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# Formalities in Copyright Law

An Analysis of Their History, Rationales and Possible Future

## ACADEMISCH PROEFSCHRIFT

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aan de Universiteit van Amsterdam  
op gezag van de Rector Magnificus  
prof. dr. D.C. van den Boom  
ten overstaan van een door het college voor promoties  
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in het openbaar te verdedigen in de Agnietenkapel  
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Faculteit der Rechtsgeleerdheid

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Except for a few references that have been added later, the research for this book was completed on 1 November 2010. Throughout the book, male pronouns should be understood to include the female gender, unless the pronoun in question is meant to refer specifically to a male person. If not otherwise indicated, I bear the responsibility for the translation of Dutch, French or German texts.

*Amsterdam, 1 February 2011*

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# List of Abbreviations

Actes	<i>Actes de la Conférence internationale pour la protection des droits d'auteur</i> ; later: <i>Actes de les Conférences (de l'Union) internationale pour la protection des œuvres littéraires et artistiques</i> (records of the diplomatic conferences adopting and revising the Berne Convention) (see Bibliography)
ALAI	<i>Association Littéraire et Artistique Internationale</i>
AMI	<i>Tijdschrift voor Auteurs-, Media- &amp; Informatierecht</i>
Berne Centenary	<i>Berne Convention Centenary: 1886-1986</i> , WIPO publication No. 877(E), Geneva: WIPO, 1986 (see Bibliography)
CMO(s)	collective rights management organization(s)
COM	European Commission document number
DG	Directorate-General of the European Commission
ECHR	European Convention on Human Rights
ECL	extended collective licensing
ECR	European Court Reports
EIPR	European Intellectual Property Review
EPC	European Patent Convention
EU	European Union
F.2d	Federal Reporter, second series
F.3d	Federal Reporter, third series
F.Supp.	Federal Reporter, supplement
GRUR (Int.)	<i>Gewerblicher Rechtsschutz und Urheberrecht (Internationaler Teil)</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IER	<i>Intellectuele Eigendom &amp; Reclamerecht</i>
IIC	International Review of Intellectual Property and Competition Law (previously: International Review of Industrial Property and Copyright Law)
NJ	<i>Nederlandse Jurisprudentie</i>
NJV	<i>Nederlandse Juristen-Vereniging</i>
OJ	Official Journal
Recueil	<i>Recueil des conventions et traités concernant la propriété littéraire et artistique</i> (see Bibliography)

LIST OF ABBREVIATIONS

RIDA	<i>Revue Internationale du Droit d'Auteur</i>
RMI	rights management information
S.Ct.	Supreme Court Reports
TPM(s)	technological protection measure(s)
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UFITA	<i>Archiv für Urheber- und Medienrecht</i> (previously: <i>Archiv für Urheber-Film- (Funk-) und Theaterrecht</i> )
UK	United Kingdom
US	United States (of America)
USC	United States Code
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

# Chapter 1

## Introduction

One of the basic principles in modern copyright law is that copyright results from creative authorship and exists independently from formalities. From the moment an original work is created, the author enjoys all the benefits that copyright protection grants, without the need to complete a registration, deposit the work, mark it with a copyright notice or comply with any other statutorily prescribed formality.

This was different in the past. For a very long time in the history of copyright, the coming into being or the exercise of copyright was conditional on formalities of some kind. Only in the early twentieth century did most countries start eliminating copyright formalities.<sup>1</sup> This was the consequence of, *inter alia*, the prohibition on formalities, which was introduced in the international copyright system by the 1908 Berlin revision of the Berne Convention for the Protection of Literary and Artistic Works. This provision states: ‘The enjoyment and the exercise of these rights shall not be subject to any formality’.<sup>2</sup> In the 1990s, the Berne prohibition on formalities was incorporated by reference in the TRIPS Agreement and the WIPO Copyright Treaty.<sup>3</sup> Therefore, it has become the norm in international copyright law.

Although the Berne prohibition on formalities applies to international situations only, thus permitting contracting states to subject domestic works to formalities, the majority of signatory countries to the Berne Convention, the TRIPS Agreement and WIPO Copyright Treaty has decided to abolish formalities and grant unconditional protection to all works, regardless of their origin. As a result, in the course of the twentieth century, copyright formalities were eliminated – or reduced to a minimum – in virtually all countries around the world. They were removed in the United Kingdom (UK) in 1911, in the Netherlands in 1912 and in France in 1925. Other countries followed later. For example, Uruguay abrogated copyright formalities only in 1979, Colombia in 1982 and Spain in 1987. The United States of America

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<sup>1</sup> Note that, at the end of the nineteenth century, some national legislators began to limit the use or to soften the nature and legal effects of copyright formalities. See Van Gompel 2010a, at 176 et seq.

<sup>2</sup> Art. 4(2) Berne Convention (1908), currently art. 5(2) Berne Convention (1971). Hereinafter the year of the adopted or revised text of the Berne Convention is indicated in parentheses, unless reference is made to the latest (1971) text of the Berne Convention, in which case such indication is omitted.

<sup>3</sup> See art. 9(1) of the TRIPS Agreement and art. 1(4) of the WIPO Copyright Treaty (WCT).

