PANEL II

WHAT NOTICE DID

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In the twenty-first century, copyright protection is automatic. It vests in eligible works the instant that those works are first embodied in a tangible format.[1] Many Americans are unaware of that, believing instead that registration and copyright notice are required to secure a copyright.[2] That impression is understandable. For its first 199 years, United States copyright law required authors to take affirmative steps to obtain copyright protection. The first U.S. copyright statute, enacted by Congress in 1790, required the eligible author of an eligible work[3] to record the title of the work with the clerk of the court in the author's local district, deposit a copy of the printed title with the clerk's office, cause a copy of the registration record to be printed for four weeks running in a newspaper, and deliver a copy of the published work to the

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[1] 17 U.S.C. §§ 102(a), 201(a) (2012).

[2] When I presented an early version of this project at a faculty lunch, I began by explaining that while copyright protection is now automatic, U.S. law used to require publication, notice, and registration in order to secure a copyright. My colleagues, brilliant lawyers all and most of them too young to have run into copyright law before 1976, expressed great surprise that copyright protection no longer required publication, notice, or registration.

[3] Copyright protection under the 1790 Act was limited to maps, charts, and books authored by U.S. citizens or residents. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

Secretary of State.[4] Twelve years later, Congress added an additional requirement: copyright owners must place a prescribed copyright notice on every copy of a copyrighted work.[5] In 1909, Congress eliminated the registration and deposit prerequisites for protection,[6] but retained until 1978 the requirement that accurate copyright notice appear on every copy of a work.[7] For 176 years of United States copyright history, then, accurate copyright notice was essential to securing a copyright in almost all works.[8] Publishing copies of a work without copyright notice, or with the wrong name in the notice, was fatal to copyright protection.[9]

Scholarly commentary on copyright notice has tended to tell two conflicting stories. In the first story, the notice prerequisite was confiscatory, serving primarily to divest deserving authors of the protection they earned through

[4] *Id*. §§ 2-4.

[5] Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171, 171 (repealed 1831). Notice under the 1802 Act duplicated the language of the copyright registration record: "Entered according to act of Congress the [date] day of [month] [year] by [name of author or proprietor] of [state]." *Id*.

[6] *See* Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078 (repealed 1976) [hereinafter 1909 Act].

[7] In 1976, Congress extended automatic copyright protection to any work upon its fixation in tangible form. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2544-45 (codified at 17 U.S.C. §§ 102-810) [hereinafter 1976 Act]. It retained the requirement of copyright notice in order to preserve copyright protection, but eliminated the responsibility to ensure that the copyright notice was accurate. *See id*. §§ 401-402, 404-406. In 1988, Congress eliminated the notice requirement entirely for works that had not been published as of the effective date of the Act. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-59 (codified as amended in scattered sections of 17 U.S.C.).

[8] *See, e.g*., VINCENT A. DOYLE, GEORGE D. CARY, MARJORIE MCCANNON & BARBARA A. RINGER, STUDY NO. 7: NOTICE OF COPYRIGHT, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDY NO. 7, at 5 (Comm. Print 1960) [hereinafter STUDY NO. 7: NOTICE OF COPYRIGHT] (footnote omitted):

> Among the basic conditions for protection provided in the U.S. copyright law, perhaps the most important is the requirement for a copyright notice. To secure and maintain copyright in the United States, the copies of a work published in this country must bear a notice in the form and position specified in the statute. Publication of a work without the prescribed notice results in the permanent loss of copyright protection and places the work in the public domain.

The 1909 Act permitted copyrights in unpublished lectures, plays, musical compositions, photographs, and paintings to be secured through registration rather than publication with notice. 1909 Act § 11. If copies of those works were later distributed to the public, though, each copy needed a correct copyright notice. *Id*.

[9] *See, e.g*., Mifflin v. R.H. White Co. (*Mifflin III*), 190 U.S. 260, 264 (1903). The rules concerning copyright notices bearing the wrong date depended on the statutory class of the work and whether the date was later or earlier than the actual date of first publication. *See* STUDY NO. 7: NOTICE OF COPYRIGHT, *supra* note 8, at 19-21.

their creativity.[10] In the second story, conditioning copyright protection on the presence of accurate copyright notice helped to assure that copyright protection attached to works whose owners valued copyright protection while leaving other potentially copyrighted material in the public domain.[11] Requiring copyright notice, thus, allowed United States law to tolerate a broader range of potentially copyrightable subject matter and a lower threshold for originality than other countries found workable.[12] Copyright notice, further, enabled members of the public to ascertain whether copyright protection subsisted in a work and, if so, who owned it.[13] I am more sympathetic to the second story than the first,[14] but here I want to pursue a different question. In this article, I explore the effect of the notice prerequisite on the law's treatment of copyright ownership.

My reading of the cases has persuaded me that the notice prerequisite, as construed by the courts, encouraged the development of legal doctrines surrounding ownership that herded the ownership of copyrights into the hands of publishers and other intermediaries, notwithstanding statutory provisions that seem to have been designed at least in part to enable authors to keep their copyrights. I don't mean to suggest that anyone adopted a notice prerequisite with this purpose; I think the purpose of copyright notice was always understood as protecting members of the public by informing them that a copy embodied a work protected by copyright, and telling them who controlled it.[15] Nonetheless, with hindsight, it's easy to see that a strictly construed notice requirement had the effect of liberating many copyrights from their authors for the benefit of the works' publishers. Notice also allowed the law to tolerate

[10] *See, e.g.*, Jane C. Ginsburg, *"With Untired Spirits and Formal Constancy": Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1584-85 (2013).

[11] *See, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 502-19 (2004).

[12] *See id.*

[13] *See, e.g.*, Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation and How to Do It*, 28 BERKELEY TECH. L.J. 1459, 1460-61 (2013).

[14] *See, e.g.*, Jessica Litman, *Sharing and Stealing*, 26 HASTINGS COMM. & ENT. L.J. 1, 14-17, 20-22 (2004).

[15] *See, e.g.*, Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 294-95 (1907); *Mifflin III*, 190 U.S. 260, 264 (1903); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489-90 (2d Cir. 1960); Osgood v. A.S. Aloe Instrument Co., 83 F. 470, 472-73 (C.C.E.D. Mo. 1897); Smith v. Wilkinson, 19 F. Supp. 841, 842 (D.N.H. 1937). *But see* Rosenbach v. Dreyfuss, 2 F. 217, 220 (S.D.N.Y. 1880) ("The purpose of [a provision penalizing false copyright notice] seems to be to protect persons entitled to copyrights from their privilege being impaired, cheapened, and lessened in value by the unauthorized assumption of the privilege by persons not entitled thereto.").

completely and unpredictably alienable copyrights, since prospective licensees could always find out who the copyright owner was by looking at the notice.[16]

Copyright commentary tends to describe the alienable property characteristics of American copyright as reflecting the United States's fundamentally utilitarian approach to copyright.[17] Maybe. Alternatively, perhaps the promiscuous alienability of U.S. copyrights is an accidental development that derived from courts' constructions of the copyright notice provision. It appears in any event that some aspects of copyright's alienability reflect a story of path dependence. Because copyright law required notice, other doctrinal developments were shaped by and distorted by that requirement.

In 1989, we abandoned any reliance on copyright notice.[18] We did not, though, think about ways to retrofit our law to replace the supports that notice provided for its underlying assumptions. The distortions that notice encouraged continue to shape case law adjudicating ownership of U.S. copyrights, despite the fact that they no longer make practical or legal sense.[19]

I. BACKGROUND

Let's start with a brief and summary chronology: during the eighteenth century, crown printing privileges evolved into statutory copyright.[20] In England, Parliament enacted the Statute of Anne, which made exclusive printing privileges available to the authors of published books and their assigns, on registration of the title with the Stationer's Company.[21] The statute defined infringement as the act of printing, reprinting, or importing a registered book or causing a book to be printed, reprinted, or imported, "without the Consent of the Proprietor or Proprietors thereof first had and obtained in

[16] *See, e.g.*, *Am. Tobacco Co.*, 207 U.S. at 293-94. In today's post-notice realm, it is difficult and often impossible to discover the identity of the owners of the copyright in a work. *See* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 2, 9-11, 35-37 (2015). The adoption of unconstrained divisibility of copyright, which allows any splinter of an exclusive right to be separately owned and conveyed, has greatly aggravated the problem. *See infra* notes 132, 139-45 and accompanying text.

[17] *See, e.g.*, Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 9-13 (1994).

[18] *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-59 (codified as amended in scattered sections of 17 U.S.C.).

[19] *See, e.g.*, 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 256-61 (2d Cir. 2015); Marvel Characters, Inc. v. Kirby, 726 F. 3d 119, 136-44 (2d Cir. 2013).

[20] *See generally* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 17-40 (2010).

[21] Statute of Anne 1710, 8 Ann. c. 19. The statute also obliged the author or assign to deposit copies for the use of libraries.

