding the copyright holder, from whom permission can be negotiated. But notice failure increases the transaction costs to license a work.<sup>42</sup> Efficient licensing of protected works depends on being able to identify and locate the appropriate rights holder. Claiming would help reduce the high transaction costs of license-seekers identifying and contacting rights holders. Public claiming would also give clarity and comfort to potential users of the works. The difficulty in identifying a copyright holder has created “orphan works,” which are works essentially held hostage by copyright protections.<sup>43</sup>

In a nutshell, the orphan works problem is this: today nearly all works are protected by copyright. To use a protected work, a user typically needs permission, to “either ensure peace of mind, avoid unpredictability, or, more likely, to avoid exposure to liability,” as the Copyright Office noted.<sup>44</sup> A user cannot get permission if she cannot find the copyright holder.<sup>45</sup> And without permission, users do not risk using the works.<sup>46</sup> This decision to forgo using the work is not in the public interest. For example, libraries and museums have substantial por-

---

42. David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 156 (2009) (“[I]n a culture where the stakes of infringement are enormous, potential users must spend enormous amounts of time and money trying to track down the owners of such works and make sure they have cleared the rights to them.”).

43. See Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1434 (2012) (“I conclude that these works should not be viewed as ‘orphans,’ but rather as ‘hostages’—constrained in their movement by the restricting combination of copyright law and the absence of copyright owners who could release works from their confinement.”).

44. REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 41 (2015) [hereinafter ORPHAN WORKS AND MASS DIGITIZATION], <http://copyright.gov/orphan/reports/orphan-works2015.pdf>. The Copyright Office has emphasized that the “the orphan works problem is widespread and significant” because “anyone using an orphan work does so under a legal cloud, as there is always the possibility that the copyright owner could emerge after the use has commenced and seek substantial infringement damages, an injunction, and/or attorneys’ fees.” *Id.* at 2.

45. *Id.* at 35.

46. REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006) [hereinafter 2006 REPORT ON ORPHAN WORKS], <http://www.copyright.gov/orphan/orphan-report.pdf> (“Many users of copyrighted works who have limited resources or are particularly risk-averse have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them simply to not make use of the work.”).

## CLAIMING THE COPYRIGHT

tions of their collections that do not have an identifiable owner.<sup>47</sup> The preservation and dissemination of these materials is often thwarted by copyright. This decision to forgo using copyrighted works in ways that would contribute to education, culture, and research creates deadweight loss.

The public has legitimate interests in using others' works. Libraries, museums, archives, and universities often have large collections of donated materials for which authorship is unknown.<sup>48</sup> These collections include photographs, unpublished manuscripts and letters, and works of fine art and visual art. Scholars, documentary filmmakers, publishers, and private citizens have legitimate interests in accessing these works.<sup>49</sup> Yet the Register of Copyrights observed: "when confronted by the absence of clear information about the work's owner, most users simply do not use the work."<sup>50</sup> The risks are too high. As the Register of Copyrights noted, "[c]urrently, anyone using an orphan work runs the risk that the copyright owner may step forward and bring an infringement action for substantial damages, attorneys' fees, and/or injunctive relief unless a specific exception or limitation to copyright applies."<sup>51</sup> Today museums and libraries have millions of pages of archival documents, photographs, oral histories, and reels of film that they cannot publish or digitize because the authorship is uncertain.<sup>52</sup>

These works are essentially held captive by the automatic copyright afforded to these works. Without permission from unknown copyright holders, these

---

47. See, e.g., Response by the J. Paul Getty Trust et al. to the Notice of Inquiry Concerning Orphan Works and Mass Digitization (Feb. 4, 2013), [http://copyright.gov/orphan/comments/noi\\_10222012/Museums.pdf](http://copyright.gov/orphan/comments/noi_10222012/Museums.pdf); Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works, Comment OW0569, at 1-2 (Mar. 23, 2005), <http://copyright.gov/orphan/comments/OW0569-Thomas.pdf>. This problem is not unique to the United States. See NAT'L MUSEUM DIRS. COUNCIL, ORPHAN WORKS AND VOLUNTARY EXTENDED COLLECTIVE LICENSING: IMPACT ON UK MUSEUMS (2012), [http://www.nationalmuseums.org.uk/media/documents/images/nmdc\\_err\\_briefing\\_on\\_orphan\\_works\\_and\\_vol\\_ecl.pdf](http://www.nationalmuseums.org.uk/media/documents/images/nmdc_err_briefing_on_orphan_works_and_vol_ecl.pdf); AUSTL. LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY 290-91, [http://www.alrc.gov.au/sites/default/files/pdfs/publications/13.orphan\\_works.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/13.orphan_works.pdf).

48. 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 37.

49. *The "Orphan Works" Problem and Proposed Legislation Before the H. Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Marybeth Peters, Register of Copyrights).

50. 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 26.

51. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44, at 34-35.

52. Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFFICE (Sept. 25, 2008) (recounting testimony before the House from the U.S. Holocaust Museum).

works cannot be used or preserved.<sup>53</sup> The orphan works problem is a direct result of notice failure created by a lack of claiming.<sup>54</sup> Illustrative examples of the problems associated with unclaimed works are further explored in Part III.

Today, we have shifted from an opt-in system to a system that automatically vests protection upon fixation in a tangible medium of expression.<sup>55</sup> This shift was spurred by a desire to harmonize domestic copyright law with international trading partners. But accepting the proposition that copyright protection automatically attaches at the moment of fixation does not lead inexorably to the conclusion that a copyright holder does not have some responsibility to claim her work. The next Part traces the progressive relaxation of formalities in the domestic copyright law.

## II. HISTORY OF CLAIMING

The history of the copyright is a history of public claiming.<sup>56</sup> The first federal copyright law, enacted in 1790, offered copyright protection to authors of maps, charts, and books<sup>57</sup> who (1) registered a title of the work with the district court,<sup>58</sup> (2) published a notice of the registration in the newspaper for four

53. In a letter from the American Film Heritage Association to Senator Strom Thurmond, Chairman Larry Urbanski stated “that as much as 75% of motion pictures from the 1920s are no longer clearly owned by anyone, and film preservationists as such cannot obtain the necessary permissions to preserve them.” Orphan Works, 70 Fed. Reg. 3739, 3740 n.3 (Jan. 26, 2005).

54. See Joel Sage, *Revenue Streams and Safe Harbors: How Water Law Suggests a Solution to Copyright’s Orphan Works Problem*, 16 B.U. J. SCI. & TECH. L. 294, 298 (2010).

55. Fagundes, *supra* note 42, at 155 (“The 1976 Act converted copyright from a system in which authors had to opt in to possess rights in their work to one in which rights vested automatically upon creation of those works regardless of the author’s intent or conduct.”). See also Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 124 (2002) (“[C]opyright law has flipped over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not.”).

56. See, e.g., Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1804-05 (2006); Sorkin, *supra* note 34, at 591.

57. Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 125 (“[F]or the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”).

58. Before publication, an author was required to record the title of the map, chart, or book with the clerk’s office of the district court where the author resided. *Id.* § 1, 3, 1 Stat. 124-25. The Act further provided:

And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose, in the

## CLAIMING THE COPYRIGHT

weeks,<sup>59</sup> (3) and deposited a copy of the work with the Secretary of State.<sup>60</sup> A copyright notice on the work itself was not yet required. Copyright protection was limited to U.S. citizens and residents,<sup>61</sup> and these authors were given the exclusive right of “printing, reprinting, publishing and vending” the work.<sup>62</sup> The initial term of protection lasted for fourteen years from the date of registering the work with the clerk’s office of the district court where the author resides. If the author survived the first term, the author could renew the copyright for a second fourteen-year term by complying with the same formalities of registration and newspaper notice.<sup>63</sup>

In 1802, the formality of including copyright notice on the work itself was added.<sup>64</sup> In addition to publishing notice in the newspaper, an author was required to include a copyright notice on the title page of a book.<sup>65</sup> And in 1831,

---

words following, (giving a copy thereof to the said author or proprietor, under the seal of the court, if he shall require the same.) “District of to wit: Be it remembered, That on the day of in the year of the independence of the United States of America, A. B. of the said district, hath deposited in this office the title of a map, chart, book or books, (as the case may be) the right whereof he claims as author or proprietor (as the case may be) in the words following, to wit: [here insert the title] in conformity to the act of the Congress of the United States, intituled [sic] ‘An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.’ C. D. clerk of the district of.”

*Id.* § 3.

59. Within two months of registration, an author was required to publish a record of the copyright registration in one or more U.S. newspapers for a period of four weeks. *Id.*
60. Within six months of publication, an author was required to deposit a copy of the work with the Secretary of State. *Id.* § 4.
61. *Id.* § 5 (“[N]othing in this Act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”).
62. *Id.* § 1.
63. Within the six months preceding the expiration of the initial fourteen-year term, an author was required to re-register with the clerk’s office and re-publish the registration in the newspapers for four weeks. *Id.*
64. Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171 (1802).
65. *Id.* An author was required to insert “at full length in the title-page or in the page immediately following the title” the following words: “Entered according act of Congress, the \_\_ day of 18\_\_ (here insert the date when the same was deposited in the office) by A. B. of the state of \_\_ (here insert the author’s or proprietor’s name and the state in which he resides.)” *Id.*

Congress again amended the notice provision and extended the term of protection. The amendment simplified the notice affixed to works and eliminated the requirement to also publish notice in the newspaper.<sup>66</sup> The initial term of protection was doubled, to twenty-eight years from publication.<sup>67</sup> An author was eligible to renew the protection, which was still for an additional fourteen years.<sup>68</sup> The total term of available protection was forty-two years from registration. Rather than requiring the author to outlive the initial term of protection, the 1831 Act authorized an author's widow and children to seek the renewal term, provided the registration and notice formalities were satisfied again.<sup>69</sup> Failure to comply with these statutorily required formalities meant a work was ineligible for the statutory copyright protection, and the work entered the public domain.<sup>70</sup>

Three years later, copyright holders were allowed, but not required, to publicly claim their assignments. In 1834, copyright assignments could be registered, but unregistered assignments were "void against any subsequent purchaser or mortgagee for valuable consideration without notice."<sup>71</sup> In 1874, the copyright notice provision was simplified further and an author had the option to include just the word "Copyright" followed by the year and the author's name.<sup>72</sup>

66. Act of Feb. 3, 1831, ch. 16, § 5, 4 Stat. 436, 437 (1831). The notice of copyright required the following words: "Entered according to act of Congress, in the year \_\_, by A. B., in the clerk's office of the district court of \_\_ . . ." *Id.*

67. *Id.* § 1, 4 Stat. 436.

68. *Id.* § 2, 4 Stat. 436-37.

69. *Id.*

70. See, e.g., *Wheaton v. Peters*, 33 U.S. 591, 592-93 (1834) ("No one can deny, that where the legislature are about to vest an exclusive right in an author or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. . . . Every requisite under both the acts of congress relative to copyrights, is essential to the title."); *Ewer v. Coxe*, 8 F. Cas. 917, 919 (C.C.E.D. Pa. 1824) ("[I]t is most obvious that the proprietor can acquire no title to the copyright, unless [the Act] is complied with [inserting 'at full length in the title page, or in the page immediately following the title' a copy of the registration]. He must cause the copy to be inserted as directed, before he can be entitled to the benefit of the act of 1790.").

71. Act of June 30, 1834, ch. 157, 4 Stat. 728. Across the pond, in 1842, English policymakers abandoned copyright renewals in favor of a straight term of either the life of the author plus seven years, or forty-two years from publication, whichever was longer. 5 & 6 Vict. c. 45 (1842) (Eng.).

72. Act of June 18, 1874, ch. 301, § 1, 18 Stat. 78, 78. The alternative notice provision was: "Entered according to act of Congress, in the year \_\_, by A. B., in the office of the Librarian of Congress, at Washington." *Id.* 18 Stat. 78-79. The act also provided that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting [notice] in the several copies of every edition published . . ."

