

THE CHRONICLE

of Higher Education

The Chronicle Review

[Home](#) [Opinion & Ideas](#) [The Chronicle Review](#)



October 9, 2011

How to Reform Copyright

By Lewis Hyde

James Madison presumably wrote the clause in the Constitution that allows Congress to give copyrights to authors, but even Madison had his reservation. The founding fathers considered copyright a "monopoly privilege" and, as Madison later wrote, "Monopolies ... ought to be granted with caution" Two concerns lay behind that wariness. For the founders, both democratic self-governance and the conversation of creative communities demanded very low barriers to the circulation of knowledge and, therefore, strict restraint of monopoly privileges. Thus does the Constitution stipulate that copyrights be granted only for "limited times." "A temporary monopoly ... ought to be temporary," Madison declared. "Perpetual monopolies of every sort are forbidden ... by the genius of free Governments."

All that has changed, of course, the term of copyright now being statistically almost indistinguishable from a perpetual grant. How might that be corrected? How might we return to something more in line with the founders' caution and closer to their vision of both democracy and creativity?

Consider one proposal.

Noah Webster's first "American" dictionary bore the following notice on the back of the title page:

DISTRICT OF CONNECTICUT, ss.

Be it remembered, That on the fourteenth day of April, in the fifty-second year of the Independence of the United States of America, Noah Webster, of the said District, hath deposited in this office the title of a Book, the right whereof he claims as Author, in the words following, to wit:

"An American dictionary of the English language. ... By Noah Webster, LL.D. In two volumes."

In conformity to the act of Congress of the United States, entitled, "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. ..."

CHAS. A. INGERSOLL, Clerk of the District of Connecticut.

April 14th, 1828.

Webster was complying with one of the "formalities" of traditional copyright, the steps authors were required to take in order to secure their privileges, to wit, registering the title with a federal district court, depositing a copy with the secretary of state (later with the Library of Congress), and publishing a notice, not only in the book itself but "in one or more of the newspapers printed in the United

States, for the space of four weeks." In addition, once the initial copyright term expired, authors were required to register a second time if they wanted a renewal. Those demands have varied over time (the call for newspaper notice was modified in 1831 and dropped in 1909, for example), but until the Copyright Act of 1976, copyrights were affirmed and made secure through formalities such as these. Said conversely, for most of American history, a failure to comply with the formalities could void a copyright (or prevent it from arising in the first place), whereupon the work passed into the public domain.

Formalities are a useful part of any copyright regime. They help create efficient markets, for one thing. For users seeking licenses, they indicate who owns what and for how long. For owners whose work may be infringed, they give clear title and a way to pursue damages. As with real property, so with "intellectual property": Public records reduce transaction costs and facilitate trade.

Formalities also make it less likely that works will become orphaned, orphan works being those still under copyright but whose owners cannot be found. Orphan works are a problem for owners and users alike. A striking example on the owners' side can be found on the Web site of the Harry Fox Agency, the primary licensing agent for U.S. music publishers. On a page asking for help locating rights holders, the agency lists music publishers it has lost track of, an inventory running from Aardvark-TV to Zo's Muzik. All those multitudes—the list runs to almost 5,000 companies!—are urged to call home: Harry Fox "may be holding royalties" for them.

On the user side, orphans are problematic because work for which rights holders can't be found usually can't be used, at least not without the threat of damages should the owner later appear. When Carnegie Mellon University tried to digitize a collection of out-of-print books, one of every five turned out to be orphaned. When Cornell University tried to post a collection of agricultural monographs online, half were orphans. The United States Holocaust Memorial Museum owns millions of pages of archival documents that it can neither publish nor digitize. Each of those cases not only represents a loss of potential markets but, more broadly, indicates the degree to which orphan works impede the very constitutional purpose of copyright: "to promote the progress of science."