Writing, Signed in the Presence of Two or more Credible Witnesses . . . ."[22] British courts would construe that language to require that any copyright assignment, before or after publication, be in writing.[23] Publishers who could not produce a written assignment of the author's copyright were deemed to own no copyright in the works they claimed.[24]

In 1790, the United States enacted its first federal copyright act, enabling authors of published books, maps, or charts, who were U.S. citizens or residents to secure the sole right to print, reprint, publish, and vend the work by recording the title of the work and depositing a printed copy of the title in the office of the clerk of the district court before publication, causing a copy of the record to be published in a newspaper, and delivering a copy of the published work to the Secretary of State within six months of publication.[25] The American statute defined infringement in language imported from the Statute of Anne, as encompassing printing, reprinting, publishing, or importing any copy or copies "without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses."[26] That language would remain in United States copyright statutes through several major revisions,[27] finally disappearing in 1909.[28]

In 1802, Congress added a requirement that the author or proprietor insert a notice of copyright on the title page of any book or the face of any map or chart.[29] The requirement made particular sense in a market in which the vast majority of published books, maps, and charts were unprotected by copyright.[30] The question whether the statutory provisions imposed strict preconditions to copyright protection or simply mandated obligations that might be excused came before a federal court in 1824 in the case of *Ewer v.*

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[22] *Id*. Parliament repealed the two-witness requirement in 1814. *See* Copyright Act 1814, 54 Geo. 3 c. 156, § 4; Cumberland v. Copeland (1862) 158 Eng. Rep. 856, 856.

[23] *E.g*., Power v. Walker (1814) 171 Eng. Rep. 3, 3-4; *see also* PETER BURKE, A TREATISE ON THE LAW OF COPYRIGHT 19-21 (1842).

[24] *E.g*., Clementi v. Walker (1824) 107 Eng. Rep. 601, 603 (alternate ground).

[25] Act of May 31, 1790, ch. 15, §§ 1, 3-4, 1 Stat. 124, 124-25 (repealed 1831).

[26] *Id*. § 2.

[27] *See, e.g*., Act of Feb. 3, 1831, ch. 16, §§ 6-7, 4 Stat. 436, 437-38 (repealed 1870); Rev. Stat. §§ 4964-65 (1875).

[28] 1909 Act, ch. 320, § 42, 35 Stat. 1075, 1084 (repealed 1976).

[29] Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171, 171 (repealed 1831). The Act also extended copyright protection to etchings and prints. *Id*. § 2.

[30] In 1987, historian James Gilreath reported that of 15,000 publications between 1790 and 1800, researchers were able to find only 779 copyright registrations for the period. JAMES GILREATH, FEDERAL COPYRIGHT RECORDS 1790-1800 ix (1987). Since works by foreign authors were categorically ineligible for copyright, it isn't surprising that a small proportion of published works availed themselves of copyright protection. Bill Patry asserts that another and perhaps more important reason for the small number of copyrighted books was that publishers found the registration and deposit requirements too burdensome. *See* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT §1.19 (2015).

Coxe.[31] Charles Ewer, the publisher of the *Pharmacopoeia of the United States of America*, filed suit to enjoin the publication of a competing drug reference book, claiming that it infringed his copyright. Ewer had registered the title of the book, and had printed a copyright notice on the page after the title page of every copy of the book, but had failed to publish a copy of the registration record in any newspaper. The court held that Ewer had failed to secure a copyright in the *Pharmacopoeia*.[32] The language of the 1802 Act, the court concluded, admitted of no other construction than that all four requirements—registration and deposit of a printed copy with the court clerk, newspaper publication of the record, transmission of a copy of the published work to the Secretary of State, and printing the copyright notice—were strict prerequisites to copyright protection.[33]

In 1831, Congress enacted the first general revision of copyright law.[34] The revision act extended copyright to musical compositions and extended the copyright term. It retained the registration, deposit, and notice requirements, though, and continued to define infringement as printing or publishing a work without having secured the written consent of the copyright owner in the presence of two witnesses.[35] In 1834, Congress amended the copyright act to provide for the recordation of copyright assignments.[36]

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[31] 8 F. Cas. 917 (C.C.E.D. Pa. 1824).

[32] *Id*. at 920.

[33] *Id*. at 919.

[34] Act of Feb. 3, 1831, ch. 16, §§ 6-7, 4 Stat. 436, 437-38 (repealed 1870).

[35] *Id*. §§ 1, 6-7, 9.

[36] Act of June 30, 1834, ch. 157, § 1, 4 Stat. 728, 728 (repealed 1870):

> That all deeds or instruments in writing for the transfer or assignment of copyrights, being proved and acknowledged in such manner as deeds for the conveyance of land are required by law to be proved or acknowledged in the same state or district, shall and may be recorded in the office where the original copyright is deposited and recorded . . . .

In 1870, Congress enacted another general revision of copyright. Act of July 8, 1870, ch. 230, 16 Stat. 198 (repealed 1909). Section 89 of the Act provided:

> That copyrights shall be assignable in law, by any instrument of writing, and such assignment shall be recorded in the office of the librarian of Congress within sixty days after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.

In *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), the Supreme Court predicated its conclusion that renewal terms were assignable on a comparison between the copyright office records of renewal term assignments before and after the enactment of the 1909 Act. *Id*. at 657-58. This was appropriate, the Court said, because "[s]ince the enactment of the Copyright Act of 1870, 16 Stat. 198, 213, assignments of copyrights must be recorded in the office of the Register of Copyrights." *Id*. at 658. Lower courts before and after this case, however, construed the recordation requirement to permit enforcement of unrecorded assigned copyrights unless infringers were bona fide purchasers without notice. *E.g*., New Fiction Publ'g Co. v. Star Co., 220 F. 994, 995-96 (S.D.N.Y. 1915); Photo Drama

Henry Wheaton was the reporter for Supreme Court decisions from 1816 to 1827. When his successor, Richard Peters, announced that he would be republishing the judicial decisions that Wheaton had reported, Wheaton sued for copyright infringement. Peters argued that Wheaton had failed to secure a copyright on his reports, because he had neglected to deliver copies of the volumes to the Secretary of State. Wheaton insisted that even if he had failed to comply scrupulously with the copyright statute's requirements, he was entitled to an injunction on the basis of a common law copyright, arising from natural law.[37] The Supreme Court rejected the principle that authors had a perpetual common law copyright, holding that copyrights in published work were available only as a matter of statutory law. Any common law rights in an unpublished manuscript did not survive its publication.

> That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.[38]

The Court construed the copyright laws to require strict compliance with all of the statutory conditions as a prerequisite to federal copyright protection.[39]

> The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.[40]

Motion Picture Co. v. Social Uplift Film Corp., 213 F. 374, 376-78 (S.D.N.Y. 1914), *aff'd*, 220 F. 448 (2d Cir. 1915).

[37] *See generally* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1178-87 (1983); Craig Joyce, *The Story of* Wheaton v. Peters*: A Curious Chapter in the History of Judicature*, *in* INTELLECTUAL PROPERTY STORIES 36 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

[38] Wheaton v. Peters, 33 U.S. 591, 657 (1834). It's unclear from a twenty-first century vantage point whether the Court's reference to a common law "property in his manuscript" refers to the author's ownership of the tangible copy embodied in the manuscript or to literary property in the manuscript's contents. *See, e.g.*, Wendy Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 620-21 n.15 (2014); Ronan Deazley, Capitol Records v. Naxos of America *(2005): Just Another Footnote in the History of Copyright?*, 53 J. COPYRIGHT SOC'Y U.S.A. 23, 62-63 (2005).

[39] *Wheaton,* 33 U.S. at 665-68; *see also, e.g.*, Baker v. Taylor, 2 F. Cas. 478, 478-79 (C.C.S.D.N.Y. 1848) (holding the copyright invalid because of a failure to print the correct date in the copyright notice).

[40] *Wheaton*, 33 U.S. at 664.

The Court remanded the case to the lower court to permit a jury to determine whether Henry Wheaton or his publisher had in fact complied with all of the statutory conditions.[41]

II. NINETEENTH CENTURY ASSIGNMENTS OF COPYRIGHT . . . AND OTHER TRANSFERS

By the middle of the nineteenth century, then, the federal copyright statute afforded copyright only to published works.[42] It required deposit before publication of a printed copy of the work's title with the clerk of the local district court, printing of copyright notice on the title page or the page following the title page, and delivery of a copy of the published work within three months to the clerk of the court, who was commanded to send it on to the Secretary of State.[43] U.S. courts had concluded that copyright protection was available only after careful compliance with the statutory conditions.[44] The statute also commanded that copyright assignments be recorded.[45] It contained language that had been read by British courts to invalidate any assignment of copyright in a published or unpublished work unless that assignment were in writing.[46] Did the requirement for strict compliance with statutory terms apply either to the provision requiring copyright assignments and licenses to be in writing, or to the command that written assignments "shall and may" be recorded? Mid-nineteenth century copyright experts were unsure.

In 1847, Boston lawyer George Ticknor Curtis published his *Treatise on the Law of Copyright*.[47] Curtis characterized the question whether unwritten

[41] *Id*. at 667-68. The majority opinion also noted in passing that all of the Justices were "unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id*. at 668.

[42] Although the meaning of the term "publication" was contested, the weight of authority defined it as the distribution of copies of a work to the public. *See* WILLIAM S. STRAUSS, STUDY NO. 29: PROTECTION OF UNPUBLISHED WORKS, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES NOS. 29-31, at 5-15 (Comm. Print 1961). In 1976, Congress added a definition of "publication" to the copyright statute. *See* 17 U.S.C. § 101 (2012).

[43] Act of Feb. 3, 1831, ch. 16, §§ 4-5, 4 Stat. 436, 437 (repealed 1870).

[44] *E.g*., *Wheaton*, 33 U.S. at 665; *Baker*, 2 F. Cas. at 479; Ewer v. Coxe, 8 F. Cas. 917 (C.C.E.D. Pa. 1824).