## CLAIMING THE COPYRIGHT

It was nearly one hundred years after the first federal copyright act before protection was offered to foreign authors.<sup>73</sup> In 1891, copyright protection was extended to foreign authors on three conditions. First, the foreign author's country protected works by U.S. authors on "substantially the same basis" as it protected works of its own citizens.<sup>74</sup> Second, "the foreign author complied with all formalities applicable to works of U.S. authors", including registration, notice, and deposit.<sup>75</sup> And third, the work of a foreign author was printed and manufactured within the U.S.<sup>76</sup> This third requirement, known as the manufacturing clause, was one of the most unpopular provisions of U.S. copyright law for foreign authors.<sup>77</sup> Indeed, scholars have noted that this provision was "one of the most serious obstacles blocking United States participation in international copyright conventions, and on several occasions threatened to disrupt entirely copyright relations between the United States and other nations."<sup>78</sup>

The manufacturing clause required foreign authors (1) to have their works printed from type set "within the limits of the United States" and (2) to deposit two copies of the domestic imprint with the Librarian of Congress on or before the first publication anywhere.<sup>79</sup> Foreign authors were especially disadvantaged by this requirement.<sup>80</sup> For foreign authors, it was virtually impossible to negoti-

---

73. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106, 1107. *See also* RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 358-65 (1912) (detailing debate and passage of the Chace Bill); Paul J. Sherman, *The Universal Copyright Convention: Its Effect on United States Law*, 55 COLUM. L. REV. 1137, 1140-41 (1955) ("The International Copyright Act, as it was known, extended copyright to citizens of a foreign country that either offered protection to American citizens on substantially the same basis as its own nationals or was party to an international agreement guaranteeing reciprocal protection to which the United States could adhere.").

74. Act of Mar. 3, 1891, ch. 565, § 13, 26 Stat. 1106, 1110.

75. 1 PATRY, *supra* note 35, § 1:38.

76. Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106, 1107.

77. *See infra* notes 83-87, 190 and accompanying text.

78. Sherman, *supra* note 73, at 1141; *see also* Hamish R. Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J. L. & ARTS 89, 94 (1986) ("[W]hen the Berne Convention was revised at Berlin in 1908 to prohibit any formality as a condition of the 'enjoyment' and 'exercise' of copyright, the Manufacturing Clause became a bar to Berne adherence by the United States.").

79. Act of Mar. 3, 1891, ch. 565, § 4956, 26 Stat. 1106, 1107; *see also* ELIZABETH K. DUNNE, 86TH CONG., STUDY NO. 20, DEPOSIT OF COPYRIGHTED WORKS 15 (Comm. Print. 1960) ("The effect of the act of 1891, granting U.S. copyright to foreign authors, subject to the requirements of the manufacturing clause, was to bring in deposits of some foreign works for the first time.").

80. BOWKER, *supra* note 73, at 153-61 (summarizing the complexities of the 1891 and 1909 Act manufacturing clauses, and illustrating the difficulties for copyright holders).

ate for the publication of a U.S. edition before the work was published abroad, especially if the author was writing in a foreign language.<sup>81</sup> While domestic law nominally extended protection, the strictures of the manufacturing clause “made the extension of copyright protection to foreigners illusory,” according to then-Assistant Register of Copyrights Barbara Ringer.<sup>82</sup>

In 1909, Congress made substantial revisions to both the form and substance of federal copyright protection. Under the 1909 Act, copyright protection was secured when a work was published with a proper copyright notice, rather than when a work was registered.<sup>83</sup> Notice required three items: (1) either the word “Copyright” or the abbreviation “Copr.”; (2) the copyright holder’s name; and (3) the year of publication.<sup>84</sup> But if notice was accidentally omitted, that omission would not divest copyright protection. However, an innocent infringer misled by the lack of notice would be insulated from damages.<sup>85</sup> The right to cure an accidental omission of notice was included to soften the harsh consequences of failing to comply with the statutory formalities.<sup>86</sup> The innocent in-

81. DUNNE, *supra* note 79, at 15.

82. Barbara Ringer, *The Role of the United States in International Copyright—Past, Present and Future*, 56 GEO. L.J. 1050, 1057 (1968).

83. Act of Mar. 4, 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (“[A]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act . . .”).

84. *Id.* § 18, 35 Stat. 1075, 1079 (providing that proper notice could “consist either of the word ‘Copyright’ or the abbreviation ‘Copr.’, accompanied by the name of the copyright proprietor, and if the work be printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication”).

85. *Id.* at § 20 (“[W]here the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.”).

86. A House Committee Report explained:

Under existing law notice of copyright must be printed in every copy of every edition of a book. If any copy of any edition published by authority of the proprietor of the copyright by accident or mistake gets out without the copyright notice, the whole copyright is lost. More copyright have been lost under this drastic provision of the law than in any other way. Your committee believe [sic] that an unintentional failure to comply with this requirement in the case of a single book ought not to have attached to it the penalty involved in the forfeiture of the copyright . . .

## CLAIMING THE COPYRIGHT

fringer defense was, according to copyright scholars, “a very important development in the formality scheme,” because “it sought to accommodate those who accidentally derogated from compliance (to a small, curable degree) but also showed concern for the innocent infringer.”<sup>87</sup>

In addition to modifying formalities, the 1909 Act also expanded the subject matter of copyright protection to include lectures, dramatic compositions, musical compositions, works of art, and photographs.<sup>88</sup> The Act also codified the first sale doctrine<sup>89</sup> and doubled the renewal term to twenty-eight years.<sup>90</sup> For renewed works, the total term of protection was fifty-six years. While registration was not required for an initial term of copyright protection, it was required for renewal.<sup>91</sup> An author could register any time during the initial twenty-eight year term, and registration was not necessary unless the author wanted to sue or to renew the term.<sup>92</sup>

Leading up to the 1909 Act, the renewal provision was debated and some urged a longer, unitary term rather than a renewal.<sup>93</sup> Other countries, like England, had already opted for a single, unitary term, rather than a split term.<sup>94</sup> But in the 1909 Act the renewal principle was retained for two main reasons.<sup>95</sup> First, the renewal provisions benefited authors by allowing them to capitalize on works that succeeded beyond the initial twenty-eight year term. Authors often assign their copyrights to publishers when the value of the work is unknown, and they have little bargaining power.<sup>96</sup> The renewed copyright was seen as a new and independent copyright, for which the author could bargain anew with the publisher.<sup>97</sup> And second, the renewal provision helped filter out undeserv-

---

H.R. REP. NO. 60-2222, at 13 (1909).

87. Gervais & Renaud, *supra* note 11, at 1467.

88. Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076-78.

89. *Id.* § 41, 35 Stat. 1084 (“[B]ut nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”).

90. *Id.* § 23, 35 Stat. 1080.

91. *Id.* §§10, 23-24, 35 Stat. 1078, 1080-81.

92. See Shira Perlmutter, *Freeing Copyright From Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 566 n.6 (1995).

93. BARBARA A. RINGER, RENEWAL OF COPYRIGHT (1960), *reprinted as* 86TH CONG., COPYRIGHT LAW REVISION STUDY NO. 31, at 105, 117-21 (Comm. Print. 1961).

94. 5 & 6 Vict. c. 45 (1842) (Eng.) (adopting a straight term of either life of the author plus seven years, or forty two years from publication, whichever was longer).

95. RINGER, *supra* note 93, at 121.

96. *Id.* at 125.

97. *Id.* at 124.



ing works that lacked pecuniary and commercial value to the owners.<sup>98</sup> Moreover, the renewal registration, according to Barbara Ringer, offered “a helpful starting point in searching copyright title.”<sup>99</sup>

It took more than half a century for Congress to gather the consensus to make another omnibus revision to copyright. Protection of U.S. works in foreign jurisdiction was a major impetus to amend U.S. laws to conform to international treaties, like the Berne Convention for the Protection of Literary and Artistic Work.<sup>100</sup> Domestic copyright law was seen as a “copyright island,” that was isolated from the international trading community.<sup>101</sup> Without reciprocal protection in foreign jurisdictions, domestic copyright holders reported losing billions of dollars from piracy abroad.<sup>102</sup> There was a growing desire to harmonize domestic law with international copyright laws in order to protect domestic economic interests.<sup>103</sup>

The Copyright Act of 1976 brought about a watershed change in U.S. copyright law.<sup>104</sup> Domestic copyright law changed from an opt-in system that required compliance with statutory formalities, to a system that automatically vested protection for original works of authorship at the moment of fixation.<sup>105</sup> Starting in 1978 (when the 1976 Act became effective), registration became optional and Congress began rolling back copyright formalities in earnest, as a

98. *Hearings on S. 6330 & H.R. 19853 Before the S. & H. Comms. on Patents, 59th Cong., 1st Sess.* 183, 183 (1906); *see also* H.R. REP. NO. 60-2222 (1909), S. REP. NO. 60-1108 (1909).

99. RINGER, *supra* note 93, at 188.

100. Berne Convention, *supra* note 13. The U.S. International Trade Commission estimated losses for lack of multinational copyright protection of \$6.2 billion in 1986. Irwin Karp, *A Future Without Formalities*, 13 *CARDOZO ARTS & ENT. L.J.* 521, 522 n.13 (1995).

101. David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United State*, 55 *LAW & CONTEMP. PROBS.* 211, 211 (1992).

102. *See The Berne Convention Implementation Act of 1988*, S. REP. NO. 100-352, at 2, *reprinted in* 1988 U.S.C.C.A.N. 3706; *see also* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 3 (2003) (“[B]etween 1987 and 1999, a period of only twelve years, annual U.S. receipts from foreign trade in intellectual property rose from \$10 billion to \$36.5 billion, versus U.S. payments to foreign owners of intellectual property in 1999 of only \$13 billion.”).

103. *See, e.g.*, William Belanger, *U.S. Compliance with the Berne Convention*, 3 *GEO. MASON L. REV.* 373, 373 (1995).

104. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 405 (2012)).

105. *Id.* § 408. At this time, copyright attached at the moment of fixation but the copyright could detach if an author published without a copyright notice—and failed to timely cure that omission. *Id.*

## CLAIMING THE COPYRIGHT

prelude to joining the Berne Convention.<sup>106</sup> The notice requirement became more forgiving, and an omission of notice could be cured within a five-year window.<sup>107</sup> The manufacturing clause was phased out.<sup>108</sup> Rather than a split copyright protection with an option to renew, there was a single, unitary term.<sup>109</sup> And the term of protection was calculated from the author's death, rather than from publication.<sup>110</sup> For natural persons, the term of protection was fifty years after death.<sup>111</sup>

By 1989, a copyright notice on the work was no longer required,<sup>112</sup> and by 1992, registration renewal was no longer required.<sup>113</sup> In 1994, Congress "re-stored"<sup>114</sup> copyright protection to certain categories of works if the author had failed to comply with mandatory formalities.<sup>115</sup> In 1998, the term of protection

- 
106. See H.R. REP. NO. 94-1476, at 135 (1976) ("Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate . . .").
107. Under the 1976 Act, copyright notices still needed to be put on published copies of works, but the law allowed copyright holders to cure some inadvertent notice omissions. See Copyright Act of 1976, Pub. L. No. 94-553, § 405, 90 Stat. 2541, 2578 (codified as amended at 17 U.S.C. § 405).
108. 17 U.S.C. § 601 (2012).
109. With the unitary term, renewal registration became unnecessary for works created after 1978. Copyright Act of 1976 § 302. And in 1992 Congress relieved authors of works published between January 1, 1964 and December 31, 1977 from the obligation to file for renewal certificates. Copyright Amendments Act of 1992, Pub. L. No. 102-307, §§ 102(a), 304(a), 106 Stat. 264, 264.
110. Copyright Act of 1976, Pub. L. No. 94-553, § 304, 90 Stat. 2541, 2573-76 (1976) (codified as amended at 17 U.S.C. § 304 (2012)).
111. Corporate and anonymous works were protected seventy-five years from the date of publication or 100 years from the date of creation, whichever expired first.
112. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853.
113. Copyright Renewal Act of 1992, Pub. L. No. 102-307, § 102, 106 Stat. 264, 264 (codified at 17 U.S.C. § 304(a) (2012)).
114. *Golan v. Holder*, 132 S. Ct. 873, 882 n.13 (2012) ("Restoration is a misnomer insofar as it implies that all works protected under § 104A previously enjoyed protection. Each work in the public domain because of lack of national eligibility or subject-matter protection, and many that failed to comply with formalities, never enjoyed U.S. copyright protection.").
115. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976 (1994). Copyright protection for certain foreign works that had fallen into the public domain for failure to comply with mandatory formalities was restored "for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States." 17 U.S.C. § 104A(a)(1)(B) (2012). See also *Golan*, 132 S. Ct. 873 (upholding § 514 and concluding that Congress did not exceed its

was increased, retroactively and prospectively, from fifty to seventy years after an author's death.<sup>116</sup>

The U.S. has progressively relaxed copyright formalities in order to comply with the Berne Convention.<sup>117</sup> The Berne Convention is widely considered the most important multilateral copyright treaty today.<sup>118</sup> One hundred sixty eight nations have signed it,<sup>119</sup> and it has been incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>120</sup>

The Berne Convention is predicated on principles of national treatment<sup>121</sup> and automatic protection.<sup>122</sup> The Berne Convention provides that authors have the same rights to copyrighted material that the Berne Union members grant to their own nationals. In other words, foreign authors are accorded the same treatment as domestic authors. The second principle is automatic protection. Automatic protection is embodied in Article 5(2) of Berne, which provides that “[t]he enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work.”<sup>123</sup> It is commonly understood that “enjoyment” refers to the existence and scope of the copyright, whereas “exercise” refers to enforcement.<sup>124</sup>

---

authority under the Copyright Clause, and that heightened First Amendment review was unnecessary).

116. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), (d), 112 Stat. 2827, 2827-28 (1998). *See also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (affirming the constitutionality of the 1998 Copyright Term Extension Act). Protection for corporate and anonymous works was extended to ninety-five years from the date of publication or 125 from the date of creation, whichever expired first.
117. *See* Kenneth D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, 6 GLOBAL LEGAL STUD. J. 117, 119 (1998) (“The pressure for international conformity has altered the means for acquiring copyright, has restructured the term of copyright duration, and has brought new protection under U.S. law where no legal rights previously existed.”).
118. Other major international treaties concerning copyright include the Rome Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performance and Phonograms Treaty.
119. For an updated list of Berne members, see Signatories to the Berne Convention, WORLD INTELLECTUAL PROP. ORG., [http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited June 5, 2016).
120. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
121. Berne Convention, *supra* note 13, art. 5(1).
122. *Id.* art. 5(2).
123. *Id.*
124. *See* Gervais & Renaud, *supra* note 11, at 1472.

## CLAIMING THE COPYRIGHT

But the Berne Convention has not always been formality-free. The first incarnation of the Berne Convention, in 1886, required that authors comply with the formalities of their home country to receive protection in other Berne-signatory countries.<sup>125</sup> But in 1908, the Berne Convention was amended because assessing if an author had complied with her country of origin's formalities was too difficult, thus formality-free protection was adopted.<sup>126</sup> The resistance to formalities has pragmatic foundations, rather than a deep antipathy toward formalities per se.<sup>127</sup> By the time the United States seriously considered joining the convention, though, it was unique in requiring authors to comply with formalities.<sup>128</sup>

While a majority of U.S. formalities have been rolled back to join the Berne Convention, not all formalities have been eliminated. For example, a domestic copyright holder must register a work as a prerequisite to filing an infringement suit.<sup>129</sup> And for domestic and foreign copyright holders, statutory damages and attorneys' fees are not available for infringement that takes place before registration.<sup>130</sup> If a copyright notice appears on a hard copy of the work, the innocent infringement defense is unavailable.<sup>131</sup> These provisions were intended to pro-

- 
125. Berne Convention, *supra* note 13, art. 2(2); *accord* Gervais & Renaud, *supra* note 11, at 1471.
126. Berne Convention, *supra* note 13, art. 4(2).
127. Stef van Gompel, *Copyright Formalities and the Reasons for the Decline in Nineteenth-Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 158 (Ronan Deazley et al. eds., 2010) (“Thus, the rationale behind the [Berne Convention] proscription of formalities at the international level seems to be practical rather than idealistic.”); Sprigman, *supra* note 33, at 545 (“[I]t is important to understand that Berne’s antiformality principle does not arise from any supposed foundational incompatibility between formalities and an authors’ rights copyright framework.”).
128. Karp, *supra* note 100, at 522 (“An additional basis for the U.S.’s gradual progression toward a less stringent copyright environment was that the U.S. was unique in its imposition of formalities and the resulting destruction of domestic copyright protection for thousands of foreign authors.”); Perlmutter, *supra* note 92, at 567 (“By the early twentieth century, this extensive system of formalities had become peculiar to U.S. law, placing us out of step with the rest of the world.”).
129. 17 U.S.C. § 411(a) (2012).
130. *Id.* § 412. There are additional requirements to qualify for protection under the Visual Artists Rights Act, including that for limited edition works of 200 copies or fewer, they must be signed and consecutively numbered by the author. *Id.* § 101 (defining “work of visual art”).
131. Today, a copyright notice on a copyrighted work serves as a bar to a minimum damage award. *Id.* § 504(c)(2); *see also id.* § 402 (except as provided in § 504(c)(2), when a copy or phonorecord bears a properly affixed notice, “no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages”).

vide powerful incentives for copyright holders to register voluntarily.<sup>132</sup> But as discussed in Parts III and IV below, these incentives are not enough to prevent deadweight losses and notice failure.

### III. CLAIMING TODAY

We no longer require a copyright holder to claim an interest in her work. Today, our formality-optional system has swept within the bounds of copyright far more works for far longer than was initially contemplated. And copyright's bounds are larger than ever. Not only has the subject matter of copyright expanded, but the rights have expanded too.<sup>133</sup> Once limited to books, maps, and charts, today's copyright protects a full range of works including photographs, sound recordings, and computer programs. And once limited to verbatim or near-verbatim copying of a whole work,<sup>134</sup> today's copyright allows authors to prevent reproduction, distribution, public performance and display, as well as the creation of derivatives.<sup>135</sup>

The consequences for the expansive protection of original works of authorship are magnified with the Internet and the digital age. The digital environment has remade the relationship between listeners and speakers.<sup>136</sup> The line between author and reader, between creator and user, is blurred in the digital ecosystem.<sup>137</sup> Modern technology has enabled nearly all of us to be publishers,<sup>138</sup>

---

132. See, e.g., Oliar et al., *supra* note 1, at 2215-19; David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J. L. & ARTS 1, 48 (2013); Perlmutter, *supra* note 92, at 569 (“The overall goal of the changes in the law was to make registration an optional rather than a mandatory system, encouraged by the carrot of ‘special remedies’ rather than impelled by the stick of loss of rights.”).

133. See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 599-600 (2008) (suggesting that copyright rights have expanded such that they now “spill out all over personal uses like billowing white goo”).

134. See Samuelson et al., *supra* note 37, at 1191 (“In the early years of modern copyright law, only exact or near-exact copying of the whole of a copyrighted work, which would obviously undermine the primary market for authorized copies of the author’s work, was deemed an infringement of copyright.”).

135. 17 U.S.C. § 106 (2012).

136. See Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537, 1547 (2013) (“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 and to aggregate existing works into new content.”).

137. *Id.* at 1545.

## CLAIMING THE COPYRIGHT

whereas in 1790 there were only a handful of publishers in the United States. Today, copyright affects regular folks, not just specialized industries.<sup>139</sup> Copyrighted works are created with ease, and they are infringed with equal ease.<sup>140</sup> And we have coupled the expansive protection of modern copyright and the digital age with the reduction in formalities.<sup>141</sup> This lack of formalities has made ownership “muddier.”<sup>142</sup> The externalities of this opacity include a diminished public storehouse of creative works from which others can draw.

Several societal harms flow from uncertain ownership.<sup>143</sup> Uncertain ownership retards the creation of new works,<sup>144</sup> like adaptations by documentary filmmakers.<sup>145</sup> Uncertain ownership undermines digital dissemination of cultural and scientific works by museums and libraries.<sup>146</sup> Cultural works held hos-

- 
138. See, e.g., Gibson, *supra* note 31, at 169 (“[C]omputers have changed everything. Digital architecture has so drastically reduced the cost of creating and distributing expression that today we can all be authors *and* publishers . . .”).
139. Samuelson et al., *supra* note 37, at 1177.
140. Gibson, *supra* note 31, at 214-15 (detailing a range of online activity that implicates a copyright holder’s exclusive rights “from forwarding e-mail, backing up data, and printing a hard copy of an online document to caching frequently accessed files, cataloging Internet sites, and webcasting one’s travels,” and noting that our world is “replete with copyrighted content that is constantly being infringed”).
141. WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 204 (2012) (“In the past, a short term of copyright coupled with formalities and the natural restraints that arose in the hard copy world—significant costs in production and distribution—limited the public’s innocent exposure to copyright infringement. With a functionally perpetual copyright duration, no formalities, and instant global distribution, matters have greatly changed.”).
142. Fagundes, *supra* note 42, at 155 (noting that eliminating formalities “made copyright entitlements muddier, by robbing the public of a key means of ascertaining the ownership status of a given work”).
143. See, e.g., Libby Greismann, Note, *The Greatest Book You Will Never Read: Public Access Rights and the Orphan Works Dilemma*, 11 DUKE L. & TECH. REV. 193, 200 (2012) (“When the author cannot be found, subsequent creators are dissuaded from creating new works that incorporate those existing works, resulting in a net loss for the creative wealth of society.”).
144. See, e.g., Sami J. Valkonen & Lawrence J. White, *An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: An Argument in Support of the Orphan Works Act*, 29 HASTINGS COMM. & ENT. L.J. 359, 388-93 (2007).
145. Comments of the Int’l Documentary Ass’n et al. in the Matter of Orphan Works and Mass Digitization (Feb. 4, 2013), [http://copyright.gov/orphan/comments/loi\\_10222012/International-Documentary-Association.pdf](http://copyright.gov/orphan/comments/loi_10222012/International-Documentary-Association.pdf).
146. See, e.g., Comments of the Art Inst. of Chi. et al. in the Matter of Orphan Works and Mass Digitization (Feb. 4, 2013), [http://copyright.gov/orphan/comments/loi\\_10222012/Museums.pdf](http://copyright.gov/orphan/comments/loi_10222012/Museums.pdf); Response by the Cornell Univ. Library to the Notice of Inquiry Concerning Orphan Works, Comment OW0569, at 1-2 (Mar. 23, 2005), <http://copyright.gov/orphan/comments/OW0569-Thomas.pdf>.

tage by unknown copyright owners have included unreleased jazz recordings from the 1930s and 1940s,<sup>147</sup> photographs and artifacts housed at the U.S. Holocaust Memorial Museum,<sup>148</sup> and historical literature tracing the evolution of rural life and agricultural economy in the United States.<sup>149</sup> Large-scale digital archives offer unprecedented data mining opportunities for scholars,<sup>150</sup> yet uncertain ownership of the works threatens public availability.<sup>151</sup>

Uncertain ownership also impairs free speech interests in a robust public domain. Uncertain ownership holds works hostage from the public.<sup>152</sup> Three examples illustrate this problem. The first example comes from the Frontera Collection at UCLA, which is reputed to be the “largest repository of Mexican and Mexican-American vernacular recordings in existence.”<sup>153</sup> Notwithstanding the “value of the collection to students, scholars, and the community” the UCLA library director noted that “copyright law prevents the Library from making this work fully available because most of it is covered under copyright and we are unable to locate the copyright owners.”<sup>154</sup> The second example is

147. Steven Seidenberg, *Orphaned Treasures: A Trove of Historic Jazz Recordings Has Found a Home in Harlem, But You Can't Hear Them*, A.B.A. J., May 2011, at 48.

148. *Balancing the Interests of Copyright Owners and Users: Hearing Before the H. Subcomm. on Courts, the Internet and Intellectual Property and the H. Committee on the Judiciary*, 110th Cong. 64-67 (2008) (statement of Karen Coe, Assoc. Legal Counsel, U.S. Holocaust Memorial Museum) (noting the Museum has “approximately 42 million pages of archival documents, 77,000 photographs, 9,000 recorded oral histories, 985 hour of historical film footage, and its library contains 72,000 items in 55 languages”—many of which are orphan works).

