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A PERFECT (COPYRIGHT) UNION: UNITING REGISTRATION AND LICENSE DESIGNATION

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I. INTRODUCTION

A major criticism of the current copyright system is that it affords overly broad protection in terms of the duration, works, and uses covered.[1] Following the passage of the Copyright Act of 1976[2] and the

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1. William Fisher, *The Proposer's Opening Remarks*, *Economist Debates: Copyright and Wrongs: Statements*, ECONOMIST (May 5, 2009), http://www.economist.com/debate/days/view/310#pro_statement_anchor.

2. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006 & Supp. IV 2010)).

Berne Convention,[3] copyright protection has been given extraordinarily long duration,[4] and breadth-limiting formalities have been eliminated.[5] Virtually any use of the creative expressive content in a work is subject to control by a copyright-holder,[6] and attempts to invoke the "fair use" exception can result in protracted legal disputes.[7] The result is near-constant infringement of copyright, made bearable only by virtue of limited enforcement.[8]

Transaction-cost barriers to licensing copyrighted content exacerbate this problem. Each time an individual wants to make use of content, she must (1) identify all of the potentially protected works embodied in the content,[9] (2) identify the protected or unprotected status of those works with respect to the intended use,[10] (3) identify the relevant copyright owners, and (4) negotiate a license or determine that the expected/potential liability is sufficiently low to permit unlicensed use. The homogeneous nature of the copyright system reinforces this problem. While the copyright system uses a one-size-fits-all approach to incentivize content creation, many creators would be sufficiently incentivized by a system that freely permitted some types of uses, or use by some types of users. Consequently, most uses of protected works — even uses to which virtually any author would consent — must be cleared through this high-transaction-cost process.

The result is a copyright system that fails both content creators and content users. Content creators are denied opportunities to see their works disseminated because the system assumes by default that

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3. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (acceded to Mar. 1, 1989).

4. *See* Eldred v. Ashcroft, 537 U.S. 186, 192–94 (2003) (holding that a copyright term of the life of the author plus seventy years does not exceed Congress's grant of power under the Progress Clause).

5. *See infra* Part III.A.

6. *See infra* notes 13–16 and accompanying text.

7. The copyright infringement case against Shepard Fairey regarding the "Obama HOPE" poster is a recent example. *See* Complaint for Declaratory Judgment and Injunctive Relief, Fairey v. The Associated Press, No. 1:09-CV-01123-AKH (S.D.N.Y. Feb. 9, 2009). The case settled after nearly two years of litigation, without generating a conclusion as to the question of fair use. Larry Neumeister, *Shepard Fairey vs. AP Lawsuit Dropped*, HUFFINGTON POST (Jan. 11, 2011, 8:53 PM), http://www.huffingtonpost.com/2011/01/12/shepard-fairey-ap-suit-dropped_n_807800.html.

8. *See* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 ("We are, technically speaking, a nation of constant infringers.").

9. An individual piece of content may embody many discrete copyright-protectable works. For example, a film might embody a script (a literary work), a score (a musical composition), the performance of the score (a sound recording), and the filmed scenes (an audiovisual work).

10. Certain uses, even of protected works, do not give rise to potential copyright liability. For example, some uses are sufficiently de minimis to avoid infringement. *See* 2-8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01[G] (Matthew Bender rev. ed. 2011). Other uses might be protected by the "fair use" doctrine. *See infra* note 20 and accompanying text.

they want strong protections. Content users — both passive consumers and downstream creators — are denied opportunities to use works in ways for which copyright protection is not necessary in order to incentivize creation. Put simply, there are work-use combinations that are unnecessarily subjected to strong copyright protection and the associated high transaction costs of license negotiations. This Note refers to this as the *overprotection problem*.

This Note proposes a solution to this problem, based on a combination of two existing structures: *copyright heterogeneity* and *copyright formalities*.[11] Copyright heterogeneity describes structures that permit different types of copyright protection to be chosen by a content creator; today, copyright heterogeneity is achieved primarily through the use of form licenses that permit certain free uses of a work (for example, the Creative Commons licenses). Copyright formalities are steps — such as inclusion of a copyright notice or registration with a national copyright office — that must be taken by content creators to secure protection for their works. Although formalities once operated to substantially limit the number of works protected by copyright law, they have been relegated to an inferior status over time. Today, they operate only to limit enhanced damages or prevent certain evidentiary presumptions.

Parts II and III explore copyright heterogeneity and copyright formalities, respectively, as structures that mitigate or could mitigate the overprotection problem. These structures are examined with respect to their feasibility, the extent to which they address overprotection, and their potential fallbacks. Part IV proposes two schemes that combine Creative Commons licensing (a genre of copyright heterogeneity) with copyright registration (a copyright formality). The first of these schemes involves a modest change to the copyright registration process, while the second creates a more ambitious public-private copyright registration system. Part V concludes with a look toward the future.

II. HETEROGENEITY

In the United States, the copyright system is directed principally toward the goal of incentivizing the creation of new works.[12] To

11. The idea for this Note was inspired by Christopher Sprigman's proposal to include CC-style partial rights reservations in a reinvigorated system of copyright formalities, "enforceable as a matter of positive law." Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 564 (2004).

12. U.S. CONST. art. I, § 8, cl. 8. (emphasis added) ("*To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."); *see also* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 173 (Stephen Munzer ed., 2002) (citations omitted)) ("[T]he constitutional provision

achieve that goal, it provides protection to a number of broad classes of original creative works.[13] This system provides exclusive economic rights to authors (or their employers) of works for a period of at least seventy years following creation.[14] Generally, the bundle of exclusive rights provided to creators of protected works is uniform across classes of work and across creators.[15] In almost all cases,[16] the system does not provide for separate moral rights, such as rights of attribution or integrity.[17] With the possible exception of permanently granting a work to the public domain,[18] there is no way to choose an alternate system of protections for one's creative works.[19] Our copyright system thus generally takes a one-size-fits-all approach.

