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Formalities and Tiered Copyright Protection

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In [my last IP Issues entry](#), I discussed the advantages of reinstating formalities as prerequisites to copyright protection. In this entry, I will suggest one way in which this reinstatement might take place.

For most of modern copyright law's existence, a work of expression received copyright protection only if the author complied with several formalities, such as registering the work with a government agency and placing a copyright notice on each copy of the work (the ubiquitous C-in-a-circle).

These formalities served two functions. The first is what I call the "threshold" function: They gave the author a chance to demonstrate his or her desire for copyright protection. The rationale was that if an author could not be bothered to expend the minimal effort to register a work or include a notice on published copies, then he or she was clearly uninterested in obtaining legal protection. Non-compliant works would simply enter the public domain.

The second function of formalities is what I call the "informational" function: Formalities provided useful information about the work. The registration formality made it easier for potential licensees to track down the owner of the copyright and offer a licensing deal. The notice formality likewise provided useful ownership information, and it also gave the public some information about how long the copyright would last and warned users that the work was protected.

One problem with formalities was that these two functions were conflated, despite their different goals. In theory, the threshold function should have been extremely easy for an author to fulfill, because all it called for was some unequivocal declaration of interest in copyright protection. But the informational function called for more; its goals would not be met without the inclusion of a notice on every copy and the provision of accurate and comprehensive data about who owned the copyright. Courts that were focused on the informational function would therefore be exacting about compliance, which meant that authors who were interested only in the threshold function (*i.e.*, using copyright to protect their works) would find themselves without protection because of a failure to comply with the greater demands of the informational function (*e.g.*, including a copyright notice on each and every published copy).

Therefore, if we are to reinstate formalities, we should do so with an eye toward decoupling these functions, to the extent possible. One way to do so would be to establish tiers of copyright protection.

Consider, for example, a work that fails to comply with any formality. The law might deny it protection entirely, as used to be the case. After all, the author of such a work is apparently uninterested in exploiting the commercial advantages that copyright has to offer. But the law might instead take a lesson from data that suggest that [attribution \(i.e., credit for being the author\) is what matters most to the noncommercial author](#). So instead of working a forfeiture, the law might simply limit the noncompliant work to some sort of attribution right; the only available remedy for infringement would be an injunction ordering the defendant to give proper attribution or hyperlink to the originating source.

The next tier might comprise works that comply with some low-cost, author-friendly threshold formality. These works too would get a limited attribution remedy, but the law might also grant them protection against direct, pay-per-copy or pay-per-performance commercial exploitation, with injunctive relief or actual damages available against the infringer.

Finally, the highest tier would be reserved for those who fully comply with information-providing formalities: registration (both for the work's creation and for subsequent transfers), and notice on all available copies and performances. That would get them the full lineup of copyright rights that exist today, including statutory damages and preliminary and permanent injunctions.

This proposal raises a number of issues. For example, would this kind of system exacerbate the existing power imbalance between well-informed big media companies and small-time authors who are less aware of these sorts of legal intricacies? And what about international treaty obligations, which are unfriendly to formalities in any form? Those seeking answers to these questions, however, will have to wait until a future entry in IP Issues.

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