149. *The Core Historical Literature of Agriculture: Background Of This Collection*, ALBERT R. MANN LIBRARY, CORNELL UNIV., <http://chla.library.cornell.edu/c/chla/about.html> (last visited June 5, 2015). See also Response by the Cornell Univ. Library to the Notice of Inquiry Concerning Orphan Works, Comment OW0569, at 1-2 (Mar. 23, 2005), <http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>.

150. See, e.g., *Content, Contest, and Capacity: A Collaborative Digitization Project on the Long Civil Rights Movement in North Carolina*, TRIANGLE RESEARCH LIBRARY NETWORK, <http://www2.trln.org/cc/index.htm> (last visited June 5, 2015) (a collaborative large-scale manuscripts digitization project).

151. Matthew L. Jockers et al., *Digital Archives: Don't Let Copyright Block Data Mining*, NATURE, Oct. 4, 2012, at 29-30.

152. See Loren, *supra* note 43, at 1434 (“I conclude that these works should not be viewed as ‘orphans,’ but rather as ‘hostages’—constrained in their movement by the restricting combination of copyright law and the absence of copyright owners who could release works from their confinement.”).

153. Letter from Gary E. Strong, Univ. Library & Dir., UCLA, to Jule L. Sigall, Assoc. Register for Pol’y & Int’l Affairs, U.S. Copyright Office 10 (Mar. 2005), <http://www.copyright.gov/orphan/comments/OW0473-Strong.pdf>.

154. *Id.*

## CLAIMING THE COPYRIGHT

from a Cornell University librarian who recounted a similar orphan works experience for art work created by a Japanese-American while at the Poston War Relocation Center during World War II: “The current copyright owner has since disappeared and the paintings have become orphan—and no future scholar can publish them again until they enter the public domain, some 120 years after the date of the events they depict.”<sup>155</sup> And the third example involves the reissue of early sound recordings by African-Americans, which was planned to accompany the release of the book, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*.<sup>156</sup> But the release “had to be aborted because of the time and cost involved in locating and dealing with rights holders,” according to the book’s author.<sup>157</sup> These are only three examples that illustrate the rich diversity of cultural works that are held hostage by copyright and unknown copyright holders.

The scope of the problem of unknown copyright holders is hard to overstate.<sup>158</sup> Orphan works can affect not only cultural institutions but also commercial creators and individuals.<sup>159</sup> Works of cultural value to scholars and archivists, like photographs, letters, and sound recordings, are likely to be orphaned.<sup>160</sup> Works of historically marginalized communities, like racial and religious minorities, women, the poor, and Native Americans, are also likely to be unclaimed because of poor attribution and inadequate recordkeeping.<sup>161</sup> Modern digital works, like digital photographs and sound recording samples, are also likely to become orphaned because digital technology allows works to

- 
155. Response by the Cornell Univ. Library to the Notice of Inquiry Concerning Orphan Works, Comment OW0569, at 3 (Mar. 23, 2005), <http://copyright.gov/orphan/comments/OW0569-Thomas.pdf>.
156. Letter from Tim Brooks to Jule L. Sigall, Assoc. Register for Pol’y & Int’l Affairs, U.S. Copyright Office 2 (Mar. 23, 2005), <http://www.copyright.gov/orphan/comments/OW0579-Brooks.pdf> [hereinafter Letter from Tim Brooks to Jule L. Sigall].
157. *Id.*
158. See, e.g., Robert Kirk Walker, *Negotiating the Unknown: A Compulsory Licensing Solution to the Orphan Works Problem*, 35 CARDOZO L. REV. 983, 989 (2014); Mark Tratos, *Informal Formalities: The Government’s Attempt to Find Families for Orphan Works*, 3 INTELL. PROP. BRIEF 42 (2011); Sage, *supra* note 54, at 300.
159. See Vicenç Feliú, *Orphans in Turmoil: How A Legislative Solution Can Help Put the Orphan Works Dilemma to Rest*, 12 RUTGERS J. L. & PUB. POL’Y 107, 110 (2015); Hansen et al., *supra* note 132, at 14.
160. Katharina de la Durantaye, *Finding A Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 229, 234-35 (2011).
161. Brianna Dahlberg, Note, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275, 288 (2011) (“[T]he orphan works problem disproportionately impacts access to cultural works by minorities, women, and other disadvantaged groups.”).



be separated from ownership information.<sup>162</sup> This is a problem for new works, as well as old works, and one that is not likely to go away any time soon.

The problem of unclaimed works was not an unanticipated consequence of abandoning the notice formalities. Congress nevertheless pursued this policy change. In an attempt to explain Congress's largesse with regard to copyright, some scholars have observed the mentality that "if a little copyright law is good, more is always better."<sup>163</sup> But a little now goes a long way—specifically seventy years after the author's death. And it is far from clear that more copyright law leads to more creative works for the public to enjoy.<sup>164</sup>

It is also not evident that all original works of authorship fixed in a tangible medium of expression want, need, or warrant copyright protection.<sup>165</sup> When copyright offers the same protection to voicemail messages and honey-do lists as it does to novels and movies, perhaps it is worth reconsidering the default presumption of full protection without any affirmative claiming by the author. Works created with little regard for copyright are extended the same protection as works that are deeply reliant on copyright as a vehicle for financial compensation. And it is uncertain whether an author can efficiently disclaim her copy-

---

162. See *The "Orphan Works" Problem and Proposed Legislation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Marybeth Peters, Register of Copyrights), <http://www.copyright.gov/docs/regstat031308.html>; Comment on Orphan Works Study (70 FR 3739) from Brad Holland & Cynthia Turner, Illustrators' P'ship of Am., to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 24 2005), <http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf>; see also Comments on Notice of Inquiry Regarding Orphan Works from Stephen Morris, Prof'l Photographers of Am., to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 25, 2005), <http://www.copyright.gov/orphan/comments/OW0642-PPA.pdf>.

163. Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1681 (2009).

164. *Id.* at 1708 ("At the very least, our findings cast serious doubt on the idea that, with copyright law, one size fits all. In other words, there is little support for the broad proposition that one may expect changes in copyright law to have a predictable and uniform effect across all creative works, whether those works are books, sound recordings, or musical compositions. Even interpreted in the light most favorable to our hypotheses, the evidence suggests that it is at best slightly better than a coin toss whether a legal change will have any effect upon a single category of creative works.").

165. See, e.g., Gibson, *supra* note 31, at 215 ("Because copyright protection attaches the instant an original thought is expressed in fixed form, these newly empowered authors never have a chance to affirmatively decide whether they want that protection.").

## CLAIMING THE COPYRIGHT

right to the public domain.<sup>166</sup> Copyright attaches whether or not the author wants, needs, or knows it—for seventy years after an author’s death.

It is not clear that copyright is the driver of creation for most texts, tweets, and selfies, rather than just an afterthought.<sup>167</sup> Our digital ephemera likely have little regard for copyright. The same can be said of many private letters, family photographs, and personal diaries. While such works may have little commercial value, they can have high cultural and historic value.

Scholars have denominated works for which copyright was only an afterthought as the “dark matter” of copyright.<sup>168</sup> For these works, copyright is neither a consideration nor an incentive. Copyright-as-afterthought risks undermining respect for copyright. When the creator of dark matter does not care about copyright, it is hard to get the public to respect copyright as a whole.<sup>169</sup> The breadth of copyright today leads to innumerable technical violations that social norms would regard as innocuous.<sup>170</sup> Copyright’s indiscriminate ubiquity defies common sense.<sup>171</sup>

The consequences of too much indiscriminate copyright are considerable. We face an ever growing private domain and a shrinking public domain. We

- 
166. Lydia Pallas Loren, *Building A Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 320 (2007) (“Whether a copyright owner can abandon a portion of the rights granted to him remains an open question.”); see also Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 362 (2010) (noting uncertainty about “whether an author may use the statute’s termination provisions to rescind her own express dedication of a work to the public domain”).
167. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 740 (2003) (“[C]opyright law might want to distinguish authors whose expressive activities are motivated by copyright from authors for whom copyright was an afterthought.”).
168. See Stef van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERKELEY TECH. L.J. 1425, 1432 (2013) (quoting Fred von Lohmann, Senior Copyright Counsel at Google).
169. See Gibson, *supra* note 31, at 230-31.
170. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543-48.
171. Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 751 (2013) (noting that restoring formalities “would breed more respect for copyright law because the current law’s promiscuous ubiquity—under which even grocery lists, emails, and mobile phone photos are automatically protected for seven decades past their authors’ lives—runs counter to common sense and is economically unnecessary and inefficient”).

face a virtually perpetual copyright term,<sup>172</sup> even for works of unknown owners. The problem of unknown and unfindable copyright holders threatens the creation of new works, scholarly access to digitized archives of disintegrating analog works, and the fodder necessary for robust public discourse. Rather than serving as the engine of progress, copyright now is a burden on speech and creativity.<sup>173</sup>

This is the right time for this conversation. Calls for copyright reform are everywhere.<sup>174</sup> Domestic<sup>175</sup> and international<sup>176</sup> policymakers are grappling with the notice failure externalities caused by a reduction in formalities. Solutions to the orphan works problem are presently being debated in the United States<sup>177</sup> and the European Union.<sup>178</sup> Part IV outlines my proposal for “new-style” formalities as a solution to notice failure.<sup>179</sup>

- 
172. Sprigman, *supra* note 33, at 522 (“The copyright term is now sufficiently long that the net present value to the rightsholder of a copyright is practically indistinguishable from what it would be under a perpetual term.”).
173. See Valkonen & White, *supra* note 144, at 361-62 (“[T]he copyright regime should protect creativity, not creators.”).
174. See, e.g., Gervais & Renaud, *supra* note 11, at 1470 (arguing “a renewed discussion on formalities is both timely and necessary”); see also Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 973 (2015) (“Over the last fifteen years, there has been a marked uptick in scholarly and popular calls for the reform, or even the replacement, of the copyright system.”); Samuelson, *supra* note 171, at 740 (“Copyright law has taken quite a beating in the legal literature in the past decade or so.”).
175. Feliú, *supra* note 159, at 107 (“The orphan works issue has continued to grow in the United States despite strong efforts to find a workable solution.”).
176. See, e.g., IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 38 (2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf).
177. See *Orphan Works*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan> (last visited June 5, 2016); (providing overview of and resources concerning the orphan works issue); ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44.
178. *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works* art. 1(1), 2012 O.J. (L 299) 8, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&rid=1>; *Impact Assessment on the Cross-Border Online Access to Orphan Works Accompanying Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works* (Euro. Comm’n, Staff Working Paper, May 24, 2011), [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/docs/ia\\_2011/sec\\_2011\\_0615\\_en.pdf](http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf).
179. See, e.g., Michael W. Carroll, *A Realist Approach to Copyright Law’s Formalities*, 28 BERKELEY TECH. L.J. 1511, 1525 (2013) (discussing advantages of new-style formalities).

## CLAIMING THE COPYRIGHT

## IV. A MODEST PROPOSAL: CLAIM THE COPYRIGHT

I propose incentivizing a copyright holder to publicly claim her work. And if she fails to do so, I propose a robust defense to users of unclaimed works. The goal of my proposal is to increase productive and socially beneficial uses of unclaimed works by decreasing the risks of using these unclaimed works. There are a host of advantages that flow from requiring a copyright holder to claim an interest in her work. These advantages, explored below, include a workable solution to the orphan works problem, functional replenishment of the public domain, and decreased transaction costs to license works. And as discussed below, this proposal complies with our international obligations under the Berne Convention.

The pendulum has swung on the prevailing views of formalities.<sup>180</sup> Formalities may have been at their height under the 1909 Act, which included the manufacturing clause and renewal provisions. Leading up to the 1976 Act, the challenge against formalities was mounting. The main criticisms against formalities centered on fairness. Formalities were seen as a trap for the unwary because compliance was onerous and cumbersome.<sup>181</sup> Many copyrights were lost because of strict interpretation and technical defects in the notice and registration.<sup>182</sup> Formalities were also costly,<sup>183</sup> which tended to favor commercial creators. And elements like the manufacturing clause<sup>184</sup> were protectionist for U.S. authors, which engendered strong antipathy from foreign authors toward U.S. formalities.<sup>185</sup>

---

180. See, e.g., Séverine Dusollier, *(Re)Introducing Formalities in Copyright as a Strategy for the Public Domain*, in OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE 75, 103-05 (Lucie Guibault & Christina Angelopoulos eds., 2011); STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW 1-8 (2011); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 290-91 (2004).

