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Who's Afraid of the Berne Convention?

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A few months ago, I wrote an essay for this series that argued for reinstatement of formalities as a prerequisite to copyright protection. I left unaddressed one of the main objections to such a system: the fact that international law is unfriendly to formalities. I address that objection here.

The most pertinent international law is the Berne Convention, a multilateral treaty that dates to the 1800s. Since 1908, Article 5(2) of the treaty has prevented any signatory nation from requiring formalities such as registration and notice as a condition of copyright protection. It was the United States' accession to the Berne Convention in 1989 that precipitated the removal of formalities as copyright prerequisites in U.S. law. And if the United States fails to comply with Berne, it can suffer serious trade sanctions under the World Trade Organization's dispute resolution system.

Yet the Berne Convention may not be the obstacle it seems. The United States and its copyright industries seem to have no problem flouting Berne when doing so suits their purposes. Two examples bear this out. First, Article 6*bis* of the treaty requires signatory nations to protect authors' "moral rights." This means that even after an author sells his or her "economic rights" to a publisher – *i.e.*, the right to copy the work, perform it, etc. – he or she still retains the power to demand attribution as the author and to prevent prejudicial modification of the work. Moral rights play a key role in much continental European copyright law, but U.S. law barely acknowledges them; it relies instead on a hodgepodge of statutes that do little to protect the moral interests of the vast majority of authors.

Second, although U.S. copyright law no longer requires compliance with formalities like registration, it grants significant benefits to those who do register their works. Foremost among these is the availability of "statutory damages" for any post-registration infringement. Under the statutory damages scheme, a copyright owner can receive up to $150,000 for each work infringed, even if he or she can demonstrate no actual harm. (Thus the music industry can sue a single file-sharer for hundreds of millions of dollars.) Yet requiring registration as a precondition to receiving statutory damages arguably violates both Berne and the WIPO Copyright Treaty, to which the United States is also a signatory and which is even more demanding when it comes to damages and other infringement remedies.

Even if these examples are not convincing, and the Berne Convention remains a real obstacle to reform of U.S. law, why not reinstate formalities by changing Berne? If formalities are good policy in the United States, they are good policy abroad – particularly given that the Internet makes possible an international, universally accessible copyright registry. As for feasibility, the United States has no problem throwing its weight around in international intellectual property negotiations (including pressuring other countries to make the unique American statutory damages approach into a global standard). And if rights of attribution were to be tied to a formalities regime, as I suggest they should be, then the United States would have a valuable bargaining chip to offer its European trading partners: a true incorporation of moral rights into U.S. law, rather than the lip service the concept currently receives.

In short, our international treaty obligations are important, but they should not stop us from considering and promoting much-needed reform of our domestic copyright system.

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