There are some aspects of the existing copyright system that limit its homogeneity. The fair use defense provides a backstop against the assertion of copyright under circumstances that are deemed contrary to the public interest, such as when protection would limit free speech

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upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts . . . . The United States Supreme Court, when construing the copyright and patent statutes, has repeatedly insisted that their primary objective is inducing the production and dissemination of works of the intellect.").

13. The Copyright Act states that:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

17 U.S.C. § 102 (2006).

14. Copyright protection begins at creation and generally endures for the author's life plus seventy years; this makes the minimum duration seventy years. *See id.* § 302. Certain classes of works are granted different terms, but these are all greater than seventy years. *See id.*

15. The exclusive rights of reproduction, derivative work production, and distribution are granted to authors of all protected works. *Id.* § 106(1)–(3). The exclusive rights of performance and display extend (where applicable) to all classes of protected works except for sound recordings and architectural works; a separate digital performance right exists for sound recordings. *See id.* § 106(4)–(6).

16. *Cf. id.* § 106A (granting a limited right of attribution and integrity to authors of a narrowly-defined class of "visual art" works). For the definition of a "work of visual art," see *id.* § 101.

17. *See generally* 3 NIMMER & NIMMER, *supra* note 10, § 8D (defining moral rights and describing the status of moral rights in U.S. law).

18. The legal status of public domain declarations is unsettled. *See* Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 396–97 (2010). Because of the unsettled nature of the law in this area, a belt-and-suspenders approach with a broad free license is often used. *See infra* note 53 and accompanying text.

19. License-based alternative rights schemes — such as the CC system — have been developed, and are explored further in Part II.B. However, these are not enforceable as a matter of positive law. *See* Sprigman, *supra* note 11.

or downstream creativity.[20] The factors considered in the fair use analysis take into account the nature of the allegedly infringing use and the identity of the alleged infringer.[21] The practical value of an affirmative defense such as fair use in reducing the overprotection problem is limited by the expense of litigating the issue.[22] The availability of statutory licenses for certain classes of work also limits heterogeneity.[23] Importantly, these are very limited exceptions to the general rule that copyright protection is homogeneous.

The homogeneous nature of the copyright system is not in line with the heterogeneous nature of the creative individuals the copyright system seeks to incentivize. For creative professionals and corporations making a substantial investment of time, resources, or risk in an innovative enterprise, with the expectation of potential profits, the existing system of economic rights (with exceptions for unprofitable and socially beneficial uses) is at least somewhat appropriate. But for the tortured artist who considers his work to be a reflection of his own personality, a strong system of moral rights may be a better fit. For the fame-obsessed YouTube phenom, a right of attribution alone would suffice. A computer programmer who wants her work to keep serving society, on the other hand, would prefer robust copyleft-style protections to prevent the proprietization of downstream derivative works.[24] A blogger writing purely for the satisfaction of expressing himself might not need any protection at all.

To satisfy the creators' varied interests, one could conceive of a differentiated system of alternative rights schemes. For the purposes of this Note, "copyright heterogeneity" means the up-front selection by a content creator of a rights scheme to apply to a given work, cho-

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20. As the Supreme Court has explained, in codifying the fair use exception, 17 U.S.C. § 107:

> Congress meant § 107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'

Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994) (alteration in original) (citations omitted).

21. 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . .").

22. *See* Neumeister, *supra* note 7.

23. Statutory licenses are available for limited classes of work and uses, and are therefore heterogeneous changes in protection. *See* 17 U.S.C. § 115.

24. "Copyleft is a general method for making a program (or other work) free, and requiring all modified and extended versions of the program to be free as well." *What Is Copyleft?*, GNU OPERATING SYS., http://www.gnu.org/copyleft (last updated Mar. 4, 2012). Copyleft licensing has proved tremendously successful in the free software movement. For instance, Linux, the widely installed server operating system, is copyleft licensed.

sen from a menu of alternative rights schemes. This approach has immediate practical appeal as a means of addressing the overprotection problem because works would receive protection only to the extent their creators desire it. This Part discusses two methods for introducing heterogeneity into the copyright system: one that would require systemic change, and one that is already occurring.

A. Systemic Heterogeneity

One option for using copyright heterogeneity to address the problem of overprotection is to directly build heterogeneity into the copyright system by offering alternative rights schemes from which a content creator may choose. Because it would require a wide-scale change in copyright policy across international boundaries, this option will not be considered extensively in this Note; nonetheless, it serves as a useful point of comparison.[25]

The implementation of true alternative rights schemes has attractive features. Moral rights could be disentangled from economic rights, and different moral rights could be disentangled from each other; these could be packaged together in ways that reflect the incentive needs of specific types of creators. Generally, a considerably higher percentage of creators would feel that the copyright system was addressing their specific needs. Duration could be limited for economically incentivized works, where extended protection provides little additional incentive, but could be lengthened for works whose creators are concerned only with the personality benefits of continued attribution. Blanket licensing schemes and broader derivative works exceptions could be imposed upon profit-maximizing creators, but left out for those who choose a more moral-rights-focused package. The result would be a narrower tailoring of the rights granted under copyright law to the incentives demanded by the creator of a given work, reducing the overprotection problem.

Feasibility concerns aside, the biggest problem with this approach is the difficulty of designing the different rights schemes offered to creators. The schemes would need to be numerous enough to serve different creators, but not so numerous as to make the choice burdensome or to discourage their use. Considerable study would be required in identifying types of creators and the rights scheme that would serve each best. New and fading types of creation might justify changes to the rights schemes, but inertia would operate to keep the rights

25. Because the Berne Convention and other copyright treaties internationalize many aspects of copyright law, international coordination would be necessary to provide meaningful and harmonized alternative rights schemes. Accomplishing change in established copyright policy across many countries would likely be considerably more difficult than producing change in the United States alone.

schemes static. Thus, even without the feasibility concerns, there are considerable drawbacks that should temper enthusiasm for wholesale alternative rights schemes.