181. See, e.g., Molly Schaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1541 n.26 (2005) (“[T]he formalities of U.S. copyright law had long been criticized as hypertechnical traps for unsophisticated authors.”).

182. See Gervais & Renaud, *supra* note 11, at 1461 (“A number of formalities were difficult to comply with, and many works were thus accidentally unregistered or registered incorrectly.”); see also CATHERINE SEVILLE, THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY 248 (2006).

183. See Sprigman, *supra* note 33, at 493.

184. See Act of Mar. 3, 1891, ch. 565, § 4956, 26 Stat. 1106, 1107.

185. See, e.g., 1 PATRY, *supra* note 35, § 1:38 (“[T]he manufacturing clause, remained, in amended form, a most unfortunate part of U.S. copyright law until July 1, 1986. The conditioning of copyright protection on local printing was a reactionary return to the monopolistic days of the Stationers Company, where the interests of printers and booksellers were primary.”); Gervais & Renaud, *supra* note 11, at 1463 (“The perceived burden of complying with formalities and the strict application of

The 1976 Act signaled a major policy shift as the United States sought to conform its copyright laws to the Berne Convention. We shifted from a system that required public claiming to a system that required no affirmative acts beyond fixing an original work of authorship in a tangible medium of expression. This shift has created the orphan works problem and impoverished the public domain. In response to these concerns, there has been a resurgence in the formality debate. Formalities are now said to be in the “zeitgeist.”<sup>186</sup> This is the time to consider how to thoughtfully reconstruct copyright law for the modern digital age.

Before exploring what appropriate formalities might look like, it is worth noting that a number of criticisms have been raised at the prospect of reintroducing formalities. Some criticisms are of a philosophical nature, whereas others have a pragmatic basis.

Some who resist the reintroduction of formalities champion a natural rights perspective on copyright.<sup>187</sup> From the Lockean view, a person is entitled to the fruits of her labor.<sup>188</sup> And from a moral rights perspective, an author’s personality that is reflected in a work of authorship is entitled to legal protection.<sup>189</sup> Formalities that force an author to make an affirmative claim on her copyright, or risk losing protection, are thought to be in basic conflict with these principles. But these perspectives are not irreconcilable with the notion of limited rights. Even countries that embrace natural and moral rights philoso-

---

the U.S. manufacturing clause may also have been in the minds of the Berne negotiators in Berlin, which resulted in the adoption of the broad ban on formalities.”); Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce’s Ulysses in America*, 108 YALE L.J. 633, 645 (1998) (“Clearly, the legislative purpose behind the manufacturing clause, in both its 1891 and its 1909 incarnations, was protection of American labor from the effects of foreign importation. . . . Since works that could not comply with the manufacturing clause enjoyed no copyright protection, the clause helped create the conditions necessary for book piracy—a fact that led Ezra Pound to complain of ‘the thieving copyright law.’”).

186. Gervais & Renaud, *supra* note 11, at 1496.

187. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing natural rights philosophy of copyright); Arthur Levine, *The End of Formalities: No More Second-Class Copyright Owners*, 13 CARDOZO ARTS & ENT. L.J. 553, 553 (1995) (arguing that formalities “inhibit[] the ability of a copyright owner to enjoy the full fruits of her work”).

188. See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

189. See, e.g., Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

## CLAIMING THE COPYRIGHT

phies seek to balance interests of creators and users, and these countries do not offer perpetual protection.<sup>190</sup>

Another criticism against the reintroduction of formalities is that they do not scale when applied to a large volume of works. Specifically, formalities could be prohibitively expensive for creators of large amounts of content.<sup>191</sup> For example, it has been suggested that it would not be feasible for authors who publish digital content online several times a day to comply with copyright formalities.<sup>192</sup> But this practical concern is not insurmountable. Concerns about monetary cost could be addressed with something akin to a flexible spending account at the Copyright Office or a blanket fee.<sup>193</sup> And concerns about process costs could be addressed with an annual registration option for high volume creators.<sup>194</sup>

Another concern surrounds the unknown value of works. Some inexperienced creators may not know which of their works are worth claiming.<sup>195</sup> Yet this valuation problem exists in today's copyright structure. Authors often do not know the value of their copyrights when they transfer their works to publishers.<sup>196</sup> Congress was mindful of this and enacted the termination right to protect authors from un-remunerative assignment deals.<sup>197</sup> But a copyright holder's ignorance about whether to claim her work is not worth the current deadweight costs on the public. We do not protect ignorant property owners in other situations. Much like someone selling estate items, sometimes property owners do not know the full value of their property. On balance, if the creator values it, she should claim it or otherwise bear the risk that someone else can put it to use.<sup>198</sup>

---

190. Sprigman, *supra* note 33, at 543 (“[E]ven in so-called ‘natural rights’ systems, copyrights expire, works enter the public domain, and the law therefore must seek some form of ‘utilitarian’ balance between private incentives and public access.”).

191. 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).

192. *Id.*

193. Jane C. Ginsburg, *The U.S. Experience with Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 346 (2010).

194. *Id.*

195. See Greenberg, *supra* note 191, at 1048-49.

196. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1346 (2010) (“[T]he policy justification for the termination rights is the valuation problem inherent in estimating the commercial worth of a work before it has been exploited and in judging its commercial longevity.”).

197. See 17 U.S.C. §§ 203, 304 (2012).

198. Under my proposal discussed below, if the work does turn out to be valuable, the copyright holder could collect a reasonable license fee. A copyright holder would

Others worry that formalities will favor commercial copyright interests<sup>199</sup> and disadvantage smaller entities and individual authors.<sup>200</sup> Some fear that formalities would again become a trap for the unwary.<sup>201</sup> The concern is that formalities would hurt the least informed and the least affluent.<sup>202</sup> Registration might be too burdensome for individual authors.<sup>203</sup> And authors of user-generated content may not be well suited to calculate and evaluate the potential commercial success of their works to decide whether to comply with formalities.<sup>204</sup> But the current formalities already disfavor non-commercial authors. For example, statutory damages are not a meaningful incentive for the average

---

have the option to claim the work and try to collect additional rents against future users.

199. Elkin-Koren, *supra* note 136, at 1543 (noting a commercial bias in reinstating formalities); Julia D. Mahoney, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305, 2329-30 (2004) (noting "corporate copyright holders are likely to have a much easier time negotiating the system than the lone individual creator, and that a turn to more formalities could bestow an advantage on none other than the 'Big Media' interests").
200. Elkin-Koren, *supra* note 136, at 1551-52 (arguing that formalities, if reintroduced, could "strengthen existing commercial players and marginalize individual creators and collaborative initiatives"); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 383 n.27 (2005) (observing that formalities "could actually discriminate against individual creators who are unable to carry the burden of legal counseling and registration").
201. Charles Ossola, *Registration and Remedies: Recovery of Attorney's Fees and Statutory Damages Under the Copyright Reform Act*, 13 CARDOZO ARTS & ENT. L.J. 557, 561 (1995) ("If anyone is of the opinion that there are no such registration errors, he should sit through a deposition with a client when he is asked to justify his position on work made for hire in light of *Reid* factors, joint work in light of recent case law, or what constitutes preexisting material for the purpose of derivative works.").
202. See Ginsburg, *supra* note 193, at 314; see also Perlmutter, *supra* note 92, at 586 ("It is not good policy for any legal regime to penalize the unwary, the less well-off, and the less sophisticated. The reality is that many individual authors fall into one or more of these categories when it comes to the technical requirements of copyright law. They have little legal expertise, either personally or readily available. We should not make the choice that conditions rights on such expertise.").
203. See Ossola, *supra* note 201, at 560.
204. Elkin-Koren, *supra* note 136, at 1552 ("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.").

## CLAIMING THE COPYRIGHT

author; they favor institutional actors.<sup>205</sup> Moreover, for authors who create without a profit motive, most litigation-based incentives are irrelevant.<sup>206</sup> And as noted above, the valuation uncertainty exists today and is not unique to copyrighted works. It is manifest with tangible property too.

I acknowledge there are distributive concerns, but I believe they are overestimated. Appropriate use of technology, combined with a simple registration form, could prevent public claiming from being too burdensome for average creators. As a point of comparison, in 2005 Congress authorized a preregistration formality for unpublished works that served to supplement, but not supplant, the optional registration formality.<sup>207</sup> Industry forces, including the Motion Picture Association of America, sought a way to enjoin prerelease infringement, such as when a movie is leaked on the Internet before it is released in theatres. Preregistration of a work enables a copyright holder to bring suit in federal court and receive statutory damages and attorney's fees. Preliminary data from this preregistration formality suggest individual users are not disproportionately and adversely impacted by this preregistration formality.<sup>208</sup> Researchers have observed that the majority of users of the preregistration system have been individuals, small entities, and other non-repeat players.<sup>209</sup> In light of this recent experience with the preregistration formalities, I proffer that the new-style formality I propose would not disadvantage individuals and non-commercial creators.<sup>210</sup>

Another concern about reintroducing formalities is that, without the full right to exclude, authors would lack an incentive to create. Without a limited monopoly right, the nonexcludable, nonrivalrous nature of copyright means an author would be unable to prevent others from copying and using the work. Authors would lack the financial incentive to create works for which the return is less than the cost of investment. But often other doctrines are available to help protect against activity that might discourage creation, such as privacy,

---

205. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 454 (2009) ("The prompt registration requirement for statutory damages has not become a meaningful inducement to registration for all authors who value copyright protection, but rather a substantial boon to major copyright industry players—the commercial exploiters of copyrighted works whose rights largely derive from the Act's work for hire rules or assignments from authors.").

206. Sprigman, *supra* note 33, at 495.

207. Oliar & Matich, *supra* note 41, at 1077-79.

208. *Id.* at 1120.

209. *Id.*

210. While a registration formality in itself may not favor commercial over non-commercial entities, the amount of the registration fee could have a disparate impact and needs to be calibrated carefully. *Id.* at 1125-26 (noting "the fee elasticity of preregistration likely changes with the type of preregistrant" and that it is "small entities and individual authors who are particularly sensitive to increases in fees").



misappropriation, and unfair competition. Indeed, copyright is often ill-equipped to protect privacy interests.<sup>211</sup> Whether it is a rap music star seeking to enjoin a magazine from publishing racist lyrics he wrote in his youth, or the Church of Scientology invoking copyright protection to protect its scripture from public distribution, or a famously reclusive author preventing the publication of a biography containing excerpts of his writings,<sup>212</sup> copyright is an inappropriate vehicle. In such instances, copyright can lead to censorship rather than the progress of science and learning.

There are still others who express concerns about the Berne Convention. Article 5(2) prohibits formalities that affect the enjoyment or the exercise of copyright. The rejection of constitutive formalities was driven by pragmatic considerations. Berne's no-formality movement developed at a time when formalities were cumbersome and indeed a trap for the unwary.<sup>213</sup> It was hard to know if an author had complied with her home country's formalities.<sup>214</sup> In addition to complying with her home country's formalities, some Berne countries required foreign authors to comply with the same formalities as domestic authors.<sup>215</sup> Berne's no-formality rule stems from practical problems.<sup>216</sup> Today, there seems to be a new practical concern: we do not want each country reinstating its own peculiar formality system for which compliance would be necessary to get international protection.<sup>217</sup> If the United States reinstates formalities, such action may embolden and enable other countries to enact their own formalities, and U.S. authors would be disadvantaged if they did not comply.<sup>218</sup>

---

211. Gibson, *supra* note 31, at 218-19 ("Copyright law thus operates under the assumption that the author wishes to disseminate his or her work to the public for a fee, and that the only thing standing in the way is the threat of unauthorized (i.e., uncompensated) copying. When the opposite is true—when the goal is privacy, not profits—copyright often gets it wrong. Because copyright law assumes that authors' desire for control derives from their desire to market their works, courts presume an irreparable injury whenever infringement takes place. This makes it remarkably easy for a copyright owner to secure an injunction, a prior restraint on speech that would be exceedingly difficult to get outside the copyright context.").

