Copyright Debate

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General Copyright Background

- Copyright law is derived from the "Progress Clause" in the Constitution which says:

  "Congress has the power to promote the Progress of Science . . .
  by securing for limited Times to Authors . . . exclusive Right to
  their . . . Writings. . . ."

- The underlying goal of Copyright is to encourage the creative expression of ideas, and the mechanism is to give authors the exclusive rights to that content for a time so they may derive financial gain from their work. However, this financial gain is balanced by the needs of the public and the desire for past creativity to fuel future creativity, hence the explicit limitation (i.e. Copyrights are established as individual rights, but as most of the laws, they are supposed to be designed for the larger benefit of society).

- Copyright covers any content that is "fixed in a tangible form of expression," and that has been independently and creatively produced by an author. This means that there is a general test for the "creative merit" of the content (which is pretty loose) and rules for what constitute a "tangible form" (this currently includes many forms, including computer memory). Copyright does not cover ideas or facts.

- Copyright confers upon the author certain exclusive rights which include: reproduction right, distribution right, right to make derivative works, and performance and display rights. The author may exclusively reserve all or some of these rights, and may transfer all or some of these rights to others in the form of exclusive or non-exclusive licenses. In most cases the terms of these licenses are at the discretion of the author, but in some cases Congress has mandated statutory licenses to limit the power of the author (such as payment for playing songs).

- Ownership of copyright is not always granted to the creative author. If the work is made in the course of employment then the copyright is owned by the employer. Content created as a "work for hire" or as the result of a commission (with appropriate contract) can also considered the property of the employer. In the cases where a work is created by multiple authors, and the work cannot be considered
whole without the contributions of all the authors, then joint ownership is conferred to the authors.

- As of 1989, when the US became party to the so-called Berne Convention, any work that can be considered protected under copyright is implicitly protected as soon as it is committed to a "fixed tangible form" by the author. The author need not give copyright notice or register the work with the government. In many cases notice will help the author in defending the copyright against infringement, and registration is required before an author can bring a suit against an infringer (if the registration is filed before infringement, or within the first 3 months since publication, it permits the owner to collect compulsory fines beyond damages). To register a work costs $30 and requires one to two copies of the work to be submitted to the Copyright Office.

- The term of a copyright is dependent on when the work was created, when it was published, and the context in which it was created. The base term is from creation to the death of the author plus 70 years (since 1998 when it was increased from 50). If a commissioned work, done for an employer, or created anonymously or under pseudonym the term is 95 or 125 years. There are several other conditions that may affect the length of the term as well.

- Copyright can be enforced by bringing a civil suit against an infringer. An infringer can invoke several valid defenses, the most common being that the use of the work is valid under the fair use clause. Fair use allows for copying and use of a copyrighted material in certain circumstances such as for educational purposes or for commentary and criticism.

**General Categories of Impact**

(1) Logistics  
(2) Commercial  
(3) Social/Intellectual  
(4) Political/Legal

**Affirmative Argument**

**Affirmative:** For mandatory, explicit registration by authors of their works. (opt-in)

**Key Issues:**  
1) Centralization of knowledge regarding the copyright holders  
2) Ability to alleviate the harm done to orphaned works  
3) Helps lower cost to create and thus more incentive to create

**Background:** The point of copyright is to spur the creation of creative property (will find exact quotation from Constitution). To enable this, the Constitution allows Congress to grant exclusive ownership to a creative work that has been "fixed in a tangible form" to ensure the authors that they can extract a commercial benefit from their creation.
Two models for explicit registration:

(I) Explicit registration from the beginning of a works existence. This would require that all works which wish to have copyright protection must register before they can claim copyright protection. We will assume that this is a different model than the current one which requires registration only for the sake of litigation and which can be done after there has been a case of infringement.

(II) The Lessig/Elder hybrid model believes that copyright protection should be granted automatically (as it is now) up to a fixed term (most likely one to coincide with that of the Berne Convention, which is death + 50 years). After that time, in order to extend the protection, the author would need to explicitly register the work and pay a nominal fee. This is mostly a reaction to the current practice of copyright extension (Congress has extended the copyright term 11 times in the last few decades) which detrimentally affects works which are not commercially viable (orphaned works).

Points in the affirmative:

- *Orphaned works go away.* Orphaned works benefit from both models, however, they would benefit most from a model that requires all works to be copyrighted from the beginning. The primary reason for the benefit is that in (I) any author who wants to relinquish his/her rights can do so without any work, and if they don't relinquish the rights, at least a record of this (and a starting point for a search for the author) would have to be recorded. In the (II) model, orphaned works benefit because they don't get dragged along with the 2% of profitable content that advocate for term extensions (like the 1998 Sony Bono CTEA).

