Copyright Formalities: Lessons from Real Property
Why Formalities?

- Costs Incurred: Delay, Inconvenience, Error
- Who Benefits?
  - Parties to the Transaction
  - Third Parties
Contracts and Wills: Benefits to Parties to the Transaction

- Effectuating Intent
  - Assure Understanding of Significance
  - Protect Against Fraud and Forgery
- Providing Evidence
  - Guard against Dim Memories
  - Reduce Litigation Costs
- No Externalities: Same Parties Bear Costs and Benefits
Real Property (and Copyright?): Benefits to Third Parties

- Two Functions:
  - Notice
  - Sorting
- Beneficiaries
  - Non-Parties Who Avoid Transaction Costs
Real Property: The Notice Function

- Difficulty of Assessing Ownership
- Possession Insufficient
- Operation of Recording System
Notice v. Certificate of Title

- Future Costs Saved
  - Certificate Would Avoid Search Costs on Each Transfer
- Present Costs Incurred
  - Certificate Requires Before-the-Fact Adjudication
Balancing

- How Significant are Recording Costs
  - Short-Term Leases

- What Costs are Avoided by Requiring Recording?
Real Property: The Sorting Function

- Recording Sorts as it Provides Notice
- With Inefficient Interests, Sorting Predominates
  - Example: periodic re-recording of possibilities of reverter
  - Owners who attach significant value will re-record; others won’t, causing interest to disappear
Lessons for Copyright: Notice

1. Time Matters: Longer Copyright Period Suggests More Formalities
2. Notice Is More Efficient than Substantive Examination
3. Designing an Effective Notice System Will Be More Challenging in Copyright
4. Even if Notice System is Well-Designed, it May not be as Effective in Avoiding Inefficient Expenditures
Lesson I: Time Matters

- Costs are the Same Regardless of Copyright Period
- Benefits of Notice Increase as the Period Increases
  - Greater Certainty for Potential Users
  - Greater Certainty in Subsequent Litigation
Lesson 2: Minimize Cost of Compliance

- Real Property: No Examination of Substantive Rights
- Why Not the Patent Model?
  - Is the dispute over the claimant’s right or the actions of the supposed infringer?
Lesson 3: Designing Formalities to Avoid Wasted Investment Presents a Challenge

- Importance of Notice
- Real Property: Recording Serves Notice Function
- Copyright: Recording or Registration Less Useful
- Other Mechanisms for Providing Notice
Lesson 4: Context Matters

- Real Property: Prospective Purchase Provides Discrete Moment for Search

- Copyright: Less Clear When a Potential User Would Search
Lessons for Copyright: Sorting

- Real Property Law: Protects One User at a Time
- Copyright: Protects Many Users Simultaneously
- No Harm to Owners Who Expect to Derive Substantial Value
- Need to Register in Multiple Jurisdictions No Longer a Plausible Excuse for Eschewing Formalities