[45] Act of June 30, 1834, ch. 157, § 1, 4 Stat. 728, 728 (repealed 1870).

[46] Act of Feb. 3, 1831 §§ 7, 9. *See, e.g*., Clementi v. Walker (1824) 107 Eng. Rep. 601, 603; Power v. Walker (1814) 171 Eng. Rep. 3, 3.

[47] GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT IN BOOKS, DRAMATIC AND MUSICAL COMPOSITIONS, LETTERS AND OTHER MANUSCRIPTS, ENGRAVINGS AND SCULPTURE, AS ENACTED AND ADMINISTERED IN ENGLAND AND AMERICA (1847). Curtis's treatise is commonly described as the first American treatise on copyright law. *See, e.g*., Oren Bracha, *Commentary on George Ticknor Curtis's* Treatise on the Law of

copyright assignments were void as "a point admitting of great doubt."[48] Curtis noted that British cases had read similar statutory language to permit only written assignments of copyright in published or unpublished works.[49] The 1834 amendment to the U.S. copyright law, Curtis wrote, "seems to recognize the doctrine, that transfers or [sic] copyright must be in writing, but it does not expressly declare that they shall be so."[50]

Five years later, that question arose in the case of *Pulte v. Derby*.[51] Dr. Pulte signed an agreement to give publisher H.W. Derby & Company "the exclusive right to print and publish an edition of one thousand copies" of a book to be written by Pulte titled *Homoeopathic Domestic Physician*,[52] in return for a royalty of 15¢ per copy sold. The agreement gave Derby the option to print a second edition in return for a royalty of 20¢ per copy. After the success of the second edition, the publisher sought to publish another edition. Dr. Pulte objected that he had not authorized any editions beyond the second printing and sued to enjoin Derby from infringing his copyright. Derby countersued, insisting that it owned the copyright and seeking an injunction to prevent Dr. Pulte from publishing his own edition of the book.[53]

The Circuit Court for the District of Ohio concluded that the written agreement did not itself convey Dr. Pulte's copyright to Derby because Dr. Pulte did not yet have a copyright at the time he signed the agreement:

> The agreement between the parties does not purport to convey the copyright. At the time it was entered into no copyright had been secured; and there is no provision in the agreement, by whom it was to be acquired in future. The contract embraced only the printing and publication of the work, on the terms stated. It gave the defendants the exclusive right to print and publish an edition of one thousand copies; and should a second edition be called for, the complainant was to revise and correct the first one, and the defendants were to prepare stereotype plates, and to print as many copies, on the terms stated, as "they can sell." We must look out of the contract, to the acts of the parties, in regard to the copyright. And these facts must, necessarily, have a strong bearing upon the contract. It will tend to show how it was understood and construed by the parties to it. It may be observed that in making a mere contract for printing and publishing a work, it is not usual to say any thing about the copyright.

Copyright (1847), *in* PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds., 2008), www.copyrighthistory.org [https://perma.cc/FE9W-7WWU].

[48] CURTIS, *supra* note 47, at 220.

[49] *Id*. at 220-24; *see, e.g*., Clementi v. Walker (1824) 107 Eng. Rep. 601, 603.

[50] CURTIS, *supra* note 47, at 233.

[51] 20 F. Cas. 51 (C.C.D. Ohio 1852).

[52] J.H. PULTE, HOMOEOPATHIC DOMESTIC PHYSICIAN; CONTAINING THE TREATMENT OF DISEASES, WITH POPULAR EXPLANATIONS ON ANATOMY, PHYSIOLOGY, HYGIENE, AND HYDROPATHY (1850).

[53] *Pulte*, 20 F. Cas. at 51.

> That is ordinarily retained by the author, unless there be an agreement or understanding, that the name of the publisher shall be used for that purpose. We must then look at the book itself, and to the appropriate records, to see in whom the copyright is vested. The evidence of this right must appear on the second page of the book published, it must be entered in the records of the clerk of the district court of the United States, and one of the copies must be deposited in the department of state of the United States, the Smithsonian Institute, and the Congressional Library. Until these things are done, the copyright is not perfect; although, by taking the incipient step, a right is acquired, which chancery will protect, until the other acts may be done.[54]

Looking outside the contract to the acts of the parties, the court concluded that Dr. Pulte had in fact authorized Derby to secure the copyright on its own behalf:

> When the agreement was entered into, the complainant had no copyright to convey. . . . It was the interest of both parties to have the copyright secured. Without this, the first publication of it would have abandoned it to the public, and consequently, it could have been of no more value to either party than to any other publishers or authors, who might choose to revise and republish it. The defendants, it appears, secured to themselves the copyright. And the evidence of that right was published on the second page of the book, which was under the eye of the complainant. He, therefore, sanctioned it.[55]

Since the notice and certificate of registration were in the name of the publisher, the court reasoned, the publisher must be the owner of the copyright.[56] The author's failure to assign his copyright in writing didn't undermine the validity of the transfer because, at the time of the agreement, he had not yet secured federal statutory copyright protection.[57]

Henry Wheaton, in addition to being the Supreme Court reporter at the center of *Wheaton v. Peters*, authored an influential international law treatise.[58] After Wheaton's death in 1848, his widow, Catherine Wheaton, consulted her late husband's friend, W.B. Lawrence, who had done some work for Wheaton

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[54] *Id*. at 51-52.

[55] *Id*. at 52. The court concluded that the action arose under a contract rather than the copyright law and that the federal court therefore lacked jurisdiction to enter an injunction against either party. It recommended, however, that the author agree to revise and improve the manuscript, in return for which the publisher would pay the author a more generous royalty for subsequent editions. *Id*. at 53.

[56] *Id*. at 52.

[57] *Id*.

[58] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF SCIENCE (Carey, Lea & Blanchard 1836). The copyright was registered in the publisher's name, and the notice accordingly named the publisher. Wheaton published three revised editions before his death in 1848.

on a revised edition of the treatise. Catherine asked Lawrence to edit a new edition of the treatise, which he agreed to do. Lawrence updated and annotated the treatise. It was published in 1855 by Little, Brown as *Elements of International Law* by Henry Wheaton, Sixth Edition by William Beach Lawrence.[59] Little, Brown registered the copyright in the sixth edition in Catherine's name and put her name in the copyright notice.[60] At Catherine's request, Lawrence edited a seventh edition, published in 1863, and copyrighted in Catherine's name.[61]

In 1866 Catherine died. Her daughter, Martha Wheaton, was dissatisfied with Lawrence's work, and she and Little, Brown engaged Richard Henry Dana, Jr., to prepare an eighth edition of the treatise.[62] Lawrence filed suit for copyright infringement.[63] He alleged that he had agreed to furnish his services for no pay on the understanding that while Catherine would hold the formal title to the copyright and would be paid all of the proceeds of the revised editions, she would not use his additions and annotations without his written consent. Catherine, moreover, had authorized Lawrence to reuse his contributions in any way that he wished. Although Dana denied having incorporated any of Lawrence's contributions into his edition, Lawrence identified multiple incidents of copying.[64] Dana argued that the copyrights on Lawrence's two editions of Wheaton were void, because Lawrence never assigned his copyright in writing to Catherine, and thus registration and notice had been made in the name of the wrong person.[65]

The court concluded that because Lawrence wished to render his services to Catherine at no charge, so that she could profit from further editions of her late husband's treatise, Lawrence's contributions vested in Catherine as an initial matter:

> Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to

[59] HENRY WHEATON & WILLIAM BEACH LAWRENCE, ELEMENTS OF INTERNATIONAL LAW (Little, Brown & Co. 6th ed. 1855).

[60] *See id*. at the page following the title page.

[61] HENRY WHEATON & WILLIAM BEACH LAWRENCE, LAWRENCE'S WHEATON: ELEMENTS OF INTERNATIONAL LAW (Little, Brown & Co. 2d ann. ed. 1863). The page after the title page included two copyright notices in Catherine's name: one for the 1855 edition and the second for the 1863 edition.

[62] *See* HENRY WHEATON & RICHARD HENRY DANA, JR., ELEMENTS OF INTERNATIONAL LAW (Little, Brown & Co. 8th ann. ed. 1866). The page following the title page of the 8th edition contained three copyright notices: the 1855 and 1863 notices in Catherine's name, and an 1866 notice in Martha's name.

[63] Lawrence v. Dana, 15 F. Cas. 26, 29 (C.C.D. Mass 1869).

[64] *See id*. at 52-63.

[65] *See id*. at 50.

> the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement. . . . The title and property of the contributions being vested in Mrs. Wheaton, she would not acquire any thing by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign any thing, because he owned nothing in praesenti, as the title to his contributions and the inchoate right of copyright for those editions, had become vested in Mrs. Wheaton as proprietor of the book.[66]

Having rescued the copyright by finding that Lawrence's authorship vested magically in Catherine because he wished it to, the court went on to subject the copyright to Lawrence's claim to be its equitable owner.[67]

Three years later, painter Arthur Parton sued lithographer and publisher Louis Prang for copyright infringement. Parton had painted a landscape and sold the painting to a purchaser, who resold it to Prang. Prang made and published a lithograph of the painting and registered the copyright in the name of his firm. Parton argued that he had not conveyed the copyright to his work by selling the painting because the statute required copyright assignments to be made in writing before two witnesses. The court held that those provisions of the law applied only to textual manuscripts, and that no written assignment was required to transfer the copyright in an unpublished painting.[68]

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[66] *Id*. at 51. The sophisticated reader may be wondering why Lawrence's book was not a work made for hire. The answer is that in 1869, courts had not yet invented the work made for hire doctrine. Copyright proprietors other than the author therefore needed to demonstrate that they had legitimately acquired ownership of the copyright. As should be clear from the description of the cases, courts were eager to accept flimsy evidence of such an assignment. The first cases recognizing employer ownership of employee's works appeared at the turn of the twentieth century. *See* Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003).