Impact: (3)

- *More innovation.* By having the default be no copyright protection, the vast majority of non-commercially viable material would be available for use by others to build upon, thus actually expanding innovation, which is the raison d'etre for the copyright law.
  
  o Of course, a rebuttal to this would be that for content that is not initially viewed as viable by the author, but then suddenly becomes viable, the author would not get any money.
  
  o Then again, if the author didn't create it with the goal of making money in the first place then he can't complain about not making any windfall profits off it (this becomes a very contestable and circular argument).

Impact: (2) (3)

- *Less lobbying for extensions.* This mainly comes from model (II). If there is no need for companies to lobby for term extensions to maintain their control on the product (which they claim both for commercial reasons, and for cultural reasons, such as
"Mickey Mouse could be used for porn if we don't control it, and that would be bad for our culture") if they can simply register for term extensions.

- An argument against this would be that they would still lobby to extend the length of the registered extension (because the Constitution mandates that this term be limited).
- I would counter by saying that the facts brought in Eldred v. Ashcroft would be palatable to the justices in this model, and they would find that extensions are tantamount to making this infinite (see me if you are curious about this statement, its relevant to the discussion in Lessig's book)
- Another counterargument could be that the balance might be tipped against society in such cases, by allowing unlimited extension terms to some largely successful company. But for this one can always say, that this is what lobbying is today. Thus, a company that has a successful copyright should pay more to renew their rights, and that money reverts in benefit of society instead of benefiting certain politicians.

Impact: (2) (4)

- **Lower transaction costs for finding authors.** If you have a centralized, mandated place to find the author, it would lower the search cost for finding the author. This would mean that people would be freer to innovate since they can definitively determine whether or not something is copyrighted, and could mean more money to the author since more people would be able to ask them for permission/license to use their work. This comes mostly from model (I) and to a lesser extent (II).
  - Of course, this is predicated on the notion that the central repository is efficient and well maintained, and this can be expensive.
  - However we already have a registration mechanism in place, and with current technology it would be cheap to do this with commodity stuff.

Impact: (1) (2) (3)

- **Lower court costs and less litigation.** When registration is mandatory and explicit, it is less ambiguous who is at fault in cases of infringement. This also makes it easier for companies to bring charges against infringers (and thus would probably make infringers think twice) because the centralized nature would make it so they have little defense. Currently you can line up the cost of bringing charges against an infringer versus the eventual gains, and it can be cost effective for people to infringe. This would help prevent that to some extent.
  - What about fraud here. If fraud is easier to commit, you will still get bogged down in proving who actually the author was.
  - To counter the above, fraud is still a problem in either registration model. It is a systemic problem. With or without registration, one has trouble in proving who the “original” author was. At least, registration imposes a starting point on average (assuming that the average person is not fraudulent).

Impact: (2) (3)
Negative Argument

Negative: No mandatory registration of works by the authors. (opt-out).

Key Issues: 1) Registration imposes a logistical burden on the copyright office and on the creator of works
2) Changing to a registration model signals a philosophical shift from viewing work as a "natural right" to one that is statutory

Background: In the current system since 1989 any work that is in a "fixed tangible form" is implicitly granted copyright protection to the author. This does not require a copyright notification (i.e. "Copyright (c) 2005, Andrew Schultz") nor does it require the registration of the work. This change was the result of the US becoming a signatory of the Berne Convention which holds creative property to be a "natural right" and thus not subject to registration. The negative side holds that this should remain the case.

Points in the Negative:

- Creative commons project. This provides an alternative to forcing explicit registration by allowing ad hoc projects like Creative Commons collect the will of the author to relinquish certain rights. This provides a compelling, real world example of a way to provide explicit "opting-out" of certain implicitly reserved rights.
  - Of course, the major problem is that this is not mandatory, and thus is not exhaustive. This would play an important component in the real implementation of model (II) of the affirmative argument. Regardless, this alone leaves doubt as to whether it is safe to use content not found there.
  - It is not mandatory, but it could become the de facto standard (much in the way eBay or Craigslist are) and thus could actually do a better job than the government.

Impact: (1)

- Small authors and non-authors lose out. For small authors and people who don't view themselves as authors (ie they generate content without any commercial intent), the burden of registration is unfair. Companies which deal in content have the time/resources/money/knowledge to register all of their works, but small authors and amateurs may not have the ability (or knowledge) to register their works. This creates an imbalance that favors commercial interests of publishers, aggregators, and distributors over the author which goes against the goal of copyright.
  - For small authors this assumes that the burden is high. You could conceive of a nominal or non-existent fee and a easy way to register (Lessig advocates a "1-click" approach). For non-authors I would consider this to be a windfall if their content is picked up, but this is still a problem of imbalance. However, this can be alleviated by model (II) which makes initial protection automatic, thus freeing small/non-authors of the burden of protecting all of their work, and allows them to register if it does become worthwhile to.
o Either way, you can always argue a de facto imbalance exists, this in my mind becomes a somewhat degenerate argument.