B. License-Based Approach

Under the existing copyright system, the alternative rights schemes described above must be carved out of the strong default protections using individual licenses granted by the artist (or a downstream agent) to the user. Some-rights-reserved form licenses create uniform means for making these carve-outs, typically by permitting free use under one or several of the exclusive rights or to certain groups of users. This Subpart introduces the idea of some-rights-reserved licenses generally, and the Creative Commons license system in particular. It then explores the benefits and drawbacks of using these licenses as a means for copyright heterogeneity aimed at remedying the overprotection problem.

1. Some-Rights-Reserved Licensing

Some-rights-reserved licenses grew out of the free and open source software movement, which pioneered the use of standard copyright licenses, written by a third party, for retaining limited rights to software under copyright.[26] These licenses provided legally unsophisticated parties (software authors) a reliable way to permit free and wide adoption of their software while preserving rights of attribution (in the case of "permissive" licenses) or guaranteeing free access to and modification of derivative code (in the case of open source, copyleft licenses). In 2000, the Free Software Foundation released the GNU Free Documentation License ("GFDL"), which extended the idea beyond software.[27] The GFDL was later adopted by Wikipedia as its license for user contributions, until it was superseded in 2009.[28]

Today, the most well-known licensing scheme for partial rights reservations is the Creative Commons ("CC") license system. Creative Commons was established in 2001 by Lawrence Lessig, Hal Abelson, and Eric Eldred, with the aim of providing content creators an alternative to the strong default protections afforded under copy-

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26. *See, e.g.*, *Artistic License 1.0*, THE PERL FOUND., http://www.perlfoundation.org/artistic_license_1_0 (last visited May 3, 2012); *GNU General Public License, Version 1.0*, FREE SOFTWARE FOUND., http://www.gnu.org/licenses/gpl-1.0.html (last updated Jan. 30, 2012); *Other Copyrights*, THE XFREE86 PROJECT, INC., http://www.xfree86.org/3.3.6/COPYRIGHT2.html#5 (last visited May 3, 2012).

27. Armstrong, *supra* note 18, at 380.

28. *Wikipedia: Licensing Update*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Licensing_update (last modified Apr. 8, 2012).

right.[29] The CC licenses allow creators to license their content to users with restrictions chosen from a menu of commonly desired moral and economic rights reservations — for example, prohibiting derivative works or modifications to downstream licensing.[30] Licensees typically receive the licensed content and the license grant directly via the Internet, often from a content repository like Wikimedia Commons or Flickr and without direct contact with the copyright holder. As long as the licensee complies with the terms of the rights reservations selected by the copyright holder, she is free to use and redistribute the work without further restriction.

Under the current scheme, CC licenses are widely used by content creators. Content can be designated as CC-licensed on a variety of user-generated-content and content-aggregation websites including Wikipedia,[31] Wikimedia Commons,[32] Flickr,[33] YouTube,[34] SoundCloud,[35] deviantART,[36] and Vimeo.[37] On Flickr alone, over two hundred million photographs are available under CC licenses.[38] Probably the largest single collection of CC-licensed contributions is on Wikipedia, where on average more than 100,000 edits are made each day, all subject to CC licenses.[39]

2. The Creative Commons License Scheme

The CC 3.0[40] licenses contain general provisions common to all of the licenses, as well as drop-in clauses (designations) associated with each of the four specific rights reservations provided by the system. The *by* designation requires attribution by means of a reference

29. *History*, CREATIVE COMMONS WIKI, http://wiki.creativecommons.org/History (last modified Apr. 28, 2011).

30. *See infra* Part II.B.2.

31. *See Wikipedia: Licensing Update*, *supra* note 28.

32. *Commons: Licensing*, WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/Commons:Licensing#Well-known_licenses (last modified May 1, 2012).

33. *The Flickr API*, FLICKR HELP, http://www.flickr.com/help/api/#1123806 (last visited May 3, 2012).

34. *Creative Commons*, YOUTUBE COPYRIGHT CENTER, http://www.youtube.com/t/creative_commons (last visited May 3, 2012).

35. *What Is Creative Commons?*, SOUNDCLOUD HELP, http://help.soundcloud.com/customer/portal/articles/243852-what-is-creative-commons (last visited May 3, 2012).

36. *Case Studies: DeviantART*, CREATIVE COMMONS WIKI, http://wiki.creativecommons.org/Case_Studies/DeviantART (last modified Sept. 3, 2010).

37. Dalas Verdugo, *Recycle, Remix and Re-Use with Creative Commons*, VIMEO STAFF BLOG (July 13, 2010), http://vimeo.com/blog:321.

38. Kay Kremerskothen, *200 Million Creative Commons Photos and Counting!*, FLICKR BLOG (Oct. 5, 2011), http://blog.flickr.net/en/2011/10/05/200-million-creative-commons-photos-and-counting.

39. *See Wikipedia Statistics*, WIKISTATS: WIKIMEDIA STAT., http://stats.wikimedia.org/EN/TablesDatabaseEdits.htm (last updated Apr. 30, 2012).

40. For the purposes of this Note, the details and text of version 3.0 of the CC licenses will be discussed, except for CC0, which is in version 1.0. Prior versions of the CC licenses follow the same general pattern as version 3.0.

to the creator of the work, the work's title, and a Uniform Resource Identifier ("URI") associated with the work, if available. The *nc* (non-commercial) designation prohibits use "in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation."[41] The *nd* (no derivatives) designation removes the grant of a license to create derivative works and includes a strong right of integrity.[42] Finally, the *sa* (share-alike) designation requires that derivative works distributed by the licensee be licensed in a manner equivalent to the license of the underlying work;[43] this license mimics the copyleft provisions made famous by the GNU General Public License ("GPL") in the open source software context.[44]

All of the current CC licenses include the *by* reservation, and each of the six licenses reflects one of the possible combinations of the

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41. *Attribution-NonCommercial 3.0 Unported*, CREATIVE COMMONS, http://creativecommons.org/licenses/by-nc/3.0/legalcode (last visited May 3, 2012). The designation further provides:

> The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

Id. The boundaries of non-commercial use under this license have been the subject of considerable study by CC, but the precise limits are subject to legal interpretation by courts. *See generally* CREATIVE COMMONS CORP., DEFINING "NONCOMMERCIAL:" A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS "NONCOMMERCIAL USE" (2009), *available at* http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf.

