



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