[67] *Lawrence*, 15 F. Cas. at 53-55:

> As the proprietor of the book, Mrs. Wheaton, by virtue of that arrangement, became the absolute owner of the notes as they were prepared, so far as respects the editions in question; and she also acquired therewith the right to copyright the same for the protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work, without the consent of the complainant.

[68] Parton v. Prang, 18 F. Cas. 1273, 1278 (C.C.D. Mass. 1872). The 1831 Act did not mention paintings. Sections 7 and 9 of the 1831 Act expressly required that the assignment of the copyright in a manuscript, print, cut, or engraving be signed in the presence of two witnesses. Act of Feb. 3, 1831, ch. 16, §§ 7, 9, 4 Stat. 436, 438 (repealed 1870). The court held that the word "manuscript" in Section 9 did not encompass a painting, and didn't address whether the phrase "print, cut, or engraving" also excluded paintings. *See Parton*, 18 F. Cas. at 1275-77. As the court noted, the recent 1870 Copyright Revision Act (enacted after the facts giving rise to this case) had expressly extended copyright to paintings and required assignment of copyright in paintings to be signed in the presence of two witnesses.

> Beyond doubt, the right of first publication is vested in the author; but he may sell and assign the entire property to another, and if he does so his assignee takes the entire property, and it is a great mistake to suppose that any act of congress, at the date of the sales of the picture in this case, required that such an assignment should be in writing; and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent.[69]

Thus, the court concluded, an author transferred his copyright (or his entitlement to secure copyright) in the unpublished painting simply by selling

Id. at 1276-77; *see also* Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909). The court noted that the fact that paintings were expressly added to the statute in 1870 supported its conclusion that the term "manuscript" in the 1831 Act didn't include them. It nonetheless appeared to hold that paintings were entitled to copyright under the 1831 Act, even though the language enumerating works subject to copyright was the same as the language enumerating works requiring written assignments in the presence of two witnesses. *See Parton*, 18 F. Cas. at 1278. Notwithstanding the 1870 amendment, later courts relied on *Parton v. Prang* for the proposition that assignments of the copyright in a work of art need not be in writing. *See infra* note 69.

[69] *Parton*, 18 F. Cas. at 1278. A later court cited *Parton v. Prang* as authority for the proposition that a commission of a work of art conclusively vests the copyright in the commissioner unless the artist has expressly reserved copyright in writing. Dielman v. White, 102 F. 892, 895 (C.C.D. Mass. 1900). In *Dielman*, the contract to create a mosaic for the Library of Congress said nothing about copyright. The artist put a copyright notice in his own name on the two dimensional drawing created as a model for the mosaic, and on the mosaic itself. He then registered the copyright on his own behalf. *Id*. at 892-93. The court held that notwithstanding the Library's acceptance of the mural bearing the artist's copyright notice, the contract itself had transferred the reproduction right, and the notice and registration therefore had no effect. *Id*. at 895. The Court of Appeals for the Second Circuit followed *Dielman v. White* in *Yardley v. Houghton Mifflin Co*., 108 F.2d 28 (2d Cir. 1939), a 1939 decision involving a mural painted in 1905 by Charles Y. Turner. The City of New York commissioned the mural for a wall of the auditorium in the DeWitt Clinton High School. The contract said nothing about copyright. Mr. Turner put a copyright notice in his own name on the mural itself, and registered his copyright under the terms of the then-applicable statute. The court held that, in the absence of any mention of copyright in the contract and any evidence of the precise terms of the agreement, "we must infer that whatever agent of the city negotiated with Turner did his duty and obtained for the city all that its contract for the building required; in other words, that Turner's contract of employment did not reserve the copyright." *Id*. at 29-31. If you've been reading with great care, you may be wondering why the notice in the artists' names on Dielman's mosaic and Turner's murals didn't void the copyrights. In *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907), the Supreme Court had held that no copyright notice was required on an original painting, as distinguished from copies of it. *Id*. at 295-96. In neither case, though, did the court need to reach that question. Once it held that the artists had parted with their copyrights and lacked standing to sue for infringement, the cases were over.

the painting. The statutory requirement of a written assignment in the presence of two witnesses didn't control.

When Eaton Drone published his influential copyright treatise in 1879, he declared confidently that, "[w]hile there has been much discussion as to the necessity of a writing in assigning statutory copyright, it has never been disputed, and is well settled, that the literary property in an unpublished work may be transferred by word of mouth."[70]

The United States Supreme Court adopted similar reasoning in *Callaghan v. Myers*.[71] Law book publisher E.B. Myers & Chandler claimed to have purchased the copyright in volumes 39 to 46 of the *Illinois Reports*, authored by state-appointed court reporter Norman Freeman. Myers had registered the copyright in his firm's name and printed that name in the copyright notice on the page following the title page of each volume.[72] When it sued Callaghan for publishing allegedly infringing reports of the same cases, Callaghan argued that under the copyright statute, Myers could not be the proprietor of the copyright unless Freeman had assigned it to him in writing. The Court disagreed:

> While, after the obtaining of a copyright, a written assignment may be necessary to convey title to it, or a written license to give a right to reproduce copies of the copyrighted book, we perceive no reason why Myers or Myers & Chandler could not become the owners by parol transfer of whatever right Mr. Freeman, prior to the taking of the copyright, had to convey. While the work was in manuscript no written transfer of such manuscript from Mr. Freeman was necessary, because the copyright had not yet been taken.[73]

Courts were willing to find a parol transfer of an author's rights, whatever they were, in an unpublished manuscript, notwithstanding the statute's requirement of a written assignment to transfer copyright.[74] When that rule met up with the requirement for strict compliance with statutory prerequisites, the result was to encourage courts to find that authors had parted with their rights. As the Supreme Court construed the copyright statute, deviation from the

[70] EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 104 (1879) (citing *Parton*, 18 F. Cas. 1273).

[71] 128 U.S. 617 (1888).

[72] *See* NORMAN L. FREEMAN, 39 REPORTS OF CASES AT LAW AND IN CHANCERY ARGUED AND DETERMINED IN THE SUPREME COURT OF ILLINOIS ii (1868) (copyright notice on the page following the title page).

[73] *Callaghan*, 128 U.S. at 658.

[74] *E.g.*, *id.*; White-Smith Music Pub. Co. v. Apollo Co., 139 F. 427, 429 (C.C.S.D.N.Y. 1905), *aff'd*, 147 F. 226 (2d Cir. 1906), *aff'd*, 209 U.S. 1 (1908).

statutory notice provision was fatal to the copyright.[75] The statute conditioned copyright protection on a notice's bearing the correct name and date. Without a correct notice, there could be no copyright protection. Courts seeking to preserve copyright protection had only to find some mechanism by which the alleged copyright proprietor named in the notice and certificate of registration had acquired ownership of the copyright.

III. INTERLUDE: ACROSS THE OCEAN

In 1886, European and Asian nations signed the original Berne Convention, promising each other to extend copyright protection to works authored by citizens of signatory countries.[76] The United States was not able to participate, since its copyright law still limited protection to works authored by citizens and residents of the United States. A variety of amendments proposed in Congress in the nineteenth century designed to extend copyright to works by foreign authors had failed.[77] Finally, in 1891, the United States enacted the Chace Act, which enabled foreign works to receive copyright protection if they complied with U.S. requirements for registration, notice, deposit, renewal, and printing from type set in the United States.[78] Although the original text of the Berne Convention had permitted signatories to condition protection of foreign works on compliance with any copyright formalities imposed by a work's country of origin,[79] the domestic typesetting condition prevented the United States from joining the treaty.[80] A revised text of the Berne Convention adopted in 1908 prohibited all formal prerequisites for international copyright protection.[81] United States law would not be even arguably Berne-compliant until 1989.[82]

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[75] *See* Thompson v. Hubbard, 131 U.S. 123, 149-51 (1889); *see also* DeJonge & Co. v. Breuker & Kessler Co., 235 U.S. 33, 36 (1914) (applying 1870 Act); Mifflin v. Dutton, 190 U.S. 265, 266 (1903) (applying 1831 Act); *Mifflin III*, 190 U.S. 260, 264 (1903) (same).

[76] *See* Thorvald Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 84 (1926).

[77] *See generally* Thorvald Solberg, *International Copyright in Congress, 1837-1886*, 11 LIBR. J. 250 (1886).

[78] Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106, 1107-08 (repealed 1909).

[79] Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886.

[80] *See* Solberg, *supra* note 76, at 103-06.

[81] Revised Berne Convention for the Protection of Literary and Artistic Works art. 4, Nov. 13, 1908, 1 L.N.T.S. 217.

[82] There are compelling arguments that U.S. law is not yet Berne-compliant. *See, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY 37-52 (2010); Jane C. Ginsburg & Eve C. Subotnik, *Speaking of Moral Rights: A Conversation*, 30 CARDOZO ARTS & ENT. L.J. 91 (2012); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 442 (2008); Justin Hughes, *American Moral Rights and Fixing the* Dastar *"Gap,"* 2007 UTAH L. REV. 659.

