Formalism and Formalities: The Public/Private Distinction and Formal/Functional Analysis

Reform(aliz)ing Copyright for the Internet Age
Berkeley, CA
April 18, 2013

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Legal Formalism

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

Anatole France, Le Lys Rouge (1894)

[« La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain. »]
Legal Formalism

Formal v. Substantive Equality

- Formally, automatic copyright treats all authors equally with respect to entry into the copyright system.

- Substantively, a range of provisions substantively treat commercially important authors/works differently.
Legal Formalism

- **Formal v. Substantive Equality**
  - Democratic theory requires that public policy treat the interests of all authors admitted into the copyright system as equally important.
Formal/Substantive Equality

- Call this the principle of “copyright neutrality”
Formal/Substantive Equality

- Therefore any exercise of public authority re: copyright formalities should take into account the diverse range of copyright-relevant interests of all authors.
Legal Formalism

- What is a copyright formality?
  - Formalist = Public formalities
  - Realist = Any functional formalities that condition exercise or enjoyment of copyright.
Legal Formalism

**Public/Private Distinction**

- “Death of formalities” narrative is a story about diminishment of mandatory formalities imposed by public law.

- Call these “public formalities”
Public/Private Distinction

- Early 20th century demise of public formalities coincides with rise of private (or quasi-private) registries administered by Collective Management Organizations (CMOs).
Legal Formalism

• Public/Private Distinction
  • Formalities are Dead!
  • Long Live Formalities!
Legal Formalism

• Public/Private Distinction

• Instead of a “Death of Formalities” story, we should recognize that this is an outsourcing/privatization story.
Legal Formalism

- Public/Private Distinction

  - On this view, we are not choosing between formalities and no formalities
  - Choice is whether privatizing formalities is desirable public policy
  - Choice is between the relevance of public and private systems of formalities
Legal Formalism

- **Public/Private Distinction**
  - Reform(aliz)ing Copyright on this view means reclaiming an increased role for public policy in establishing, administering or regulating new and existing systems of copyright formalities
Legal Formalism

Public/Private Distinction

- Discourse in the United States about copyright formalities tends to focus on public formalities
  - Have an operational public formalities system
  - Relatively less private formalities in CMOs than in other parts of the world
Legal Formalism

Public/Private Distinction

- If we look outside the United States, we see the acceptance of the diminished importance of the public/private distinction.
- Where?
WIPO SUMMARY OF THE RESPONSES TO THE QUESTIONNAIRE FOR SURVEY ON COPYRIGHT REGISTRATION AND DEPOSIT SYSTEMS

A. COPYRIGHT REGISTRATION AND RECORDATION

1. What is the name and legal status of the copyright registering/recording body in your country?

According to the responses received, 48 Member States have a copyright voluntary registration system. The vast majority of countries entrust this competence to institutions which belong to the executive branch of the central government. In a few cases, the registry is part of the legislative or judicial powers. Where such bodies belong to the executive branch of government, they are most often under the Ministry of Justice or the Ministry of Culture.
SURVEY OF PRIVATE COPYRIGHT DOCUMENTATION
SYSTEMS AND PRACTICES

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PRIVATE COPYRIGHT DOCUMENTATION SYSTEMS AND PRACTICES:
COLLECTIVE MANAGEMENT ORGANIZATIONS' DATABASES

Conference on Copyright Documentation and infrastructure
WIPO – October 13-14, 2011 - Geneva

Slides by François Xavier Nuttall, Technology Intelligence Senior Consultant, International Confederation of Societies of Authors and Composers (CISAC)
CISAC:

229 authors’ societies
121 countries,
3 million creators and publishers
(music, audio-visual, drama, literature, and visual arts)
€7.152 billion ($9.7 billion) collected in 2009.
WIPO - Enabling Creativity in the Digital Environment: Copyright Documentation and Infrastructure

Theme II: Private Registration and Documentation (Collective Management Documentation; Private Registries; Rights Management Information)

Ms. Gloria Braga, Director, Central Officer for Collection and Distribution (ECAD), Rio de Janeiro
Binding rules for documentation:

**WORKS**

- Title
- Rightsholders names
- Category (composer, author, publisher or subpublisher, versionist);
- Shares
- Agreements
World Intellectual Property Organisation

Copyright Documentation and Infrastructure

Geneva, 13th October 2011

Mark Isherwood – Rightscom Limited
What does management of this change require?

- Standardisation and automation:
  - Message creation and ingestion;
  - Message exchange;
  - Exchange of resource files;
  - Choreographies for message exchange;
  - Unique identification of all parties involved; and
  - Accessible databases of all data.

- Only this will lead to efficient exchange of data along the digital media supply chain.

- e.g. DDEX, EDItEUR, EMA etc.
- e.g. ISRC, ISWC, ISBN, ISAN etc.
- e.g. GRD, EDIR, IMR etc.
Other considerations

- Current environment people intensive which is unsustainable
- Lack of infrastructure is leading to pressure for legislative reform
- Convergence of media and distribution channels means all activities must be cross-media
- Rights management is inherently complex but no more so than mobile phones
- Role of policy makers is to support and encourage not legislate

DDEX

rightscom
Overview
YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.

Commercial partnerships
Use of YouTube’s copyright tools is free, and does not require any commercial partnership with YouTube. Content partners who would like to monetize their content can apply to join our YouTube Partner Program.
Realist Public Policy

- Systems of public formalities coexist with private formalities and always will
- Role of policymakers is to ensure that both public and private formalities serve the public interest
Realist Public Policy

- Systems of formalities will function better when they are **interoperable** and **transparent**

- Public policy about formalities should not be limited to digitizing and improving the performance of voluntary public formalities systems.
Realist Public Policy

**Interoperability**

- Use open standards
  - Both public and private databases need standard to identify, e.g.
    - Identity of author(s)
    - Identity of work(s)
    - Relevant dates
    - Rights claimed
Realist Public Policy

**Interoperability**

- Government should not only engage in best practices on use of open standards
- Also, should use regulatory and convening power to require (or at least encourage) use of common, open standards by private formalities systems
Realist Public Policy

- **Transparency**
  - Authors benefit from greater transparency from formalities systems
    - Greater support for transaction structure (licensing)
    - Ease of holding rights management accountable
  - Public benefits from more efficient transactions and better data about the creative sector