Impact: (2) (3)

- **Registration rush.** If registration becomes mandatory for copyright, it is likely that there would be a rush to register just about everything, from both corporations and individuals for fear of overlooking some important piece of content. This could induce a sort of copyright paranoia that is actually counterproductive. Having the implicit protection prevents this kind of anxiety, as it lets authors and companies focus on registering only the content they deem worth of registration (for the benefits that registration confers).
  o This is a bit of a speculative statement. There is nothing to say that in the absence of automatic copyright protection that people will rush to copyright everything. This might actually work to the advantage of the public domain by forcing people to consider what is really important and leaving the rest to the public. This also mostly affects model (I).
  o Yes, but if the system works on incentives (as it has for hundreds of years) not having the protection afforded by copyright could lessen the will or need to create.
  o To counter the Yes point above, it can be said that the cost of defending against existing copyrights, extended ad-hoc, or even fraudulent, might offset the “profit” generated by creating. So there is a marginal balance between both situations.

Impact: (2) (3)

- **Proof of authorship and fraud.** Having a system to register every piece of content that wishes copyright protection will require a fairly low transaction cost to use the system. For the system to operate realistically, it cannot spend a lot of time authenticating the claims of the authors which submit to the system. This could potentially be used by the unscrupulous to register other peoples’ works which were not previously registered and thus claim authorship. This is a problem that exists in the system today, and the burden is still on the original author to prove authorship. However, the lower cost of using this new registration system would make it even easier to commit authorship fraud, and thus would invalidate many of the claims regarding litigation benefits above.
  o This is a problem for (I) which is compulsory for all works, but for (II) you have the same problem as you have today. Presumably by the time one was to submit for a registration extension, authorship would have been sufficiently proven.
  o An argument going against the previous point is that not everybody has the economic capabilities to go for litigation, and thus validate authorship. So in a sense the economic burden of authorship and fraud affects small authors. [This argument supports the original negative statement, and counters the previous bullet].
Burden on the creative process. Forcing the author to explicitly register his/her works places a burden on the creative process that is onerous and potentially damaging to creativity. If the author knows that their work won't be protected without the act of registration, they have less incentive to create. While the true impact of this burden is debatable, the fact remains that this signals a fundamental shift in the view of creative property. Under the current Berne Convention rules, the protection of creative property is considered a "natural" right of the creator, much as the right to own any other type of property. To change the ownership of this property to be dependent on registration is a major change in philosophical view, one that is not to be taken lightly just for the sake of efficiency.

- The view that changing copyright procedure is just for the sake of efficiency misses the negative impact that current copyright mechanics has on the creative process. The fact that it is expensive and difficult to utilize works that should be in the public domain stifles creativity and is actually demonstrably detrimental to the goal of copyright law. Perhaps this burden is too great in model (I), but the fact that it would only affect works that are commercially worth protecting after some term makes this less onerous in model (II).

- To counter the bullet above, notice that it depends on the view we have of copyright: is it a societal net-benefit view, or individual benefit view. Both are at odds in the above scenario. For example, it might be more beneficial for society if new authors were able to create over existing material, accelerating the economic gains, and multiplying them. In an individual view, this is unfavorable.

Cost to build such a system and the logistical nightmare of protecting online/small content. Building a system for maintaining the much more widespread registration is not free. This would require money from the government to build and maintain far beyond the needs of the current registration system. Additionally, it is almostlogistically impossible to have a registration system for the vast amount of content created online, especially things like individual pieces of code. It would place too much of a burden on the registration system and on the authors to be forced to register this content. This is especially important since code often is commercially important.

- This is a very valid point about compulsory registrations of model (I). This is again alleviated by model (II) since the amount of code and other small content that is still worth protecting after a long term will be dramatically reduced.
requires registration of all material would be in conflict with this internationally accepted model for copyright. This would provide considerable problems legally, economically, and socially for material that fails to be registered in the United States, but is still covered by copyright in other countries. Reconciling a new system with this international system most likely would be logistically impossible.

- Model (II) would allow US copyright to adhere to the limits set by Berne while also allowing registration for valuable works in the longer term. Furthermore, the US copyright laws already have considerable discrepancies from European laws. For example, in Europe, a copyright is a “good” owned by the author.

Impact: (1) (4)