By repudiating formal preconditions to copyright, members of the Berne Union necessarily constrained the presumptions and trade practices surrounding copyright ownership and assignment. The absence of any record of who owns the copyright in a work is a workable regime only when either the copyright owner or a licensing agent empowered to represent her is easily identified. In most Berne Union nations, the rejection of formalities supported the recognition of a strong presumption that copyrights belong to works' authors.[83] Over the next century, some Berne members would develop copyright markets in which authors, as a matter of custom, rarely assigned their copyrights, or were legally restricted in doing so.[84] Some Berne nations would adopt requirements that any transfer of copyright be recorded.[85] Others would establish rights holders collecting societies and task them with the responsibility to keep track of copyright ownership.[86] In the United States, the work of identifying the rights holder was done by copyright notice, so those mechanisms never became robust.

IV. COPYRIGHT NOTICE AND PAROL TRANSFERS

In the United States, copyright notice continued to be essential, and courts insisted that the person named in the notice be the true owner of the copyright.[87] At the same time, courts were reluctant to find copyright forfeit. This led them to uphold purported transfers of the copyright in unpublished works from the works' authors to copyright claimants on thin evidence.[88] Where it was possible to do so, though, they often sought to recognize authors' equitable claims to relief. In *Lawrence v. Dana*, upon finding a parol transfer of copyright in an unpublished work to the person named in the notice, the

[83] *See, e.g.*, CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] arts. L111-1, L113-1 (Fr.); Copyright, Designs and Patents Act 1988, c. 48, § 104(2)-(2)(a) (UK).

[84] *See, e.g.*, CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] arts. L131-4 (1994) (Fr.); ALEXANDER R. KLETT, MATTHIAS SONNTAG & STEPHAN WILSKE, INTELLECTUAL PROPERTY PROTECTION IN GERMANY: PROTECTION, ENFORCEMENT AND DISPUTE RESOLUTION 61 (2008).

[85] *E.g.*, Chosakuken Hō [Copyright Act], No. 48 of 1970, art. 77 (Japan), http://www.japaneselawtranslation.go.jp [https://perma.cc/G9N7-CXT8] (Japan).

[86] *See, e.g.*, CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] arts. L132-2-1, L133-2 (Fr.); Intellectual Property Act art. 147-159 (B.O.E. 1996, 97) (Spain); Copyright, Designs and Patents Act 1988, c. 48, §§ 116-123 (UK).

[87] *E.g.*, Osgood v. A.S. Aloe Instrument Co., 83 F. 470, 470-72 (C.C.E.D. Mo. 1897).

[88] *E.g.*, Belford v. Scribner, 144 U.S. 488, 504 (1892); Houghton Mifflin v. Stackpole Sons, Inc., 104 F.2d 306, 310-11 (2d Cir. 1939); Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161-62 (2d Cir. 1927); Grant v. Kellogg Co., 58 F. Supp. 48, 50-52 (S.D.N.Y. 1944).

court recognized conditions requiring the copyright owner to secure the authors' permission or pay compensation.[89]

In *Belford v. Scribner*,[90] the publisher of *Common Sense in the Household: A Manual of Practical Housewifery* sued to enjoin the publication of an allegedly infringing cookbook. Defendants argued that the publisher could not be the owner of the copyright because the author was a married woman, unable under the law to dispose of her own personal property, and her husband had not assigned the copyright to his wife's books in writing. Agreeing with the lower court that "if there is any ownership in this work by copyright at all, it is in the [publisher], in whose name the copyright was taken and now stands," the Supreme Court concluded that the husband's acquiescence in the publisher's claim to own the copyright justified the inference that "legal title . . . was in some due and proper manner conveyed to and vested in the persons who secured the copyright thereof."[91]

In the late nineteenth century, as publishers increasingly assumed the rights of copyright proprietors, even the lax presumptions of copyright transfer did not always suffice. In some cases, written documents undermined an assertion that copyright was transferred implicitly.[92] In others, claimants introduced no evidence of how they became the alleged proprietors of copyrights in the works they published.[93] Without some evidence of facts to support a transfer, some courts held that the alleged proprietor's claim of copyright ownership was void.[94] Others, though, relied on bare surmise to support their conclusion that the proprietor had somehow gained ownership of the common law copyright and the right to apply for federal statutory protection.[95]

So far, the cases finding a parol transfer of common law copyright from author to proprietor predicated that transfer on a supposed agreement between

[89] Lawrence v. Dana, 15 F. Cas. 26, 53-55 (C.C.D. Mass. 1869). Other courts devised similar gambits. *See, e.g.*, Maurel v. Smith, 271 F. 211, 214-15 (2d Cir. 1921); Dam v. Kirk La Shelle Co., 175 F. 902, 905-07 (2d Cir. 1910); Fitch v. Young, 230 F. 743 (S.D.N.Y. 1916), *aff'd mem.*, 239 F. 1021 (2d Cir. 1917).

[90] 144 U.S. 488 (1892).

[91] *Id.* at 504.

[92] *E.g.*, Press Publ'g Co. v. Monroe, 73 F. 196, 198-99 (2d Cir. 1896); *see also* Pub. Ledger Co. v. Post Printing & Publ'g Co., 294 F. 430, 432-33 (8th Cir. 1923) (construing 1909 Act); Pub. Ledger Co. v. N.Y. Times, 275 F. 562 (S.D.N.Y. 1921) (construing 1909 Act), *aff'd per curiam*, 279 F. 747 (2d Cir.1922).

[93] *E.g.*, Yuengling v. Schile, 12 F. 97, 100-02 (C.C.S.D.N.Y. 1882).

[94] *E.g., id.*; *see also* Kaplan v. Fox Film Corp., 19 F. Supp. 780, 781 (S.D.N.Y. 1937) (construing 1909 Act). That meant that the publication of copies with notice in the alleged proprietors' name, if done with the permission of the author or true copyright proprietor, would have caused the work to enter the public domain. *See, e.g.*, Egner v. E.C. Schirmer Music Co., 139 F.2d 398, 399-400 (1st Cir. 1943).

[95] *E.g.*, Dielman v. White, 102 F. 892, 895 (C.C.D. Mass. 1900); *see also* Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939).

the author and the person in whose name the the copyright was registered.[96] At the turn of the twentieth century, though, courts began to issue decisions finding that the copyright had vested in the employer, notwithstanding the absence of any evidence of a parol transfer, based on the bare fact of employment.[97] These early cases involved disputes between employers and third parties who challenged the validity of the employer's copyright, rather than between employers and author-employees. From these cases, courts evolved what became the work for hire doctrine.[98]

V. NOTICE IN THE WRONG NAME

Thus, the state of United States law at the turn of the twentieth century was that copyright protection required scrupulous compliance with the statute's registration, deposit, and notice provisions, but that the statutory provision requiring any copyright assignment to be in writing had no application to works until after they were published. That combination encouraged courts to conclude that if copyright protection subsisted, it must belong to the individual named in the copyright notice.[99] A handful of recent cases had upheld copyrights in the name of someone other than the author on the ground of employment rather than express or implied-in-fact assignment, but those cases were still few.

It's worth remarking that the three prerequisites to copyright ownership—registration of the printed title page before publication, deposit of published copies shortly following publication, and copyright notice printed on the title

[96] *See, e.g.*, *Dielman*, 102 F. at 895; Parton v. Prang, 18 F. Cas. 1273, 1278 (C.C.D. Mass. 1872); Lawrence v. Dana, 15 F. Cas. 26, 51 (C.C.D. Mass. 1869).

[97] *E.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248-49 (1903); Edward Thompson Co. v. Am. Law Book Co., 119 F. 217, 219 (C.C.S.D.N.Y. 1902); Colliery Eng'r Co. v. United Correspondence Schs., 94 F. 152, 153 (C.C.S.D.N.Y. 1899); *see also* Fisk, *supra* note 66, at 59-62; Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 248-54 (2008). Both Fiske and Bracha suggest that the work made for hire doctrine arose in part because of the increasing appreciation of corporate personhood.

[98] *See* Fisk, *supra* note 66, at 55-62. The rule that an employer could own the copyright in its employees' works without either a written or parol assignment was a novelty and copyright lawyers were divided about whether it made sense. In 1905, the Librarian of Congress convened a meeting of copyright lawyers and businesses and groups interested in copyright to discuss copyright reform. These discussions led to the introduction of copyright revision bills and, ultimately, to the enactment of the 1909 Copyright Act. *See* 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT xiii-xv (E. Fulton Brylawski & Abe Goldman eds., 1976). In the early discussions, participants disagreed about the current state of the law regarding employer ownership, about the wisdom of addressing it in a revision bill, and about the nature of an appropriate rule. *See id.* pt. C at 41-45, 54-57, 64-69; 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 65, 142-48, 188, 207-08 (E. Fulton Brylawski & Abe Goldman eds., 1976).

[99] *E.g.*, Dam v. Kirk La Shelle Co., 175 F. 902, 906-07 (2d Cir. 1910).

page—were all actions peculiarly within the competence of the publisher. Unless the publisher had expressly agreed to secure copyright in the author's name, one would expect the publisher to use its own name in copyright registration and notice, whether or not an author had executed a formal assignment. That would leave courts with the choice of holding the copyright void, or ratifying the publisher's ownership.