42. The general CC license language grants a right "to create and Reproduce Adaptations provided that any such Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work" and "to Distribute and Publicly Perform Adaptations." *Attribution 3.0 Unported*, CREATIVE COMMONS, http://creativecommons.org/licenses/by/3.0/legalcode (last visited May 3, 2012). The *nd*-designated licenses lack these grants. *Attribution-NoDerivs 3.0 Unported*, CREATIVE COMMONS, http://creativecommons.org/licenses/by-nd/3.0/legalcode (last visited May 3, 2012).

43. Licenses with the *sa* designation provide that derivative works may be licensed:

> [O]nly under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US)); (iv) a Creative Commons Compatible License.

Attribution-ShareAlike 3.0, CREATIVE COMMONS, http://creativecommons.org/licenses/by-sa/3.0/legalcode (last visited May 3, 2012). A "Creative Commons Compatible License" is a license approved by CC as being equivalent to the relevant CC license. *Id.* At this time, no such license has been approved. *Compatible Licenses*, CREATIVE COMMONS, http://creativecommons.org/compatiblelicenses (last visited May 3, 2012).

44. Eli Greenbaum, *Open Source Semiconductor Core Licensing*, 25 HARV. J.L. & TECH. 131, 139 (2011).

remaining rights reservations.[45] Each license is a legal tool with an associated short form in plain English, a pictogram, and a programmatic representation for identification by computer applications.[46] The licenses do not purport to affect any non-copyright rights that might be associated with a work, and they expressly disclaim any modification of limits on copyright, such as fair use exceptions.[47] The licenses disclaim waivable rights to collect royalties from the licensee under compulsory or voluntary license schemes,[48] waive warranties (unless the parties contract for them separately),[49] and limit liability on the part of the licensor.[50] The licenses terminate all rights in the event of breach by the licensee.[51] Finally, the licenses allow the licensee to disseminate copies the work, but only under the same terms as the original license.[52]

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45. The *nd* and *sa* designations are incompatible because the *sa* designation only applies to putative derivative works. As a result, there is no *CC-by-nd-sa* or *CC-by-nc-nd-sa* license.

46. *See About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/licenses (last visited May 3, 2012).

47. *Attribution 3.0 Unported*, *supra* note 42 ("Nothing in this License is intended to reduce, limit, or restrict any uses free from copyright or rights arising from limitations or exceptions that are provided for in connection with the copyright protection under copyright law or other applicable laws.").

48. On this topic, the licenses state:

> In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme can be waived, the Licensor waives the exclusive right to collect such royalties for any exercise by You of the rights granted under this License; and . . . [t]he Licensor waives the right to collect royalties, whether individually or . . . [via a collecting society], from any exercise by You of the rights granted under this License.

Id.

49. With regard to warranties, the licenses state:

> Unless otherwise mutually agreed to by the parties in writing, Licensor offers the work as-is and makes no representations or warranties of any kind concerning the work, express, implied, statutory or otherwise, including, without limitation, warranties of title, merchantability, fitness for a particular purpose, noninfringement, or the absence of latent or other defects, accuracy, or the presence of absence of errors, whether or not discoverable. Some jurisdictions do not allow the exclusion of implied warranties, so such exclusion may not apply to you.

Id. (emphasis omitted).

50. On liability, the licenses state:

> Except to the extent required by applicable law, in no event will Licensor be liable to you on any legal theory for any special, incidental, consequential, punitive or exemplary damages arising out of this License or the use of the Work, even if Licensor has been advised of the possibility of such damages.

Id. (emphasis omitted).

51. *Id.* ("This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License.").

52. The licenses state:

> Each time You Distribute or Publicly Perform the Work or a Collection, the Licensor offers to the recipient a license to the Work on the

CC licenses serve creators with diverse needs quite well. For a creator interested in gaining maximum exposure for her work in the interest of notoriety or to further her professional reputation, the *CC-by* license casts aside impediments to distribution while guaranteeing that credit will be given. A creator who perceives his work to be socially beneficial and who wants his work to have maximum social benefit can choose one of the share-alike licenses, *CC-by-sa* or *CC-by-nc-sa*, to prevent the proprietization of his work through the creation of derivative works. When a work is highly personal to its creator, or if its creator does not want to risk being misrepresented, its integrity can be protected using the *CC-by-nd* or *CC-by-nc-nd* licenses. Creators can authorize a broad spectrum of noncommercial uses beyond what is provided for in the copyright system (by doctrines such as fair use) by licensing under *CC-by-nc* or *CC-by-nc-sa*.

With the six CC licenses discussed above, a seventh instrument, CC0, rounds out the collection by providing a way to disclaim all copyright and related rights in a work.[53] This provides an effective way to bypass the default copyright protection for creators interested only in the inherent rewards associated with creation.

3. An Incomplete Solution

Some-rights-reserved licenses do far less to eliminate unjustifiably protected work-use combinations than would a complete systemic change. Licenses are clunky carve-outs from the predominant system of economic rights and do not provide an opportunity for creators to receive certain kinds of enhanced rights in exchange for the rights they concede. For example, a creator cannot use a mere license to reach derivative works that are beyond the scope of copyright law, such as those allowed by fair use. This is so even if the author would be willing to give up other rights in return.[54] Similarly, a license can-

> same terms and conditions as the license granted to You under this License. . . . Each time You Distribute or Publicly Perform an Adaptation, Licensor offers to the recipient a license to the original Work on the same terms and conditions as the license granted to You under this License.

Id.