Formalities are a boon to the market side of the copyright bargain, then, but they benefit the commons side as well. Public records indicate when ownership expires, for one thing, but they do more than that. Formalities help enlarge the commons as soon as new work comes into being. A registration requirement, after all, asks

creators to make a simple judgment: Does this work have commercial value worthy of capture? In many cases, the answer is no, whereupon the work doesn't get registered and immediately enters the public domain. According to one study, of the approximately 15,000 maps, charts, and books published during the decade 1790-1800, only 779 were registered. Everything else—sermons, political pamphlets, newspapers, and so forth—passed to the public immediately.

Data for later periods in U.S. history are harder to come by, but it appears that of all works published in the 19th century, only about half were registered. No matter the exact figure, the point is simply that by asking authors to assess the value of their work early on, a registration formality makes it more likely that everyone gets unimpeded access to work that, while judged to have little commercial value, may nonetheless have significant cultural value (for history, science, politics, religion, and so forth).

Focusing on the benefits of an initial registration requirement tells only one part of the story. Whenever copyright offers a second term, the renewal formality has even stronger commons-enhancing effects. After all, the commercial value of most creative work is exhausted fairly early. A study done of copyrights registered in 1934 found, for example, that half of them were worthless after 10 years, 90 percent after 43 years, and 99 percent after 65 years. It should consequently come as no surprise that many rights holders did not renew after the initial 28-year term. The numbers vary year to year and by genre (music rights being renewed more often than books, for example), but roughly speaking, for most of the 20th century, when owners were given a right to renew, only 15 percent chose to do so. As with initial registration, a renewal formality serves as a filter, releasing commercially dead work to the public without depriving authors of a longer term if they wish to have it. Put another way, formalities effectively shortened the term of the copyright grant during most of the last century; 85 percent of copyrights lasted only 28 years.

Given the clear value of formalities, why have we dispensed with them? The answer has to do with international trade. There has always been significant variation from one nation to another when it comes to the steps that authors must take to secure a copyright. A novelist lucky enough to have her work appear in a dozen foreign languages might have to seek out a dozen foreign-rights experts and file for protection under a dozen different procedures. To mitigate those burdens, the primary international accord governing copyright, the Berne Convention, declares that "the enjoyment and

the exercise of [copyrights] shall not be subject to any formality." It should be added that the difficulties of multijurisdictional authorship are not the only source of Berne's antipathy toward formalities: The agreement originated in continental Europe, where copyright has often been viewed as arising more from natural rights than from positive law. Where natural law is the point of departure, formalities are entirely out of place: No author should need to ask the state for rights that nature itself has bestowed.

The Berne Convention was first put into force in 1886. The United States did not consent to its terms until 1988, however, in large part because U.S. law historically had a statutory or utilitarian basis and therefore did indeed find it proper to insist upon formalities. Beginning in 1976, however, the formalities began to drop away, and now they have almost entirely disappeared. While it is true that an author may still register a copyright and, by doing so, be better positioned in the event of litigation, registration is voluntary, not required. Nor do we anymore have a renewal requirement, having abandoned the practice of dividing the full term of copyright into several shorter terms.

Gone, then, are the market efficiencies that formalities once brought to users and owners alike, and gone are the benefits they brought to the commons. Registration and renewal long helped divide the commercial from the noncommercial and move the latter into the public domain. We now lack any mandated way to prompt that useful sorting. Default copyright presently encloses everything as soon as it is "fixed in any tangible medium," even works that authors themselves do not care to own or to protect.

What is to be done? Is there any way to bring back formalities, the traditional stints that so usefully focused the market and enriched the commons for almost two hundred years?

Yes, there is, and at two different levels—nationally and internationally. First of all, it isn't actually the case that the Berne Convention forbids all formalities: It does so only in regard to authors publishing in foreign lands. Authors publishing "in the country of origin" may be "governed by domestic law." Each of Berne's signatory nations is entirely free to ask its own citizens to comply with formalities. Christopher Jon Sprigman, a professor of law at the University of Virginia, has suggested a way for the United States to do that so as to capture the benefits of the old formalities without forcing those who fail to comply with them to lose their copyrights.