A careful author might seek to ensure that copyright was registered in the author's name by publishing copies of the work that included notice in the author's name, and registering and depositing those copies. Both Oliver Wendell Holmes, Sr. and Harriet Beecher Stowe tried precisely that gambit, with disastrous results.[100] Both authors licensed the *Atlantic Monthly* to publish their works in serial installments. The earlier installments were published without any attention to copyright formalities. For the later chapters, though, the *Atlantic Monthly* included a copyright notice in its own name and registered the copyright in each monthly issue on its own behalf. Meanwhile, Holmes and Stowe published the full novels as books, each with notice in the author's name, and registered their copyrights in the books. The Supreme Court concluded that their efforts were unavailing. The publication of the initial chapters of both books without copyright registration, deposit, or notice had abandoned those chapters to the public domain.[101] The later chapters had been published both with a notice in the name of the magazine and with a notice in the name of the authors; both the magazine and the authors had registered the copyrights. Those facts made it impossible to tell a plausible story about the authors' intent to convey their copyrights to the initial publisher and registrant, since their registration of their copyrights in their own names were inconsistent with any such intent.[102] The Court of Appeals for the First Circuit held that there could be no double copyrighting.[103] That led inexorably to the conclusion that if the authors retained their copyrights, the initial magazine publication of the chapters with notice in the magazine's name forfeited the copyright. If the authors had assigned their copyrights to the *Atlantic Monthly*, on the other hand, the notice on the magazine would have been proper, but the subsequent publication of their novels with notice in the authors' names forfeited the copyright.[104] The Supreme Court affirmed:

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[100] Mifflin v. Dutton, 190 U.S. 265, 266 (1903); *Mifflin III*, 190 U.S. 260, 264 (1903).

[101] *Mifflin III*, 190 U.S. at 261; Holmes v. Hurst, 174 U.S. 82, 87-90 (1899).

[102] *Mifflin III*, 190 U.S. at 262-63.

[103] Mifflin v. R.H. White Co. (*Mifflin II*), 112 F. 1004, 1005 (1st Cir. 1902), *aff'd*, 190 U.S. 260; *accord* Caliga v. Inter-Ocean Newspaper Co., 215 U.S. 182, 189 (1909) ("There is absolutely no provision in the statutes for a second filing of the photograph or description, nor is there any provision as to filing any amendments thereto, and as the matter is wholly the subject of statutory regulation, we are at a loss to perceive by what authority any second application for the same painting, with a view to securing a copyright thereon, can be sustained.").

[104] *See Mifflin II*, 112 F. at 1005-06. The trial court put it this way:

The law seems to be settled that the name of the party taking out the copyright must be

> It is exceedingly unfortunate that, with the pains taken by the authors of these works to protect themselves against republication, they should have failed in accomplishing their object; but the right being purely statutory, we see no escape from the conclusion that, unless the substance as well as the form of the statute be disregarded, the right has been lost in both of these cases.[105]

Focusing on litigated failures to comply with statutory formalities can leave a false impression. While evidence suggests that large numbers of copyright registrations failed to comply with statutory prerequisites, and would have been ruled invalid if their validity were litigated,[106] in most cases, copyright validity was not litigated. The majority of copyright registrations with latent technical defects appear to have worked well enough for their proprietors.[107] Even Harriet Beecher Stowe's copyright in *The Minister's Wooing* and Oliver Wendell Holmes's copyright in *The Professor at the Breakfast Table* enabled the authors and publishers to profit from the novels for more than forty years, from their initial publication in 1859 until the courts ruled the copyrights to be invalid in 1901. Similarly, the Warner Music Group, for many years the claimant to a copyright in the song *Happy Birthday to You*, collected more than two million dollars annually from licensing the song, despite multiple defects in any claim that the copyright was valid.[108] In addition to the issues that persuaded a federal district court to rule in 2015 that Warner had failed to

> inserted in the notice of every edition published, and that the failure to do this vitiates the copyright. A literal compliance with the statute may not be required, but the notice must contain the essentials of the name, claim of exclusive right, and the date when obtained. Under the authorities, I must hold that the insertion of the name "Ticknor & Fields" in the copyright notice in the Atlantic Monthly for the months of November and December, 1859, was an insufficient notice of Mrs. Stowe's copyright, and invalidates her right to any copyright in that portion of her book.

Mifflin v. R.H. White Co. (*Mifflin I*), 107 F. 708, 710 (C.C.D. Mass. 1901), *aff'd*, 112 F. 1004, *aff'd*, 190 U.S. 260. Because Stowe and Holmes had authorized the serialization of their novels in the *Atlantic Monthly*, any notice defects in its publication of the chapters inured to the authors' detriment.

[105] *Dutton*, 190 U.S. at 266. In the companion case, the Court noted that the magazine's registration of its copyright under the title "Atlantic Monthly Magazine" would be insufficient to secure a copyright in Holmes's novel, *The Professor at the Breakfast Table*. *See Mifflin III*, 190 U.S. at 264:

> With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person.

[106] *See, e.g.*, Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1409 (2010).

[107] *See id.* at 1409, 1425.

[108] *See generally* Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S.A. 335 (2009).

prove that it had acquired title to the copyright,[109] there's compelling evidence that the song was published without copyright notice in 1922.[110] Under then-controlling law, the song would have entered the public domain immediately.

VI. THE 1909 ACT

In 1909, Congress overhauled the copyright statute. Congress eliminated registration and deposit as prerequisites to copyright protection.[111] The 1909 Act made copyright available, going forward, for works published with copyright notice.[112] That change elevated the importance of notice in the correct name. The statute, like its predecessors, specified both the form and position of notice.[113]

Congress added a provision excusing inadvertent mistakes in copyright notices,[114] but courts construed that provision narrowly.[115] Congress also adopted the rule that the employer would be the legal author of works prepared by employees, by defining "author" to "include an employer in the case of works made for hire."[116] As with all previous copyright statutes, the 1909 Act required that assignments or transfers of copyright be in writing.[117] Congress added a provision emphasizing that ownership of a copyright was distinct from the ownership of a material object embodying a work, and providing that the transfer of the object "shall not of itself constitute a transfer of the

[109] *See* Marya v. Warner/Chappell Music, Inc., No. 13-4460, 2015 WL 5568497, at *20 (C.D. Cal. Sept. 22, 2015).

[110] *See* Ben Sisario, *An Old Songbook Could Put 'Happy Birthday' in the Public Domain*, N.Y. TIMES (Aug. 4, 2015), http://www.nytimes.com/2015/08/05/business/media/an-old-songbook-could-put-happy-birthday-in-the-public-domain.html [https://perma.cc/D4TR-Y7HS]; Daniel Victor, *New Evidence Should Free 'Happy Birthday' from Copyright, Lawyers Say*, N.Y. TIMES (July 28, 2015), http://www.nytimes.com/2015/07/29/nyregion/new-evidence-should-free-happy-birthday-from-copyright-lawyers-say.html [https://perma.cc/Z99Q-MZ3S].

[111] *E.g.*, Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 37-39 (1939); United Thrift Plan, Inc. v. Nat'l Thrift Plan, Inc., 34 F.2d 300, 300 (E.D.N.Y. 1929).

[112] *See* 1909 Act, ch. 320, § 9, 35 Stat. 1075, 1077 (repealed 1976). Some unpublished works could for the first time acquire federal copyright protection through registration. *Id.* § 11.

[113] *Id.* §§ 18-19.

[114] *Id.* § 20.

[115] If the notice on more than a small number of copies failed to comply scrupulously with the statutory requirements, courts held it ineffective. *E.g.*, Advertisers Exch., Inc. v. Anderson, 144 F.2d 907 (8th Cir. 1944); Deward & Rich, Inc. v. Bristol Sav. & Loan Corp., 120 F.2d 537, 539-40 (4th Cir. 1941); Krafft v. Cohen, 117 F.2d 579 (3d Cir. 1941); Smith v. Wilkinson, 19 F. Supp. 841, 842 (D.N.H. 1937).

[116] 1909 Act § 62.

[117] *Id.* § 42. The 1909 Act finally got rid of the long-inoperative language requiring authors to give permission to publish only in writing in the presence of two witnesses.

copyright."[118] Nonetheless, the jurisprudence surrounding authors' parol assignments of common law copyright in unpublished works continued to control.[119] Courts evolved a presumption: "Ownership of an unpublished composition presumptively includes all the rights which the common law recognized therein, among them being the privilege of publication and of securing a statutory copyright."[120]

Dam v. Kirk La Shelle Co.[121] involved the copyright to Henry Dam's short story, *The Transmogrification of Dan*. Dam had submitted the story to *Smart Set* magazine, which accepted the story and sent Dam a check for $85. *Smart Set* published the story in the September 1901 issue of the magazine with a copyright notice in the publisher's name; it promptly registered the copyright in the entire issue. Dam later sued theatrical producer Kirk La Shelle for copyright infringement alleging that Kirk La Shelle's production of Paul Armstrong's *The Heir to the Hoorah*[122] infringed the copyright in Dam's short story. Dam insisted that he had never transferred the copyright to *Smart Set*, but merely licensed it to publish the story in its magazine.[123] The court noted that if Dam were right about that, under the Supreme Court's construction of the notice requirement, the story's publication with notice in the magazine publisher's name rather than Dam's would have caused the story to enter the public domain.[124] The court concluded that Dam had transferred the entire

[118] *Id*. § 41.