53. *See CC0 1.0 Universal*, CREATIVE COMMONS, http://creativecommons.org/publicdomain/zero/1.0/legalcode (last visited May 3, 2012); Armstrong, *supra* note 18, at 397.

54. It is possible to encumber licensees with restrictions beyond the scope of copyright, if they also rely on the license to make other uses of the work that *are* within the scope of copyright. The CC licenses do not attempt such restrictions, but some free software licenses take this approach to restrict licensees' exercise of patent rights. For example, the GNU GPL states:

> If, pursuant to or in connection with a single transaction or arrangement, you . . . grant a patent license to some of the parties receiving the covered work authorizing them to use, propagate, modify or convey a specific copy of the covered work, then the patent license you

not extend the duration of copyright, even in situations — like one in which the creator only reserves the attribution right — where the license condition is not onerous and where intellectual honesty would often demand attribution in any case.[55]

Our default system that automatically grants strong economic rights raises another major problem with using licenses to create alternative schemes that address overprotection. Because of psychological predispositions toward the default, the effort involved in choosing a license, and the lack of a central catalog for recording license grants to the public, even authors unconcerned with economic rights frequently retain them. The bias toward default choices has been recognized and exploited for public benefit in areas such as retirement savsaving and public health.[56] Copyright defaults, however, operate to keep the vast majority of creative works out of the public domain. Except for creators who publish using mechanisms that offer or require license designation, publicizing one's choice of a CC license requires an additional step in the publishing process. The lack of a centralized registry for license designations exacerbates this problem, making it difficult for potential users of CC-licensed works to find and license those works. Although a potential licensee could separately contact the creator and attempt to negotiate a license directly, doing so would introduce an additional transaction cost. Direct contact is especially difficult to secure in the context of Internet-published works because creators often use aliases.

A final problem with relying on some-rights-reserved licenses for implementing copyright heterogeneity is that these licenses may not be perceived as being a legitimate or enforceable part of copyright law. For example, CC and open source software licenses are often flagrantly violated.[57] And the association of these licenses with the "free culture" movement may deter more mainstream creators from

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> grant is automatically extended to all recipients of the covered work and works based on it.

GNU General Public License v3.0, FREE SOFTWARE FOUNDATION, http://www.gnu.org/copyleft/gpl.html (last updated Mar. 11, 2012).

55. This anti-plagiarism instinct was, for example, part of the justification for the (unsuccessful) "reverse passing off" claim in *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 27 (2003) ("Respondents later amended their complaint to add claims that Dastar's sale of Campaigns 'without proper credit' to the Crusade television series constitutes 'reverse passing off' in violation of § 43(a) of the Lanham Act . . . .").

56. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 1–3, 106, 110–11, 173–74, 179–80 (2008).

57. *See, e.g.*, Press Release, Software Freedom Law Ctr., Best Buy, Samsung, Westinghouse, And Eleven Other Brands Named In SFLC Lawsuit (Dec. 14, 2009), *available at* http://www.softwarefreedom.org/news/2009/dec/14/busybox-gpl-lawsuit; Lokenrc, *Creative Commons Copyright Violation*, FLICKRCENTRAL/DISCUSS (Jan. 31, 2011, 10:57 AM), http://www.flickr.com/groups/central/discuss/72157625822391881.

using them.[58] Because the typical affected rights-holders have limited economic resources and legal know-how,[59] incentives to sue over infringements are weak. This greatly limits the risk associated with infringing the terms of the licenses, making them less effective as legitimate mechanisms for choosing alternative rights schemes.

III. FORMALITIES

From the passage of the first Copyright Act in 1790 to the passage of the Copyright Act of 1976, obtaining copyright protection in the United States required compliance with procedural formalities. The result of this requirement was the placement of most works otherwise eligible for copyright into the public domain during that period.[60] The formalities required by the Copyright Act of 1831 are representative: authors were required to register the copyright before publication,[61] provide notice of copyright protection within the published work,[62] and renew the copyright within a fixed window of time in order to enjoy protection for the full permitted copyright term.[63] These formalities operated to significantly limit the overprotection problem.[64]

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58. "Free culture" may be considered by some as existing in a dichotomy with traditional property-rights conceptions of intellectual property. Some free licenses, such as the GPL, explicitly invoke the authors' moral opposition to traditional forms of licensing. *See GNU General Public License v3.0*, *supra* note 54 ("The licenses for most software and other practical works are designed to take away your freedom to share and change the works. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change all versions of a program . . . ."). As the successor to the GPL and other free-culture-associated licenses, the CC licenses may be prejudiced by their indirect association with free culture. This may be reinforced by CC founder Lawrence Lessig's association with the free culture movement. *Cf.* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

59. CC licensors are often small-time and individual producers.

60. *Compare* Copyright Act of 1790, ch. 15, § 3, 1 Stat. 124, 125 (requiring registration, deposit, and notice by newspaper publication), *repealed by* Copyright Act of 1891, *with* Copyright Act of 1976, Pub. L. No. 94-553, sec. 101, § 302, 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302 (2006)) (copyright vests on creation, with minimal formalities required to benefit from protection under copyright)). *See also* Sprigman, *supra* note 11, at 491–94 (discussing the history of the registration, deposit, and notice requirements for copyright).

61. Copyright Act of 1831, ch. 16, § 4, 4 Stat. 436, 437.

62. *Id.* § 5.

63. *Id.* § 3.

64. *See* Sprigman, *supra* note 11, at 514 ("In sum, this initial filter separating commercially valuable works from commercially valueless works helped focus the pre-1976 copyright regime in a way that maximized the incentive value of copyright while reducing the social costs.").