212. *Id.* at 217-18.

213. See Jane C. Ginsburg, "With Untired Spirits and Formal Constancy": *Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1589 (2013).

214. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 202-03 (1987).

215. *Id.* at 201.

216. Sprigman, *supra* note 33, at 545.

217. *Id.* at 544.

218. See Perlmutter, *supra* note 92, at 585 ("If the United States continues to impose formalities on the effective enforcement of rights, even if the formalities are technically Berne-compatible, other countries may choose to do so as well. The

## CLAIMING THE COPYRIGHT

A growing chorus, though, argues that the Berne Convention should not stop us from having a conversation about formalities.<sup>219</sup> Scholars are calling for thoughtful application of formalities,<sup>220</sup> industry actors seem open to reinstituting carefully calibrated formalities,<sup>221</sup> and international governments are searching for solutions to notice failure externalities.<sup>222</sup> And even those who are generally skeptical of a return to formalities do recognize the benefits of public claiming.<sup>223</sup>

Ultimately, this is a problem for Congress to fix.<sup>224</sup> It has tried and failed,<sup>225</sup> but it is time for Congress to try again. In 2005, Congress commissioned the Copyright Office to conduct a study of the orphan works problem and to publish a report.<sup>226</sup> The report recommended that Congress enact legislation to limit the remedies for copyright infringement against a user if the user performed a “reasonably diligent search” for the owner prior to using the work.<sup>227</sup>

Congress introduced bills in line with the recommendation of the Copyright Office. In 2006 and 2008, Congress put forth similar bills that would have

---

consequence could be a bewildering welter of formalities, all of which must be ascertained and complied with in order to obtain remedies in different countries of exploitation.”).

219. See, e.g., Carroll, *supra* note 179, at 1518; Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 570 (2007).
220. PATRY, *supra* note 141, at 208 (“In order for copyright to function effectively, some measure of formalities must be imposed.”).
221. Mike Masnick, *Did The RIAA Really Just Come Out In Support Of ‘Opt-In’ Copyright? [Updated]*, TECHDIRT (Oct. 15, 2010, 1:53 PM), <https://www.techdirt.com/articles/20101015/13051411452/did-the-riaa-just-come-out-in-support-of-opt-in-copyright.shtml>.
222. See NEW RENAISSANCE, REPORT OF THE ‘COMITÉ DES SAGES’ REFLECTION GROUP ON BRINGING EUROPE’S CULTURAL HERITAGE ONLINE (2011).
223. Ginsburg, *supra* note 193, at 342 (“Notice, registration and recordation of transfers thus are unquestionably beneficial and desirable; the problem, and the historical difference between the United States and much of the rest of the world, lies in the consequences of failure to affix notice, register, or record a transfer of ownership.”).
224. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44, at 2 (“[W]ith so many equities at stake, the complexity and breadth of the issues make them well suited for legislative action.”); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (noting “the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court”).
225. See Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).
226. Orphan Works, 70 Fed. Reg. 3,739, 3,741 (Jan. 26, 2005).
227. 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 41.

limited remedies against reasonably diligent searchers.<sup>228</sup> The 2008 Shawn Bentley Orphan Works Act would have limited remedies where the infringer had performed and documented a good faith, diligent search for the copyright holder before using the work.<sup>229</sup> The use of the work must have provided attribution to the copyright holder, if known.<sup>230</sup> And the infringing user must also have included an appropriate symbol or notice in association with any public distribution, display, or performance of the work.<sup>231</sup> Neither Congress was successful in enacting the proposed legislation. These proposals drew scholarly criticism because the term “reasonably diligent search” was left undefined and was open to judicial interpretation.<sup>232</sup>

The Copyright Office has been studying the orphan works problem for the past decade.<sup>233</sup> The Copyright Office’s 2015 report again recommended limiting user liability only for those who can document a good faith diligent search.<sup>234</sup> But diligent searching favors commercial over non-commercial users.<sup>235</sup> Paying for a search plus reasonable compensation may be too costly for large-scale users of orphan works, like the mass digitizing projects.<sup>236</sup> It may also be too costly for all but well-capitalized commercial creators.<sup>237</sup> A diligent search also favors

- 
228. H.R. 5439, 109th Cong. (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); *see also* Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).
  229. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong., at § 2(a) (2008) (amending 17 U.S.C. § 514(b)(1) & (2)); 154 CONG. REC. S9867-68 (daily ed. Sept. 26, 2008).
  230. S. 2913 sec. 2, § 514(b)(1)(A)(ii).
  231. *Id.* § 514(b)(1)(A)(iii).
  232. *See, e.g.,* Feliú, *supra* note 159, at 120; Laura N. Bradrick, Note, *Copyright—Don’t Forget About the Orphans: A Look at a (Better) Legislative Solution to the Orphan Works Problem*, 34 W. NEW ENG. L. REV. 537, 539, 559, 565 (2012).
  233. *See* Orphan Works, 70 Fed. Reg. 3,739, 3,741 (Jan. 26, 2005); ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44.
  234. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44, at 56-57 (“A diligent search requirement is necessary both to offset the limitations on infringement remedies that would otherwise apply, and to facilitate wherever possible the would-be user locating and working with the owner.”).
  235. Walker, *supra* note 158, at 987.
  236. *Id.* at 1000.
  237. *See, e.g.,* Comments of the Library Copyright Alliance In Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization 8 (Jan. 14, 2013), [http://www.copyright.gov/orphan/comments/noi\\_10222012/Library-Copyright-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf) (“[A]ny legislative approach that involves licensing, such as extended collective licensing, is completely unacceptable to the library community. It would be enormously costly to users,

## CLAIMING THE COPYRIGHT

well-funded projects over non-profit activities. This in turn creates a barrier to entry for individual and non-profit users and a de facto cartel for commercial users.<sup>238</sup> Rather than placing the burden on the user, a copyright holder should shoulder some responsibility to claim her work.

I therefore propose that a copyright holder should claim an interest in her original work of authorship. Specifically, a copyright holder should register a claim of interest for her work and affix a notice of the claim to the work. Today, copyrights come into existence without any formalities, and my proposal would not change this. My proposed public claiming would not be constitutive; copyright would still attach at the moment of fixation. And failure to comply would not divest copyright. But if a copyright holder wanted to seek certain remedies against a user, she would need to claim her work. If a copyright holder failed to register and failed to publicly claim her work (where appropriate),<sup>239</sup> a user could mount a successful innocent infringer defense.

An author would have the right to claim her copyright any time during the term of protection. But if a copyright holder failed to claim her work, a user of the work would be allowed to raise an “innocent infringer defense.” Essentially, a copyright holder would need to opt-in and publicly claim her work to defeat the innocent infringer defense. Perfecting registration and notice would foreclose future users’ resort to the innocent infringer defense. This is similar to the current requirement that a work be registered to be eligible for statutory damages and attorneys’ fees. But these current statutory incentives alone are not sufficient to curb the orphan works problem discussed above. My proposal offers added protection to users.

Users shy away from orphan works in part because of the liability they face. Copyright liability arises even if the user reasonably, but erroneously, thought a work was in the public domain.<sup>240</sup> Today, ignorance of the copyright status of a work is irrelevant. For copyright liability, it does not matter if the work fails to bear a copyright notice or is unregistered—but these factors can influence the assessment of damages.<sup>241</sup> Reinvigorating an innocent infringer defense makes

---

and little if any of the fees collected would ever actually reach the copyright owners of the orphan works.”).

238. Walker, *supra* note 158, at 1002.

239. It is hard to put a notice on some works, such as live music. See Gibson, *supra* note 31, at 226 (“[I]t would be difficult to ‘affix’ a notice to a live musical performance. The same might be said for digitally streamed audio, although the more high-tech the distribution method the more likely that some effective form of notice could be coded into the software and hardware.”).

240. ALAN LATMAN & WILLIAM S. TAGER, 86TH CONG., LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS, STUDY NO. 25, at 135, 144 (Comm. Print 1958), <http://copyright.gov/history/studies/study25.pdf>.

241. Infringers are liable either for actual damages and profits or, if the work was registered at the time of infringement, statutory damages ranging from \$750 to \$30,000 per act of infringement (and up to \$150,000 per infringement if the

sense precisely because strict liability no longer makes sense. Liability, when a copyright holder has not claimed her work, is unreasonable.

Under my proposal, a copyright holder would be encouraged to publicly claim her work. To do so she would minimally include her name,<sup>242</sup> the claim of an exclusive right,<sup>243</sup> and the date of creation<sup>244</sup> in a place readily visible to give reasonable notice of the claim of copyright. An author's name on the work, while not always perfect information, is a good starting point for finding the current copyright holder.<sup>245</sup> If the author named on the work is no longer the current copyright holder, a user could locate the current holder by consulting the registry.<sup>246</sup> For this reason, the registry should be current and user-friendly.<sup>247</sup> The practical effect of omitting a copyright claim altogether, as the Copyright Office acknowledges, is that "often a search for the owner of copyright in the work is dead in its tracks as soon as it has begun."<sup>248</sup> My proposal couples public claiming on the work, with public claiming in a registry.

---

copyright owner proves the infringement was willful), "as the court considers just." 17 U.S.C. § 504 (2012).

242. Or pseudonym if there are privacy concerns.
243. This would include "Copyright," the abbreviation "Copr.," the letter "C" enclosed in a circle, "All rights reserved," "Derechos reservados," or comparable language.
244. The date of creation gives a potential user a starting point for evaluating the term of protection. The date of creation is relevant for calculating the term of protection for corporate works and works for hire. It is also helpful in evaluating the duration of copyright for an individual because it helps bracket the time during which the author lived.
245. Ginsburg, *supra* note 193, at 344 (observing "the author's name should normally furnish the best starting point for ascertaining copyright ownership").
246. Thus, even if the author is not the current copyright holder, she can often help point a user in the right direction. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 47 n.214 (2010) ("In a world of media conglomerates who purchase each other's divisions, spin off product lines, and liquidate in bankruptcy at a dizzying rate, an author is now far easier to track down than her assorted assignees, their successors, and their respective assignees. It also seems more likely that an author will have kept track of what publisher bought her publisher than that a publisher will know how to find all of the authors whose contracts it assumed when it purchased the company that purchased the company that initially held the authors' contracts.").
247. See Ginsburg, *supra* note 193, at 346. Technology can be harnessed to create a user-friendly registry and help copyright holders affix notice to their works, like with metadata. See, e.g., Elkin-Koren, *supra* note 136, at 1540; Hansen et al., *supra* note 132, at 51. While the registry could be operated by a private entity, private registry fragmentation could be a problem. Fragmented private registries are an inadequate solution to the search cost problem. Regardless of whether a public or private entity operates the registry, its utility is undermined if it is not current and easy to use.
248. 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 23.

## CLAIMING THE COPYRIGHT

There are a couple different options to encourage up-to-date registry information.<sup>249</sup> If the copyright holder transferred her interests, either through an *inter vivos* assignment or testamentary devise, her successors would need to update the registry. Failure to do so would allow a user to assert the innocent infringer defense. A defect in the registration could be cured at any time. But while the registration was defective, a user could assert the defense.<sup>250</sup> In addition, we could require that any assignment of a copyright be recorded to be valid against subsequent transferees. Or we could prohibit an assignee from bringing an action for infringement until the assignment is recorded and the registration is updated. And lastly we could require updating the registry and recording the assignment or else the copyright would revert to the grantor.<sup>251</sup> Regardless of the specific approach used, a formality requiring transfers of copyright to be timely recorded would comply with our obligations under the Berne Convention, as discussed further below.<sup>252</sup>

In addition to encouraging public claiming and the use of unclaimed works, I propose adding an innocent infringer defense to the defenses a user can raise. This defense would not replace the fair use defense.<sup>253</sup> Today, the fair use defense offers some protection for users, but it is often unpredictable.<sup>254</sup> Courts are far from consistent in their fair use outcomes.<sup>255</sup> And the Copyright Office is

---

249. Like with domain name registries, the copyright registry should be easy to update. See *IDRP FAQs for Domain Name Registrants*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (ICANN), <http://www.icann.org/en/resources/registrars/consensus-policies/wdrp/faqs> (requiring “domain name registrants to review the contact information associated with their domain names and make corrections when necessary”).