[119] *E.g*., Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 311 (2d Cir. 1939); Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159 (2d Cir. 1927); Grant v. Kellogg Co., 58 F. Supp. 48 (S.D.N.Y. 1944).

[120] *Gerlach-Barklow Co*., 23 F.2d at 161 (citing Parton v. Prang, 18 F. Cas. 1273 (C.C.D. Mass. 1872); DRONE, *supra* note 70).

[121] 175 F. 902 (2d Cir. 1910).

[122] *The Heir to the Hoorah* opened at Broadway's Hudson Theatre on April 10, 1905, and closed on May 29 after 59 performances. *See The Heir to the Hoorah*, IBDB, http://www.ibdb.com/production.php?id=6081 [https://perma.cc/BMG3-FFCV]. The script was later adapted as a silent film, directed by Cecil B. DeMille's older brother William Churchill de Mille. *See The Heir to the Hoorah (1916)*, IMDB, http://www.imdb.com/title/tt0006777/ [https://perma.cc/TF45-UDS4].

[123] *Dam*, 175 F. at 904.

[124] *Id*. at 905-06:

> [W]e think that had Dam retained the dramatic rights to his story the entry of the magazine and the notice of copyright would have been insufficient to protect them. A notice of the copyright of the Smart Set magazine by the Ess Ess Publishing Company is hardly equivalent to a notice that the story "The Transmogrification of Dan" is copyrighted by or in favor of H. J. W. Dam. . . .
>
> But this question need not now be determined. Having found that the Ess Ess Publishing Company became the proprietor of the story within the meaning of the copyright statute, the precise question is whether that corporation took sufficient and proper steps to protect the dramatic rights which belonged to it as assignee.

copyright in his unpublished story to *Smart Set*, and that the publisher's notice and registration in its name therefore preserved the copyright.[125]

VII. THE ENDURANCE OF THE PAROL TRANSFER PRESUMPTION

Because a copyright, if it were valid, was necessarily owned by the person or entity named in the notice, there was no need to develop conventions or presumptions for identifying the copyright owner, and no need to require that copyright assignments be recorded. Unless the copyright owner were the person or entity named in the notice, the copyright was invalid. In response, courts evolved unprincipled and unpredictable doctrines to justify, whenever possible, holding that the title to the copyright was effectively assigned to the person or entity named in the notice. Where undocumented parol transfers could not be inferred, or would not support the right claimed, courts applied an increasingly broad interpretation of the works made for hire doctrine.[126] By 1955, the Copyright Office estimated that forty percent of new applications for copyright registration were for works made for hire.[127]

The presumption that an author transferred his copyright whenever he submitted a copy of the work for publication persisted under the 1909 Act.[128] The presumption may originally have arisen to prevent the forfeiture of copyright from defects in notice, but later courts applied it as a freestanding legal rule in the absence of any notice defects. Where the author claimed to have reserved any rights in his copyright, courts were unsympathetic unless the

[125] Dam had persuaded the magazine publisher to reassign to him whatever interest it had in the copyright to his story; that enabled his widow to recover from Kirk La Shelle for its production of an infringing play. *See id*. at 907.

[126] *E.g*., Brattleboro Publ'g Co. v. Windmill Publ'g Co., 369 F.2d 565, 568 (2d Cir. 1966); Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 700 (2d Cir. 1941). Designating a work as made for hire was significantly worse for authors than holding that they had assigned their copyrights before publication. Sections 23 and 24 of the 1909 Act vested the copyright renewal in the author or author's surviving family. 1909 Act, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (repealed 1976). Courts construed the Act to allow authors who assigned their common law copyrights before publication to apply for the renewal term. *See* BARBARA A. RINGER, STUDY NO. 31: RENEWAL OF COPYRIGHT, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES NOS. 29-31, at 105, 125-27 (Comm. Print 1961); *see, e.g*., Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 747 (2d Cir. 1975); White-Smith Publ'g Co. v. Goff, 187 F. 247, 251-53 (1st Cir. 1911). If works were created by employees as works made for hire, though, the employer was the author and entitled to apply for renewal. *See, e.g*., Tobani v. Carl Fischer, Inc., 98 F.2d 57, 59-60 (2d Cir. 1938).

[127] *See* BORGE VARMER, STUDY NO. 13: WORKS MADE FOR HIRE AND ON COMMISSION, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES NOS. 11-13, at 139 (Comm. Print. 1960).

[128] *E.g*., Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 311 (2d Cir. 1939); Freudenthal v. Hebrew Publ'g Co., 44 F. Supp. 754, 755 (S.D.N.Y. 1942); Pushman v. N.Y. Graphic Soc., Inc., 25 N.Y.S.2d 32, 34 (N.Y. Sup. Ct. 1941).

author could produce written documentation that he retained the copyright or any part of it.[129] Unsurprisingly, the rule worked to authors' disadvantage.[130]

VII. COPYRIGHT WITHOUT NOTICE

The repudiation of copyright notice began with the enactment of the 1976 Copyright Act. Without repealing notice, registration, and deposit requirements, Congress made most errors in copyright notice harmless.[131] At the same time, Congress endorsed an expansive version of copyright divisibility under which any subpart of any copyright exclusive right could be separately assigned and owned.[132] Going forward, it was no longer necessary that a copyright be owned by a person named in the copyright notice, or by anyone in particular. Congress moderated the chaos-inducing aspects of these changes by tweaking the copyright ownership rules. By vesting copyright in authors as of the work's fixation, Congress eliminated the parol transfer of common law copyright, and made the requirement of a written copyright assignment applicable to unpublished works as well as published ones. As soon as a work was initially fixed in tangible form, copyright vested in the author.[133] Thereafter, ownership could be transferred only by a signed, written instrument.[134] By enacting a detailed definition of works made for hire, Congress sought to introduce some clarity and predictability to the determination whether a work was owned by its creator or the person or entity who financed its creation.[135] It didn't appear to occur to anyone contemplating these changes that it might be necessary to retrofit some of our ownership, assignment, and licensing rules to make it easier to ascertain who had authority to license particular copyright uses.

In 1989, we abandoned notice requirements completely. Again, nobody suggested that Congress might need to think about new provisions that might replace some of the work that we had relied on copyright notice to accomplish.

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[129] *See, e.g.*, Manners v. Morosco, 252 U.S. 317, 326-27 (1920); Maurel v. Smith, 271 F. 211, 214-15 (2d Cir. 1921); Grant v. Kellogg Co., 58 F. Supp. 48, 51 (S.D.N.Y. 1944); *Pushman*, 25 N.Y.S.2d at 32.

[130] *E.g.*, *Grant*, 58 F. Supp. at 52 ("When plaintiff furnished his art work to the defendant for publication, he lost whatever common-law rights to copy he possessed."); *see also* Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939) (holding that where contract for mural is silent as to copyright, court must presume that artist transferred rather than reserved it).

[131] 1976 Act, Pub. L. No. 94-553, §§ 404-406, 90 Stat. 2541, 2577-79 (codified at 17 U.S.C. §§ 101-810 (2012)).

[132] 17 U.S.C. § 201(d)(2).

[133] Congress retained the rule that the "author" of a copyrighted work includes the employer in works made for hire. *Id.* § 201(b).

[134] *Id.* § 204. The statute also permits transfer "by operation of law."

[135] *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 888-93 (1987).

Now that copyright vests upon fixation, one might think that all of the precedent surrounding assignment and transfer of common law copyrights would be irrelevant. In fact, those doctrines have proved disturbingly long-lived. First, of course, they control determinations of initial copyright ownership in works first published or registered before January 1, 1978. In twenty-first century cases involving twentieth century copyrights, the old incoherent analyses still control, and cases commonly reach irreconcilable results on identical facts.[136] Meanwhile, those analyses have slopped over to confuse courts seeking to determine who owns the copyright in more recent works.[137] Publishers continue to presume that they own the copyrights in the works that they publish whether or not the author has executed and signed a transfer of copyright ownership.[138]

[136] *See, e.g.*, Keiler v. Harlequin Enters., 751 F.3d 64 (2d Cir. 2014); Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013); Gary Friedrich Enters. v. Marvel Characters, Inc., 716 F.3d 302 (2d Cir. 2013); Mattel, Inc. v. MGA Entm't, 616 F.3d 904 (9th Cir. 2010); Marvel Characters, Inc. v. Simon, 310 F.3d 280 (2d Cir. 2002); HarperCollins Publishers LLC v. Open Road Integrated Media, LLC, 7 F. Supp. 3d 363 (S.D.N.Y. 2014); Random House, Inc. v. Rosetta Books LLC, 150 F. Supp. 2d 613, 620-24 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002).

[137] *See, e.g.*, Aldon Accessories Ltd. v. Spiegel, Inc., 738 F. 2d 548, 552 (2d Cir. 1984); Blum v. Kline, No. 86 Civ. 8149, 1998 U.S. Dist. LEXIS 4424 (S.D.N.Y. May 17, 1988); Sasnett v. Convergent Media Sys., No. 95-12262, 1997 U.S. Dist. LEXIS 17960 (D. Mass. Aug. 29, 1977); *see also* 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 260 (2d Cir. 2015) (holding that copyright in raw film footage created by a film director who was not an employee and had not signed a work for hire agreement was owned by the film producer as author because the producer had "initiated the project; acquired the rights to the screenplay; selected the cast, crew and director; controlled the production schedule; and coordinated (or attempted to coordinate) the film's publicity and release"). *16 Casa Duse* doesn't cite any of the older cases I've been discussing in this article. It relies, instead, on recent cases deciding whether two contributors to a copyrighted work should be deemed joint authors. The court resolves that question in the negative, and then concludes that Merkin's contribution, which is indisputably not a work made for hire and was not assigned in writing, must belong to Casa Duse anyway. How? A little magic; a little sleight of hand. *See 16 Casa Duse*, 791 F.3d at 256-61; *cf.* Lawrence v. Dana, 15 F. Cas. 26 (C.C.D. Mass. 1869). Arguably, the joint authorship cases reflect the values of the parol transfer jurisprudence, in the sense that they show an unseemly and sometimes unreasoning eagerness to move the ownership of copyrights into the hands of the works' exploiters, but the joint work cases don't expressly rely on any of the nineteenth or early twentieth century precedents that I've focused on in this article.