In "Reform(aliz)ing Copyright," a 2004 essay in the *Stanford Law*

Review, Sprigman proposes "new-style formalities" in two parts. To begin with, registration would continue to be optional, but authors who declined to register their work would not enjoy the full allowance of exclusive rights. Their work would instead be subject to a "default license" under which anyone who made use of the work would be liable for no more than a modest royalty defined by statute. If you published my work without my permission, I could come after you for payment, but the payment would be nominal, and no other kind of damages would be available to me.

Payment should be not only nominal but actually lower than what the market would be likely to bear. For authors with commercially valuable work, that would not be such a good deal, of course, but that is exactly the point of the default license: It is there to encourage those who care about marketing their work to go ahead and register it and thereby receive the full range of exclusive rights. Unregistered work, for all intents and purposes, enters the public domain in that anyone may make use of it knowing that there is very little risk involved.

Sprigman would also have us revive the renewal requirement. As of 1998, the term of copyright runs an undivided lifetime plus 70 years for individual authors and 95 years after publication for corporate owners. Under new-style formalities, the terms could be divided into two or more shorter spans, with the full term always available to those who renew.

How long should the shorter spans be? Happily, that is a question research can probably answer. The value of most copyrights depreciates rather quickly, as indicated above in the study of works registered in 1934. If that study were our guide, we might suggest three terms for copyright and ask for renewal twice, once after 10 years (at which point 50 percent of work is commercially dead and, if not renewed, would enter the public domain) and again after 43 years (moving an additional 40 percent into the public domain). Perhaps a third renewal at 65 years would be useful (at that point only 1 percent of the original cohort has any value), but for now we can set aside the problem of how best to time the intervals. For now the point is to fit the law to the actual facts of commerce to better balance private incentive and public access, the contending goods that copyright is meant to serve. Periodic renewals do nothing to dilute the incentive (the full term is always available), but they do a great deal to improve access. Renewal requirements help square copyright's monopoly privileges with the First Amendment.

Changing domestic law to bring back formalities is not the only way to improve on the current state of affairs, nor is it the best. After all,

Berne allows each nation to impose formalities on its own but not on foreign authors, and any nation doing so would thus give foreign authors a competitive advantage. It would be much better, then, to revise Berne itself to allow for formalities and to subject all authors to similar rules. There are complexities to such a change, to be sure, but in Sprigman's view "relatively small changes to Berne" would, at the end of the day, let each nation benefit from formalities without bringing back the costs and pitfalls of earlier multijurisdictional publishing.

In premodern England, villagers used to annually "beat the bounds" of the commons. Armed with axes, mattocks, and crowbars, they would perambulate the public ways and common fields, demolishing any encroaching hedges, fences, stiles, and buildings that had been erected without permission. To bring formalities back to copyright would nicely beat the bounds of the cultural commons. I doubt it was apparent in the late 1970s that abandoning formalities would amount to a taking from the commons, but that is what it has turned out to be. To restate but one piece of what has already been said: In the old days, with a renewal requirement, 85 percent of all work passed into the public domain after 28 years; now, without it, that sizable portion remains enclosed (uselessly so) for another generation or more.

The last time that Congress added years to the term of copyright, a group of economists, both liberal and conservative (including five Nobel laureates), filed a brief with the U.S. Supreme Court arguing that the extension made no economic sense. (Milton Friedman supposedly asked that the brief contain the phrase "no brainer.") It is patently clear to almost everyone that the term of copyright is now senselessly long. At the same time, it is almost certainly politically impossible to retreat from it; the few who benefit are too well connected, and the many who do not are too thinly spread. To my mind, the greatest appeal of new-style formalities, then, is that they would leave the nominal term untouched (and accord it to all who care) while greatly reducing the effective term. Sprigman calculates that during the 20th century, when the vast majority of rights holders did not avail themselves of the renewal option, the effective term of copyright was only 32 years. That's just four years longer than the nominal term the founders offered in 1790.

Simply put, by reducing the de facto reach of monopoly privileges, formalities enrich the cultural commons. If they also remind us that copyrights are creatures of positive law, not of natural right, and thus also push back against what might be called "conceptual enclosure," so much the better.