A. The Elimination of Formalities

The elimination of formalities in U.S. copyright law began with the Copyright Act of 1909, which made publication with notice of copyright the condition for protection.[65] The Copyright Act of 1976 eliminated publication with notice as a prerequisite to protection, extending copyright protection to the moment of creation.[66] Under the 1976 Act, copyright owners who published without notice still risked losing copyright protection — until the United States acceded to the Berne Convention, which made the notice formality optional.[67] The 1976 Act and subsequent amendments also adopted a unitary term of copyright protection, eliminating the renewal formality.[68]

Although formalities have been eliminated as a prerequisite to copyright protection in the United States, complying with registration and notice continues to confer some advantages on rights-holders. Copyright holders cannot bring an infringement suit without registering first,[69] and certain enhanced damages for infringement are generally available only if a work was registered prior to commencement of the alleged infringement.[70] Registration within five years of publication constitutes prima facie evidence of the information contained in the registration.[71] Copyright notice also eliminates innocent infringement as a possible mitigating factor in computing damages in an infringement suit.[72]

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65. Copyright Act of 1909, ch. 320, §§ 9, 11–12, 35 Stat. 1075, 1077–78, *repealed by* Copyright Act of 1976. Although protection was no longer contingent on registration as of the 1909 Act, registration remained a required formality in some measure. *See* Sprigman, *supra* note 11, at 494 n.42.

66. Copyright Act of 1976 § 302 (codified as amended at 17 U.S.C. § 302 (2006)) ("Copyright in a work . . . subsists from its creation . . . .").

67. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, sec. 7, §§ 401–407, 102 Stat. 2853, 2857 (codified as amended at 17 U.S.C. §§ 401–407 (2006)).

68. *See* 17 U.S.C. § 302 ("Copyright in a work . . . endures for a term consisting of the life of the author and 70 years after the author's death.").

69. *Id.* § 411 ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made . . . .").

70. The Copyright Act states:

> [N]o award of statutory damages or of attorney's fees . . . shall be made for (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Id. § 412.

71. *Id.* § 410 ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.").

72. *Id.* § 401 ("If a notice of copyright . . . appears on the published copy or copies to which a defendant . . . had access, then no weight shall be given to such a defendant's inter-

Because of these remaining incentives, and perhaps for reasons of historical precedent or ignorance, widespread compliance with copyright formalities endures in the United States. The Copyright Office — the agency charged with conducting copyright registration[73] — receives 380,000 new copyright registrations each year.[74] Despite its minimal legal effect, copyright notice is also still widely practiced.

B. Reintroducing Formalities: A Solution?

Sprigman has suggested the reintroduction of meaningful formalities as a means of addressing the overprotection problem.[75] In seriously limiting the enforcement rights of creators who do not comply with registration, notice, or renewal formalities, these proposals directly address the overprotection problem by substantially reducing the class of works vested with full protection, moving copyright law closer to pre-1976 levels of protection. The formalities could also feature a process by which some subset of the exclusive rights could be selected, giving the system a flavor of heterogeneity.[76]

The attraction of revitalized formalities is obvious in light of the two primary functions of the registration system identified by Sprigman: registration acts as a record of copyright ownership, and as a copyright filter.[77] As an ownership record, registration facilitates licensing transactions (including free license grants) by identifying the true owner of the copyright in the work.[78] As a filter, registration limits protection for those works whose creation was not strongly incentivized by the copyright system.[79] Taken together, these functions reduce the universe of protected works and make it easier to license works that are protected, addressing the overprotection problem.

Despite its appeal as a solution to the overprotection problem, a reintroduction of formalities may be both legally and politically infeasible. Although Sprigman suggests that a modern formalities scheme

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position of a defense based on innocent infringement in mitigation of actual or statutory damages.").

73. *Id.* §§ 408–10.

74. *25 Most Frequently Asked Questions by Visitors*, LIBRARY OF CONG., http://www.loc.gov/about/faqs.html (last visited May 3, 2012).

75. *See* Sprigman, *supra* note 11, at 551; *accord* James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 221 (2005). *But see* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 314 (2010) (arguing that reinstating formalities for U.S. authors would disproportionately burden less sophisticated creators).

76. Sprigman, *supra* note 11, at 557–58.

77. *Id.* at 500–28.

78. *Id.* at 502 ("[H]istorically, copyright formalities helped to lower the transaction costs of licensing. They did so by creating information about ownership and the term of protection, which simplified the process of identifying licensors . . . .").

79. *Id.* at 500–28 (explaining how formalities filter out creators uninterested in economic rights thus increasing the amount of works available in the public domain).

could be developed within the framework mandated by the Berne Convention,[80] his analysis is uncertain and goes against the commonly understood goal of the modern Convention.[81] Moreover, reintroducing formalities hurts independent and infrequent creators, who may want to benefit from copyright protections but who lack the business and financial resources to comply with formalities — especially in the case of registration, which requires payment of a fee per work registered.[82] Unless partial rights reservations were permitted as part of the reintroduced formalities, their all-or-none nature would fail to address the use portion of the overprotection problem; that is, compliance with formalities would still grant many works unnecessarily broad protections. Also in the all-or-none context, the difficulty of determining the value of a work upfront would encourage a shotgun approach to formalities required early in the life of a work, whereby creators would comply with formalities for all of their works to ensure protection of whichever of the works end up becoming valuable.

IV. COMBINING FREE LICENSING WITH COPYRIGHT REGISTRATION

This Note proposes a solution to the overprotection problem that involves combining the steps of some-rights-reserved license designation and copyright registration, to provide benefits of both copyright heterogeneity and copyright formalities while avoiding some of the pitfalls of each. Fundamentally, the idea is to increase the proportion of copyright registrants who choose a some-rights-reserved license, and to increase the proportion of some-rights-reserved licensors who choose to register their copyrights. By increasing the number of registered, some-rights-reserved-licensed works, the solution would reduce the overprotection problem. Two proposed implementations will be discussed: a modest addition to the current copyright registration system, and an alternative public-private partnership for copyright registration.

A. A Modest Implementation

The modest proposal involves adding a single, optional step to the copyright registration system: the permanent designation of a some-rights-reserved license for the work, from among the seven CC licens-

80. *Id.* at 554–55.