[138] One of my favorite examples involves the American Society of Composers, Authors, and Publishers ("ASCAP"), who should surely know better. From 1938 to 2010, ASCAP sponsored the Nathan Burkan Memorial Competition, designed to encourage scholarship about copyright law by awarding cash prizes for law student essays. *See Foreword*, 1 COPYRIGHT L. SYMP. (ASCAP) 5, 5 (1939). A number of prominent copyright scholars wrote their first copyright paper as entries in the Burkan Competition. *See, e.g.*, Paul Goldstein, *Copyrighting the New Music*, 16 COPYRIGHT L. SYMP. (ASCAP) 1 (1968); Robert A. Gorman, *Copyright for the Collection and Representation of Facts*, 12 COPYRIGHT L.

Scholars and prospective licensees complain that it has become impossible to ascertain the identity of the owner of the rights one seeks to license.[139] We read ubiquitous stories of false[140] or conflicting[141] ownership claims, only a tiny fraction of which land in court.[142] Purported copyright owners have

SYMP. (ASCAP) 30 (1963); Melville B. Nimmer, *Inroads on Copyright Protection*, 4 COPYRIGHT L. SYMPOSIUM (ASCAP) 2 (1952). In 1990, 14 years after the enactment of the 1976 Copyright Act, ASCAP adopted the following rule governing submissions to the contest: "7(d). All papers submitted to the competition are deemed to be the property of the Society and the Society shall be copyright owner of the works." *See Papers for 1990: Rules Governing the Competition*, 40 COPYRIGHT L. SYMP. (ASCAP) xxi, xxii (1997). This is especially curious given that rule 7(b) permitted submissions that had been or would be published in law reviews, so long as the papers' entry in the Competition was "duly noted." *Id*. Presumably, the law reviews might also have believed that they owned the copyright in the papers they published and might even have asked the students to execute written copyright assignments.

[139] *See, e.g.*, Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 570-74 (1997); Litman, *supra* note 14, at 21-22; Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010); *see also* Andy Baio, *Criminal Creativity: Untangling Cover Song Licensing on YouTube*, WIRED (May 2, 2012, 3:24 PM), http://www.wired.com/2012/05/opinion-baio-criminal-creativity/ [https://perma.cc/EW22-KF9V] (reporting that YouTube has licensed sync rights from thousands of music publishers to permit the uploading of cover version of their songs, but "[f]rustratingly, we have no idea which publishers have signed on").

[140] *See, e.g.*, Tim Cushing, *YouTube's ContentID Trolls: Claim Copyright on Lots of Gameplay Videos, Hope No One Complains, Collect Free Money*, TECHDIRT (Feb. 28, 2013, 10:56 AM), https://www.techdirt.com/articles/20130227/20563322144/ youtubes-contentid-trolls-claim-copyright-lots-gameplay-videos-hope-no-one-complains-collect-free-money.shtml [https://perma.cc/9R44-HWFZ]; Ben Jones, *MegaUpload, Universal, and the DMCA-less Mega Song Takedown*, TORRENTFREAK (Dec. 16, 2011), https://torrentfreak.com/megaupload-youtube-and-the-dmca-less-mega-song-takedown-111216/ [https://perma.cc/BD3B-3SLL]; David Kravets, *Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars*, WIRED (Nov. 21, 2011, 6:30 AM), http://www.wired.com/2011/11/youtube-filter-profiting/ [https://perma.cc/HZD2-UEAF].

[141] *See, e.g.*, Eriq Gardner, *Nina Simone's Heirs Allege Sony Music Operates a Piracy Ring*, HOLLYWOOD REP. (May 21, 2015, 10:57 AM), http://www.hollywoodreporter.com/thr-esq/nina-simones-heirs-allege-sony-797376 [https://perma.cc/UQ4N-8U3X]; Eriq Gardner, *In Big Ruling, Sony Beats "Iron Man" Composer's Lawsuit*, HOLLYWOOD REP. (Apr. 21, 2015, 12:07 PM), http://www.hollywoodreporter.com/thr-esq/big-ruling-sony-beats-iron-790466 [https://perma.cc/7B2L-XTXD]; Martha Neil, *Composer's Heirs Sue CBS over Use of Iconic "Hawaii Five-0" Theme Music in TV Show Remake*, ABA J. (Mar. 20, 2015, 1:10 PM), http://www.abajournal.com/news/article/composers_heirs_sue_cbs_over_use_of_iconic_hawaii_five_o_theme_music_in_mod [https://perma.cc/QU8D-XWSF].

[142] *See 16 Casa Duse*, 791 F.3d at 253; Garcia v. Google, Inc., 786 F.3d 733, 737 (9th Cir. 2015); Severe Records, LLC v. Rich, 658 F.3d 571, 573 (6th Cir. 2011); Brownstein v. Lindsay, No. 10-1581, 2012 U.S. Dist LEXIS 170338 (D.N.J. Nov. 30, 2012), *rev'd*, 742 F.3d 55 (3d Cir. 2014); Crispin v. Christian Audigier, Inc., 839 F. Supp. 2d 1086, 1088

asserted that they cannot reliably identify all the works whose copyrights they own.[143] Who owns the right to license a particular use turns out to require close reading of the individual documents in the copyright chain of title—none of which are publicly available.[144] In the United States, we never developed a legal presumption or custom that authors retain their copyrights; we have no requirement that transfers of copyright ownership be recorded in some public registry; and for most works of authorship, we lack a robust system of collecting societies tasked with the job of tracking down rights-holders and collecting and remitting license fees for their works.[145] We face a legal milieu in which the only users of preexisting copyrighted works who can do business with confidence are the entertainment and information behemoths large enough that they can afford to self-insure.

What's to be done? One partial response that would probably do the least violence to the current structure of the U.S. copyright marketplace would be Professor Jane Ginsburg's suggestion to adopt and enforce a requirement that transfers of copyright ownership be recorded and the records maintained in a

(C.D. Cal. 2011); Complaint at 1-2, Megaupload Ltd. v. Universal Music Grp., Inc., No. C-11-6216 (N.D. Cal. Dec. 12, 2011).

[143] *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000) ("[D]espite their claim that it would be burdensome or even impossible to identify all of the copyrighted music they own, plaintiffs have made at least a minimal effort to describe the works in suit.").

[144] Who, for example, owns the copyright in this article? I know the answer, because I have read (or, by the time you read this, will have read) both my university's copyright policy and the publication agreement that this journal persuaded me to sign. You have no way to figure it out, except to ask me, and my university, and the journal, and hope that we all give you the same answer. That's a trivial problem with a work, like this one, that has negligible economic value, but the same problems obtain for works with great commercial significance. *See, e.g.*, Keiler v. Harlequin Enters., 751 F.3d 64 (2d Cir. 2014); Random House, Inc. v. Rosetta Books, LLC, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002). The fact that copyright owners may assign different exclusive rights to different exploiters in any combination exacerbates the problem significantly.

[145] In the United States, collecting societies license some uses of some works. There are well-established collecting societies that license public performance of music and digital public performance of sound recordings. *See* U. S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 32-52 (2015). The Copyright Clearance Center has for decades sought to perform a similar service for copying and distribution of published texts, with limited success. *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1240-41 (11th Cir. 2014). Collecting societies have historically had an uneasy relationship with U.S. antitrust law, *see, e.g.*, John M. Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM. J.L. & ARTS 333 (1986), and are controversial among both copyright owners and prospective licensees. *See generally* Jonathan Band, Cautionary Tales About Collective Rights Organizations (Sept. 19, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036 [https://perma.cc/T25J-4HNX].

publicly accessible format.[146] An easy-to-consult recordation database would largely duplicate the owner-identification function of copyright notice; that would partly ameliorate the inconsistency and unpredictability of copyright ownership under U.S. law—at least for prospective licensees. Whether authors would have better luck retaining their rights if their purported assignees needed to publicly declare their ownership claims is much harder to predict, but perhaps in the United States, that's no longer something we care about.

[146] *See* Ginsburg, *supra* note 10, at 1611-21. Professor Ginsburg suggests that unrecorded transfers would be treated as nonexclusive licenses. *Id*. at 1617. I would anticipate that Ginsburg's proposal would generate strong opposition among large copyright owners. The current uncertainties surrounding ownership, described in *supra* notes 139-44 and accompanying text, mean that many large copyright owners are less than confident about the clarity of their title to copyrights in the portfolio and unsure about copyrights they may or may not own. From their vantage point, it makes more sense to maintain the status quo and research the title of copyrights to works only when they decide they want to use them, rather than to risk losing enforceable rights in some work they haven't yet decided to exploit. Similar issues seem to be fueling opposition to meaningful orphan works legislation.