250. *Accord* Gervais & Renaud, *supra* note 11, at 1480 (agreeing with CPP proposal that copyright holders should be obliged to update the registry with information of assignments or death of the author, with failure to do so resulting in loss of registration benefits).

251. *Cf.* Ginsburg, *supra* note 193, at 345-46 (“Congress could provide a more radical solution to incentivize recordation: any exclusive rights that are transferred but not recorded within a stated period will revert to their grantors.”).

252. See Ginsburg, *supra* note 213, at 1621 (“The principal measure this Article proposes, conditioning validity of transfer of copyright on recordation of a note or memorandum of the transfer, is Berne-compatible because, while Berne protects the interests of successors in title, it does not regulate the means by which one becomes a successor in title.”); Ginsburg, *supra* note 193, at 345 (suggesting “a filing obligation that addresses *who* owns a copyright, rather than *whether* a copyright exists or may be enforced is not a prohibited ‘formality’ in the sense of that treaty”).

253. See 17 U.S.C. § 107 (2012) (codifying four fair use factors).

254. See, e.g., LESSIG, *supra* note 180, at 187; Litman, *supra* note 133, at 596.

unable to provide legal advice to individuals with specific questions about fair use.<sup>256</sup> Risk-averse users are often reluctant to rely on the unpredictable affirmative defense of fair use.<sup>257</sup> As a result, copyright today chills more than just unreasonable uses of works. Copyright chills fair uses as well.<sup>258</sup>

The innocent infringer defense would insulate an individual user of the work without divesting or invalidating the copyright in the work. The term “innocent infringer”<sup>259</sup> applies to a user of a work who cannot reasonably determine the copyright status of the work or from whom to seek permission. For works that are without a copyright claim or a current registration, the user would be “innocent.” As with the fair use defense, a user would carry the burden of proof on the innocent infringer defense. The user would have the burden to show either that the authorized copy of the work she used did not bear a copyright claim, or that the copyright registry information was not current at the time of use.<sup>260</sup> As noted above, the copyright holder would retain the au-

- 
255. But transformative uses tend to fare better in the fair use analysis. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 742 (2011) (“There is certainly a strikingly high—though less than universal—correlation between judicial findings regarding transformativeness and fair use outcomes.”).
256. See 37 C.F.R. § 201.2(a)(3) (2015) (“The Copyright Office, however, does not give specific legal advice on the rights of persons, whether in connection with particular uses of copyrighted works, cases of alleged foreign or domestic copyright infringement, contracts between authors and publishers, or other matters of a similar nature.”).
257. See, e.g., Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 870 (2010) (noting the problem with relying on fair use is the “after-the-fact determination of fair use, the uncertain application of it to many particular situations, plus the costs of defense if sued even where the defense would be upheld”).
258. See Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1288-91 (2008) (presenting a model of the private costs and benefits faced by would-be users of copyrighted materials and suggesting that would-be users are often deterred from engaging in conduct that likely falls within the ambit of fair use).
259. I acknowledge that the term “innocent” user does not connote a homogenous category, and therefore have further defined the term above the line. See LATMAN & TAGER, *supra* note 240, at 139.
260. If a work bears a copyright claim, and a search of the copyright registry reveals an author who is no longer alive or no longer the current holder, a user of that work should be empowered to assert an innocent infringer defense. I believe it is the responsibility of the author’s heirs or assigns to update the copyright registry. Failure to update the registry should authorize a user to assert an innocent infringer defense.

## CLAIMING THE COPYRIGHT

thority to prospectively claim the work, or to update the registry.<sup>261</sup> Once an omission was cured and the work is publicly claimed, a copyright holder would be able to enforce the copyright against future users, who could not invoke the defense.

Under my proposal, the innocent infringer defense has three components. First, a user would be insulated from statutory damages and attorneys' fees. Second, as a measure of damages, a court would be empowered to assess an amount equivalent to a fair and reasonable license fee. And third, a court would have discretion to issue an injunction on the condition that the copyright holder reimburses the innocent infringer's reasonable outlay of expenses. Actual damages would remain available for all copyrighted works.

This innocent infringer defense would ameliorate the chilling effect and risks associated with using unclaimed works. The first element of my proposal is that statutory damages and attorneys' fees would not be available against an innocent infringer.<sup>262</sup> A copyright holder should be entitled to recover provable actual damages,<sup>263</sup> but an innocent infringer should not face statutory damages or attorneys' fees. The presumption of harm for statutory damages is inapposite when faced with a user who is without notice of the copyright status and a copyright holder who has not publicly claimed her work. Additionally, the party alleging damages should bear the burden of proof. Here, the author is the least cost avoider and should bear the risk of loss. Requiring the least cost avoider to bear the burden of proof of harm fosters creative use of works, whereas the current presumption of harm and availability of statutory damages chill creative expression.<sup>264</sup>

The second dimension of the defense would authorize a reasonable license fee for use of the work. As a measure of damages, a court would be empowered to assess an amount equivalent to a fair and reasonable license fee. If at the time of the infringement, the work was unclaimed, a copyright holder's remedy could be limited to a fair and reasonable license fee, or no fee at all. The court could set the license fee on a case-by-case basis. Alternatively, guidelines could

---

261. I acknowledge that in some instances curative efforts may be easier for the registry than for notice on the work. *See, e.g., Charles Garnier, Paris v. Andin Int'l, Inc.*, 36 F.3d 1214, 1226-27 (1st Cir. 1994) (finding copyright holder's curative efforts insufficient when it did not add notice to all copies).

262. These remedies are already unavailable if the copyright holder failed to register her work before the infringement began.

263. Admittedly, actual damages are hard to prove. *See, e.g., Kent Sinclair, Jr., Comment, Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context*, 58 CAL. L. REV. 940, 964, 974 (1970).

264. *See, e.g., Ryan Andrews, Note, Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves As A Private Solution to the Orphan Works Problem and Why It Should Matter to Policy Makers*, 19 S. CAL. INTERDISC. L.J. 97, 98 (2009) ("The prospect of either high money damages or an injunction deters would-be users of orphan works from making productive use of them.").



set out reasonable license fees for different categories of works, and perhaps different categories of users, by either the Copyright Office or by a private collective rights organization. Regardless of who determines the license fee for unclaimed works, it should be a modest amount.<sup>265</sup> Works that are economically successful are unlikely to be unclaimed.<sup>266</sup> If the copyright holder wants more than modest license fee, she is incented to claim and register the work.

The third facet of the defense provides for injunctive relief, for which an innocent infringer could seek reimbursement from the copyright holder for her reasonable outlay of expenses.<sup>267</sup> A copyright holder could seek injunctive relief against an innocent infringer. But the court, in its discretion, could condition the grant of injunctive relief on the copyright holder reimbursing the infringer's reasonable costs associated with the use. If the user incurred substantial expenditures in connection with the production or performance of the copyrighted work, the court could award the copyright holder only a reasonable license fee, rather than injunctive relief.<sup>268</sup> This proposal balances concerns about copyright trolls and interests of authors whose works are appropriated by commercial entities.

Offering courts discretion to balance the concerns of authors and users is nothing new. It was once thought that the discretion of the courts to assess damages was sufficient to insulate innocent infringers.<sup>269</sup> It was thought that affording courts flexibility in granting remedies, rather than crafting a single legislative shield for an infinite variety of factual situations, would better solve the problems raised by innocent infringement. Unfortunately, history shows that this remedial discretion alone has been insufficient to forestall the problems of notice failure. My proposal offers more robust protection for users of unclaimed works, without divesting and invalidating the copyright. A copyright holder could claim her work at any time, and then a copyright holder's full panoply of rights and remedies would be available.

There are a number of advantages that flow from this proposal for new-style formalities,<sup>270</sup> which does not condition copyright protection on registra-

---

265. Randal C. Picker, *Private Digital Libraries and Orphan Works*, 27 BERKELEY TECH. L.J. 1259, 1283 (2012) ("We should expect royalty rates for orphan use to be modest.").

266. *Id.* at 1261.

267. *Cf.* Gervais & Renaud, *supra* note 11, at 1474 ("Injunctive relief could be limited as a matter of equity in cases where a rights holder has failed to communicate to the public that her work is protected when circumstances do not adequately explain or excuse the omission.").

268. In such instances, the copyright holder would not be entitled to injunctive relief and would be eligible only for a reasonable license fee.

269. LATMAN & TAGER, *supra* note 240, at 156.

270. *See* Gervais & Renaud, *supra* note 11, at 1479 ("[A] relaxed notice requirement might conceivably be reconciled with Berne if it can be characterized as something other than a formality."); Sprigman, *supra* note 33, at 556 ("Although there are

## CLAIMING THE COPYRIGHT

tion, reduces the consequences of infringement for unclaimed works, and yet still allows for redress for the infringement of unclaimed works. In practical terms, my proposal shifts the burden to copyright holders of unclaimed works. Major publishers and distributors of original works of authorship already claim their works. Open any bestselling book, watch the credits in any major motion picture, and review the jacket on any popular music album, and you will see a copyright notice claiming an interest in the work. Although operating in formality-optional systems, foreign and domestic purveyors of copyrighted materials often opt to publicly claim their works.<sup>271</sup> These copyright holders claim, not because the law requires them to, but because it is in their economic interest. Copyright holders of commercially-valuable works recognize the benefits of claiming. My proposal would have little effect on these entities. The major thrust of my proposal is felt on orphan works.

Unlike prior legislative attempts at a solution to orphan works, I would not put a double burden on the user. A user should not have to bear the cost of a reasonably diligent search and the cost of a reasonable license fee. The Copyright Office recommended that Congress limit remedies as a way to manage the orphan works problem.<sup>272</sup> But this proposed limit on remedies would be only for users who can document a “reasonably diligent search”<sup>273</sup>—a vague term. Searches can be hard and expensive,<sup>274</sup> and the prospect of a search can be enough to dissuade use of the work.<sup>275</sup> Users who have engaged in such searches report that they are onerous and cost prohibitive.<sup>276</sup>

The burden of proving a reasonably diligent search is too high to put on a user when the copyright holder did not publicly claim her work. Reasonably diligent searching favors large, commercial entities over non-profit and indi-

---

arguments both ways, I believe that the better reading of Berne would permit new-style formalities,” which are “voluntary formalities backed with default licenses.”).

271. Cf. Sorkin, *supra* note 34, at 592 (“[A]lthough European copyright laws are largely formality-free, businesses involved with copyright use systems of registration and recordation [ ] somewhat similar to those found in the United States.”).
272. See ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44, at 1; 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 115-21.
273. 2006 REPORT ON ORPHAN WORKS, *supra* note 46, at 107.
274. *Id.* at 32 (“[C]onducting searches can prove to be costly, time-consuming endeavors. The comments are littered with examples of situations where the trail ran cold, turned into a dead end, or simply involved more time and money than the user was willing to spend.”).
275. *Id.* (“The mere perception that a search will become long and arduous is itself enough to thwart some potential uses” because, for example, “in academic, scholarly, and other non-commercial uses, any search costs immediately outweigh the expected monetary return of the use.”).
276. See Hansen et al., *supra* note 132, at 38 (“Library organizations have criticized the onerous and expensive per-work search burden it places on cultural institutions.”).

vidual users.<sup>277</sup> Rather than putting the onus on the user, my proposal puts the onus on the copyright holder to claim her work. The cost of searching for a copyright holder can be prohibitive, especially when added to the cost of negotiating a fee once the holder is located.<sup>278</sup> Rather than layering these costs on top of a subjective, case-by-case inquiry into the reasonableness and diligence of each search, my proposal would protect users when the work is unclaimed. Requiring a reasonably diligent search does not meaningfully resolve the orphan works problem. My proposal offers an objective standard for determining when liability protection applies.

Using an objective criterion for an innocent infringer defense leads to more predictability. My proposal would facilitate use of unclaimed works by reducing the risk of using these works. And if orphan works can be used with limited risk, then the problem of unknown owners is largely solved.<sup>279</sup> Today, ownership uncertainty plus the high risks and costs cause users to avoid unclaimed works.<sup>280</sup> A reasonably diligent search standard does not ameliorate this. The uncertainty of assessing *ex ante* whether one's search is reasonably diligent risks producing the same chilling avoidance of unclaimed work that we see in the current system. Users will remain unsure if they are shielded from liability.