81. *See* Ginsburg, *supra* note 75, at 314 ("[T]he United States' Berne obligations would forbid it from imposing a reformalized regime on foreign works. . . . [W]ith respect to U.S. works . . ., a return to . . . formalities so significantly increases the discrimination against local creators as to be politically problematic.").

82. *See id.* Copyright registration requires payment of a user fee. 17 U.S.C. § 708 (2006).

es.[83] The government or a nonprofit organization would be designated as the licensee,[84] and would be responsible for distributing licenses to later users, pursuant to the terms of the chosen license.[85] Designation of a CC license would result in a reduction in the user fee associated with copyright registration, to reflect the reduced profit potential and registration incentive for these works;[86] the licenses would have differing user fee discounts on a spectrum of profitability.[87]

Because this proposal involves adding material to the copyright registration forms rather than a change in positive law, it could be achieved through the regulatory prerogative of the Copyright Office, a division of the Library of Congress, without congressional action. The license designation would be added to the copyright registration forms as additional "information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright."[88] The reduction in user fees for registrants making license designations would be provided as a fee adjustment to "give due consideration to the objectives of the copyright system."[89]

This proposal substantially enhances the value of the CC some-rights-reserved license scheme as a means for copyright heterogeneity, by making CC license designation a part of the official copyright registration process. Adding license designation to registration would provide a nudge toward CC license designation, as some authors who would otherwise not expend the effort to research and choose a CC license, or who are unaware of the existence of some-rights-reserved licenses altogether, would take the opportunity to designate a license when registering their work for copyright. The user fee discount would serve as a financial incentive to designate a CC license — and,

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83. Because the CC system offers a well-developed set of rights designations, and is already widely adopted, it will be used as the basis for this proposal.

84. A 501(c)(3) tax-exempt non-profit organization would make an ideal aggregator of licenses because such an organization's assets are permanently encumbered in service of its charitable mission. Jones Fortenberry PLLC, *The Inurement Prohibition & Non-Profit Organizations*, NONPROFIT L. REP., http://www.nonprofitlawreport.com/guide/private-inurement (last visited May 3, 2012). The government could also act as a similarly permanent repository.

85. CC and similar free licenses deputize the licensee to distribute the work to downstream recipients with the guarantee of a license from the copyright owner. *See Creative Commons Legal Code*, *supra* note 52. Issuing a license to an entity organized for the public benefit guarantees availability of the work under the original license regardless of the future choices of the copyright owner.

86. Because the primary remaining benefits from copyright registration relate to infringement actions, the incentive to register works is less for works unlikely to become the subject of copyright litigation. *See supra* notes 69–71.

87. For example, *CC-by* licensed works would be offered the most generous user fee discount, while *CC-by-nc-nd* license would be offered the smallest discount.

88. 17 U.S.C. § 409 (2006). The Copyright Office promulgates specifications for copyright forms. 37 C.F.R. § 202.3 (2011).

89. 17 U.S.C. § 708.

moreover, to designate the least restrictive license consistent with the creator's aims. Media companies that are frequent copyright registrants might take the opportunity to develop formal policies providing for the designation of CC licenses for their content. The perception of the CC licenses as a government-endorsed device would provide an additional boost to the rate of CC designation. These effects would substantially increase the quantity of works available under free licenses, thus mitigating the overprotection problem.

This proposal would also increase the rate of copyright registration. At present, creators who have made the choice to license their own works under a CC license often do so by publishing the work to a website that allows license designations, such as Flickr or Wikimedia Commons. Once designation is made a part of copyright registration, these creators might shift away from disparate content aggregators toward the centralized copyright registration system as the formal way to designate a license for their works. Reduced fees would facilitate such a shift for those making a license designation at the time of registration. The use of registration as an alternative to deposit with a content-aggregator would have the added benefit of providing for the possibility of enhanced damages, increasing the incentive to sue over CC license violations and strengthening the incentive to comply with CC licenses. The increased use of the copyright registration system would also reduce searching costs for some-rights-reserved content, and reduce transaction costs for negotiating other licenses with content creators, lessening the impact of the overprotection problem.

B. Sweetening the Deal: A Public-Private Copyright Registration System

A more ambitious extension of the proposal in the previous Subpart is possible, by means of a public-private partnership for copyright registration.[90] Public-private partnerships have recently received increased attention by government officials and other stakeholders,[91] as governments look to the special competencies of non-profit organizations and private companies to more efficiently accomplish tasks traditionally delegated to government agencies.

For many of the works that are candidates for some-rights-reserved license designation, the data-gathering process involved in

90. *See* Sprigman, *supra* note 11, at 517; *see also* Jonathan Bailey, *Copyright Registration – ICANN Style*, PLAGIARISM TODAY (Jan. 29, 2009), http://www.plagiarismtoday.com/2009/01/29/copyright-registration-icann-style; Dan Heller, *Reprise of a Proposal for Privatizing Copyright Registration*, DAN HELLER'S PHOTOGRAPHY BUS. BLOG (Jan. 27, 2009, 12:18 AM), http://danheller.blogspot.com/2009/01/reprise-of-proposal-for-privatizing.html.

91. *See, e.g.*, Elesha Barnette, *Obama's TechBoston Address Promotes Public Private Partnerships, Funding the Future*, POLITIC365 (Mar. 8, 2011), http://politic365.com/2011/03/08/obamas-techboston-address-promotes-public-private-partnerships-funding-the-future.

copyright registration is largely redundant with the process involved in uploading a work to a content aggregation site that collects content either as part of its charitable mission (e.g., Wikimedia Commons) or because it receives a direct or indirect profit from hosting the content on behalf of the user (e.g., Flickr and YouTube). Because these sites are typically the first stop for content creators looking to disseminate their content, and because they have already developed data entry mechanisms that are user-friendly, these sites are well-positioned to act in partnership with the Copyright Office to facilitate copyright registration. Sites would be willing to act in this role as part of their charitable mission, in order to collect direct payments for acting as registration agents, or to incentivize more content submission from creators.[92]

This proposal would add an additional license designation, *ra* (registration agent), to the CC system. Licenses with the *ra* designation would permit the licensee (a participating site) to act as the creator-licensor's agent in registering the copyright in the work. The use of a CC license designation rather than a terms-of-service provision or similar device would harmonize this private registration agency scheme across providers. Unlike the other CC licenses, the *ra* licenses would not grant downstream licensing under the same license; instead, downstream users would be granted an equivalent license without the *ra* designation.[93] In order to aggregate relicensing capabilities, as with the modest proposal above, the registration agent would be required to grant a license to a central, public licensee (the government or a non-profit organization).[94] The *ra* designation would provide any disclaimers of fiduciary duties and liability necessary to

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92. Although works released under CC licenses could be used by other websites as well, sites can receive rights beyond the scope of the CC license from creators who upload their content directly to the sites, providing an incentive to receive a direct upload from the creator. For example, the YouTube terms of service provides:

> For clarity, you retain all of your ownership rights in your Content. However, by submitting Content to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the Service a non-exclusive license to access your Content through the Service, and to use, reproduce, distribute, display and perform such Content as permitted through the functionality of the Service and under these Terms of Service.

Terms of Service, YOUTUBE, http://www.youtube.com/t/terms (last updated June 9, 2010).

93. This would ensure that only the site to which the file was uploaded would obtain the registration agent right, avoiding duplicative attempts to register the copyright in a single work.

94. *See supra* note 84 and accompanying text.

encourage participation by a broad range of sites; additional obligations and duties could be separately contracted, for example as part of sites' terms of service.

Sometime after a work is uploaded to a participating site, pursuant to whatever terms of use exist between the creator and the site, the site would then register the copyright in the work on behalf of the creator. Data entry forms on the participating sites would be modified to include all of the information required for copyright registration.[95] Because of the substantially reduced burden on the Copyright Office, and in recognition of the reduced profitability of CC-licensed works, a drastically reduced user fee would be charged for works registered in this manner. Depending on the site, this reduced user fee could be passed on to content creators using a per-use or subscription-based pricing model, or paid for by the site without being passed on.[96]

Because it would provide the opportunity for drastically easier and less expensive copyright registration, this public-private partnership would bring new creators into the free licensing world and drastically reduce the difficulty of finding and licensing works from which derivatives could be produced.

C. Critique

The hybrid solution of heterogeneity and formalities that this Note has presented is subject to a number of critiques as to its feasibility and effectiveness. This Subpart presents some of these critiques and attempts to respond to them.

First, if specific CC licenses are chosen for inclusion in either plan proposed by this Note, there is a risk that that set of licenses will be crystallized, impairing future innovation in licenses. While license crystallization is likely, its ill effects would be mitigated by the well-developed status of the CC licenses. Crystallization would also be beneficial to the extent that it would reduce the proliferation of many mutually incompatible licenses. In fact, the process of choosing licenses for inclusion in the plan could provide impetus for producing a new version of the CC license system that clarifies certain features, such as the *nc* designation.[97]

Second, there may be concerns about the willingness of the Copyright Office to participate in establishing either of the two systems proposed in this Part, particularly in light of possible opposition from interest groups. Both plans have features that might prove affirmative-

95. *See* 17 U.S.C. §§ 408–409 (2006) (detailing information required to register a copyright).

96. Free copyright registration could be advertised as a site feature, for example, in competing with similarly situated websites for uploads.

97. *See supra* note 41.

ly attractive to the CO. The first plan would increase the value of the copyright register as a central catalog of works, enhancing the prominence of the CO. The second plan would allow the CO to outsource a substantial proportion of its work, permitting it to focus on maintaining and improving the register, which would again gain importance. Because these plans do not modify the rights available to mainstream content producers, opposition from industry groups would likely be weaker than with other copyright reform proposals. In fact, the increased number of works available under CC licenses and the improved process for finding the actual identity of a licensor could be valuable for an industry that often licenses content for incorporation into new content.

Third, some creators prefer to resister their copyrights on their own, or avoid registration altogether, and these creators may be concerned about the implications of the proposed public-private partnership on work that they upload but do not wish to have registered. Here, the response is simple: participation is optional. Neither of the plans proposed in this Part would require that individual creators participate.

Finally, the value of increased copyright registration as a central catalog may be less valuable in light of the ability to search existing content aggregators for content. CC, for instance, has made available a cross-site search for CC-licensed content.[98] Notwithstanding the existing value of content aggregators, the copyright register has several advantages over them. It generally contains contact information about the true rights-holder, rather than an alias, making contact for licensing easier. And registration confers benefits on rights-holders, such as the availability of enhanced damages. If registration records contained license designations, there would be a central, permanent, irrevocable record of the license grant not available on content aggregators. Registration also lends an air of legitimacy to the copyright status of registered works, reducing infringement.

V. CONCLUSION

Our copyright law attempts to provide incentives for a large and diverse set of content creators using the blunt tool of strong default protections. The result is an overprotection problem that disadvantages both content creators and content users. Copyright heterogeneity and copyright formalities are valuable as means for addressing the overprotection problem, but each falls short either as impracticable or ineffective. Systemic copyright heterogeneity is unlikely to become law, and license-based approaches, though effective, suffer from

98. *CC Search*, CREATIVE COMMONS, http://search.creativecommons.org (last visited May 3, 2012).

underuse and the lack of a central designation mechanism. A reemergence of copyright formalities is highly unlikely, and voluntary registration is an inadequate and expensive alternative.

This Note has proposed two solutions that combine the benefits of heterogeneity and formalities to maximize the value provided by each. The more modest of these two proposals, providing the option of adding a designation of a some-rights-reserved license, could be accomplished easily under the existing regime and possibly without opposition. The second proposal, a public-private partnership for the provision of copyright registration, could prove even more powerful. The Copyright Office should consider initiating these beneficial changes, which would enhance the efficiency and functionality of the copyright system in the United States.