Under my proposal, the risk exposure for users of unclaimed works is low. Statutory damages and attorneys' fees would be unavailable, injunctive relief could involve reimbursement of a user's reasonable outlay, and a plaintiff likely would be limited to a modest license fee, if any. And for these reasons, there is greater incentive to privately negotiate rather than litigate a copyright infringement case for an unclaimed work.

Claiming also helps to filter valuable works from the dark matter of copyright.<sup>281</sup> Claiming is a rough proxy for financially-motivated authors.<sup>282</sup> My

---

277. See Walker, *supra* note 158, at 986-87.

278. See Letter from Tim Brooks to Jule L. Sigall, *supra* note 156, at 2 (“[I]t is no exaggeration to say that there has been a chilling effect on the production of public domain reissues because it is prohibitively difficult to establish what is or is not in the public domain”).

279. See Sage, *supra* note 54, at 299 (“From a social wealth-maximization viewpoint, the unavailability [of copyright holders] would not be problematic if the potential licensees proceeded to use the orphaned works without permission.”); Valkonen & White, *supra* note 144, at 399 (“[O]n the access-cost side, the elimination of the barriers to use of orphan works can have a substantial output-enhancing impact.”).

280. ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 44, at 2 (“While some users certainly may have viable defenses on fair use or other grounds, many will choose to forego use of the work entirely rather than risk the prospect of expensive litigation.”).

281. See, e.g., Samuelson et al., *supra* note 37, at 1200-01 (“Registration, by contrast, would signal to the world that copyright incentives are important to the owner of rights in a particular work and would help potential reusers and follow-on

## CLAIMING THE COPYRIGHT

proposal facilitates access to and use of works that the copyright holder did not bother to claim. The failure to claim a work signals that the work is of small enough value to the copyright holder that a reasonable license would be an appropriate compensation. For orphan works, a reasonable license would facilitate the economic interests of the copyright holders, because otherwise the works are not exploited. A reasonable license is better than nothing. And if the copyright holder disagrees, she is incited to claim her work. In other words, if the copyright holder wanted more than a reasonable license fee, then she would be encouraged to claim the work.

This proposal preserves a copyright holder's ability to choose between property rules and liability rules.<sup>283</sup> A copyright holder would decide whether to publicly claim the work or not. Generally, applying a liability rule, rather than a property rule, to unclaimed works would encourage more use of the works.<sup>284</sup> But rather than categorically shift from a property rule to a liability rule, like a compulsory license scheme would do, under my proposal an author could opt out of the liability rule by claiming her work. My proposal would give control to the copyright holder. If the copyright holder finds a reasonable license acceptable, she can do nothing. But if she wants greater rents, she is empowered to claim the work and get full property rule protections.

This proposal also complies with our international obligations under the Berne Convention.<sup>285</sup> The Berne Convention prohibits formalities that precondition the existence or exercise of copyright. While the Berne Convention

---

creators to locate the person who owns the rights and possibly the conditions under which licenses might be available.”).

282. Olliar et al., *supra* note 1, at 2241 (“What the copyright system does, however, is mainly provide a market entitlement to creators that would allow them to exclude non-payers from accessing their works, and thus enhances financially motivated creators’ ability to appropriate the returns. Financially motivated creators are expected to use the copyright system if the additional benefits that it secures to them above and beyond all other background incentives outweighs their private cost of using it. Registration records thus likely provide a proxy for the types of creators who, and works that, benefit the most financially from the copyright system.”).
283. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
284. See Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 785 (2007); Christopher Jon Sprigman, *Berne’s Vanishing Ban on Formalities*, 28 BERKELEY TECH. L.J. 1565, 1568 (2013).
285. See Gervais & Renaud, *supra* note 11, at 1479-80 (“By aiming only to reduce the consequences of infringement for unregistered works, and not conditioning copyright protection on registration, this proposal could be reconciled with Berne, provided that the creators of unregistered works are not deprived of the ‘enjoyment and exercise’ of their rights. Provisions allowing some redress for the infringement of unregistered works under qualifying circumstances may satisfy this standard.”).

prohibits copyright-specific formalities, it does not prohibit formalities like rules of procedure or evidence.<sup>286</sup> Nor does it prohibit assessing fines for failing to deposit a copy of a work with the Copyright Office.<sup>287</sup> The Berne Convention also accepts that transfers of a copyright interest must be in writing.<sup>288</sup> Thus the Berne Convention accepts some formalities. Here, my proposal to require a copyright holder to claim her work, lest the work become orphaned, would not run afoul of Berne's prohibition on formalities.<sup>289</sup> Public claiming is not a precondition on the copyright.

Moreover, my proposal to retain the availability of actual damages and injunctive relief is important in the Berne analysis.<sup>290</sup> The alternative—to categorically eliminate actual damages or injunctive relief—would undermine the spirit, if not the letter of the no-formality rule.<sup>291</sup> But conditioning certain remedies, like statutory damages and attorneys' fees, on formalities, as we do now, com-

---

286. See SAM RICKETSON & JANE C. GINSBURG, 1 INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 325-26 (2d ed. 2006).

287. Ginsburg, *supra* note 193, at 317 ("Berne does not prevent member States from requiring authors to subsidize a member State's national library by in effect taxing the local publication of foreign authors' works; thus, a member State may demand deposit and may impose fines for failure to comply, so long as any sanctions do not compromise the existence or enforceability of the copyright.").

288. 17 U.S.C. § 204(a) (2012); Berne Convention, art. 2(6). See also Gervais & Renaud, *supra* note 11, at 1472-73 (noting that the condition that a transfer be in writing is "Berne-permissible").

289. See Response by the Carnegie Mellon Univ. Libraries to the Notice of Inquiry Concerning Orphan Works, Comment OW0537, at 2 (Mar. 22, 2005), <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf> ("Like Stanford, Carnegie Mellon University Libraries does not believe that requiring copyright holders to file a notice with the Copyright Office to exclude a work from the designation of orphan status conflicts with the Berne Convention's prohibition against formalities.").

290. See Ginsburg, *supra* note 213, at 1593 ("Berne's prohibition on formalities requires that the basic copyright remedies, such as injunctive relief and actual damages, remain available to foreign authors who have not locally registered their works or undertaken other locally-imposed declaratory measures."). See also Gervais & Renaud, *supra* note 11, at 1474 ("While this [article 44.1 of the TRIPS Agreement] requires an injunctive remedy to be *available* in all cases (in the sense that the court must have the authority to impose it), it does not disallow the application of equitable considerations in particular cases.").

291. Ginsburg, *supra* note 213, at 1599-600 ("We have posited that member states may not condition the basic remedy of injunctions (nor, for that matter, actual damages) on compliance with formalities because such a limitation would effectively eviscerate the no-formalities rule: a right cannot be 'exercised' if it cannot be enforced.").

#### CLAIMING THE COPYRIGHT

plies with the Berne Convention.<sup>292</sup> I thus argue that my proposal does not violate the Berne Convention.

I acknowledge that reasonable minds may differ on my proposal's compliance with the Berne Convention. Scholars and policymakers have often differed on matters of Berne-compliance. For example, copyright scholars disagree on the permissibility of providing broader fair use protection for works that are not registered.<sup>293</sup> And members of Congress, in the late 1980s disagreed about whether the formality requirement that a work be registered as a precondition to filing an infringement suit violated Berne.<sup>294</sup> On balance, the concern about violating the Berne Convention should not be a sockdolager to the formality discussion.

#### CONCLUSION

A copyright holder should claim her copyright. And if she does not, users should have some comfort in knowing they can use the work. Claiming is part

---

292. *Id.* at 1597-98 (“In general, the argument holds that remedies that exceed the protections mandated by international instruments are not subject to the Berne minima no-formalities rule. So long as the member state requires its own authors to comply with any declaratory obligations, then imposing the same obligations on foreign authors remains consistent with the rule of national treatment. Berne neither addresses nor, arguably, assumes availability of statutory damages and attorney’s fees; TRIPS includes these measures among its specified remedies, but it does not require member states to provide them. It might follow that conditioning the availability (to local and foreign authors alike) of these remedies on some act of public filing is both Berne- and TRIPS-compatible.”). *But see id.* at 1600 (“The Berne-plus remedies argument thus rests on a fundamental fallacy. Article 5(2) does not distinguish between traditional or basic remedies and additional, unusual, or new remedies: all remedies come within ‘the means of redress.’ Under this reading, there is no such thing as a Berne-plus remedy, and therefore no basis to impose formalities on the availability of some remedies but not others.”).

293. *Compare* Samuelson et al., *supra* note 37, at 1200 (proposing that “[u]nregistered works would still be protected by copyright law against exact or near-exact copying that would cause commercial harm, but fair uses might well be broader as to such works.”), *with* Ginsburg, *supra* note 213, at 1604 n.79 (concluding that the CPP “proposal violates Berne article 5(2) because it makes the scope of copyright dependent on registration: failure to comply with the registration formality means that the work will be subject to greater incursions on exclusive rights than registered works would be”).

294. *Compare* S. REP. No. 100-352, at 26 (1988) (“The committee concludes that the recordation requirement of section 205(d), at least as applied to foreign works originating in Berne countries, is incompatible with the Berne prohibition against formalities as preconditions for the ‘enjoyment and exercise’ of copyright.”), *with* H.R. REP. No. 100-609, at 43-44 (1988) (“The [pre-suit recordation requirement] is Berne compatible because the failure to record does not lead to loss of the copyright—it merely regulates who may sue.”).

of the copyright bargain. Public claiming signals ownership, filters out commercially-dead works, and facilitates licensing.

It is time to continue the conversation on how to thoughtfully reform copyright for the modern digital age. As the current Register of Copyrights noted, “copyright law is over-stressed and requires some attention.”<sup>295</sup> Modern copyright’s stress is exacerbated because of the policy choices to make public claiming optional. Reform may face some practical hurdles, but that is no reason to mute the conversation on what type of reform would be desirable.

Arguably Berne-compliant, my solution tips the balance and encourages use of unclaimed works until the copyright holder elects to publicly claim and register her work. Copyright holders would be forced to internalize the costs of notice failure. Between a user and the copyright holder, the copyright holder is the least cost avoider of the harms of inadequate claiming.<sup>296</sup> A copyright holder can opt-in at any time and cure a prior omission of notice and registration. This proposal shifts the externalities of notice failure to the copyright holder, rather than to the public. Encouraging a copyright holder to claim her work improves the information in the copyright registry, decreases the transaction costs of finding copyright holders, promotes licensing of claimed works, reduces the risks associated with using unclaimed works, and functionally replenishes public domain.

Rather than eliminating formalities, which has created notice failure and unacceptable deadweight costs, perhaps a compromise could be reached. It is unclear why it must be all or nothing. Why must the law require onerous claiming formalities or no claiming at all? Why must the law offer complete copyright protection or no protection at all? A compromise is appropriate here to balance the competing interests and the instrumental goals of copyright. The proposal outlined above balances these interests.

Admittedly, my proposal is not a panacea that cures all that ails copyright. Claiming will not fix the clearance culture or prevent the doctrinal feedback loop that unnecessary licensing creates. Claiming does not resolve, *ex ante*, if non-literal copying is infringing. Claiming does not clarify the uncertainty in evaluating the substantial similarity of works. This proposal, while not a perfect solution, is a step in the right direction.<sup>297</sup> The story of U.S. copyright formalities is a story of adaptability and change. And we are ready for the next chapter in the story.

---

295. Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1415 (2013); *see also* Samuelson et al., *supra* note 37, at 1177 (“Copyright law is, for many reasons, under considerable stress today.”).

296. *See* LATMAN & TAGER, *supra* note 240, at 157 (observing that where notice is omitted, “the copyright owners is better equipped than the infringer to prevent the infringement”).

297. *See* PATRY, *supra* note 141, at 209 (“Reestablishing formalities is not a complete solution to the changes in the world of producing creative works, but it would at least significantly winnow down the number of problems.”).