(US) did not abandon formalities as a prerequisite for protection until it joined the Berne Convention in 1989.<sup>4</sup>

Accordingly, just around the time of the transition to the digital era, copyright formalities had been abolished in practically all countries worldwide. However, the digital revolution has caused a paradigm shift in the way copyright protected works are created and consumed. While in the pre-digital era all content was locked up in physical information products and the cost of dissemination was high, the digital networked environment has enabled an interactive, simultaneous and decentralized production and access. In addition, as digitization has considerably lowered the cost of production, storage and distribution, creative works have never before been made available to the public on such a large scale.<sup>5</sup> Hence, copyright law is now facing a number of challenges to which copyright formalities may well be able to respond. These digital challenges, which are explained in detail below, have inspired several academics to call for a reintroduction of formalities in copyright law.<sup>6</sup>

This book gives a comprehensive and thorough analysis of the history, rationales and possible future of copyright formalities in light of the increased calls for their reintroduction in the digital age. Its object is not to propose a plan for implementing copyright formalities, but to examine whether reintroducing copyright formalities is legally feasible. To this end, it studies the role and functions of formalities, revisits the history of formalities at the national and the international levels and scrutinizes the international prohibition on formalities. Additionally, it analyzes the validity of one of the main arguments against copyright formalities, namely, that copyright is a ‘natural right’ and therefore should be protected independently of formalities.

To introduce the research topic and research question, this chapter first describes the challenges that copyright is facing in the digital era (para. 1.1) and then explains how this has stirred a debate about reintroducing copyright formalities by outlining some proposals in this direction and showing the controversy they have engendered (para. 1.2). After this exposition, it presents the definition of the problem (para. 1.3) and explains the methodology and the outline of the book (para. 1.4).

## 1.1 The Challenges for Copyright in the Digital Era

The calls for a reintroduction of copyright formalities are clearly a response to the change in the production and use of copyrighted works caused by the advent of digital technologies. While creating and commercially exploiting works used to be

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<sup>4</sup> Van Gompel 2010b, at 396-397. See also Lipszyc 2010, for an extensive overview of the historical appearances and disappearances of copyright formalities at the national and international levels.

<sup>5</sup> See Gibson 2005, at 212 et seq. and Rosloff 2009, at 54.

<sup>6</sup> The reintroduction of copyright formalities has been called for, inter alia, by Lessig 2001, at 251-252, Landes & Posner 2003a, Kuhne 2004, at 549-563, Lessig 2004, at 287-290, Lévêque & Ménière 2004, at 105, Sprigman 2004, Gibson 2005, Goldman 2006, at 705-740, Samuelson 2007, at 562-563, Lessig 2008, at 260-265, Rosloff 2009, Fagundes 2009, at 179-182 and Tamura 2009, at 72-73.

the almost exclusive province of creative industries, it has now become something that nearly anyone can undertake. The widespread availability of computers, digital recording devices and online networks as media for distribution has enabled and, in fact, encouraged people to create and disseminate works to a potentially worldwide audience. Authors and creators, more than ever before, reuse pre-existing works as raw material for new creative efforts. This undeniably has presented new challenges for copyright. Above all, it has increased the need to create legal certainty regarding the claim of copyright, to improve rights clearance and to enhance the free flow of information. This section describes these three challenges in more detail.

### 1.1.1 ESTABLISHING LEGAL CERTAINTY REGARDING COPYRIGHT CLAIMS

Because copyright arises automatically upon the creation of an original work, it is not always easy to establish *ex ante* whether a particular object is protected by copyright. Even for experienced copyright lawyers this may be difficult, as the definition of what constitutes a work of authorship is broad and open-ended and the standard of originality required for protection is uncertain.<sup>7</sup>

A wide array of different types of creations may thus be protected. In fact, in the past decades, the subject matter of copyright has been extended both by legislatures and the courts. This has brought all kinds of industrial and technical creations, such as software and databases, within the realm of copyright law. In some countries, the courts have also opened the door for protecting trivial works, such as blank forms,<sup>8</sup> the scent of a perfume<sup>9</sup> and even transcripts of a simple conversation.<sup>10</sup> And these are just examples. As one scholar asserts, copyright currently seems to spring up ‘to protect nearly every creation of the human mind, be it ever so trivial’.<sup>11</sup>

This may cause legal uncertainty for authors, copyright owners and users. Unlike other intellectual property rights, such as patents, designs and trademark rights, the subject matter and scope of protection of which are defined through registration, the absence of copyright formalities, plus the ‘lack of legislative definitional closure’ of copyright-protected subject matter, makes an *ex ante* definition of copyright claims immensely difficult.<sup>12</sup> For authors and copyright owners, the fact that it can only *ex*

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<sup>7</sup> Art. 2(1) of the Berne Convention defines a ‘work of authorship’ as ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’ and gives a non-exhaustive list of examples of types of works. It includes no definition of ‘originality’.

<sup>8</sup> See *Kalamazoo (Australia) Pty Ltd v. Compact Business Systems Pty Ltd*, 5 IPR 213 (Supreme Court of Queensland, 1985), holding that collections of blank accounting forms can be copyright protected.

<sup>9</sup> See the ruling of the Dutch Supreme Court of 16 June 2006, *Kecofa v. Lancôme, NJ* 2006, 585, note J.H. Spoor. But see the ruling of the French Court of Cassation of 13 June 2006, *Mme Nejla Bsiri-Barbir v. Sté Haarmann et Reimer* (Arrêt No. 1006), refusing copyright to the scent of a perfume.

<sup>10</sup> See the ruling of the Dutch Supreme Court of 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam, NJ* 2008, 556, note E.J. Dommering, *Ars Aequi* 2008, at 819-822, note P.B. Hugenholtz.

<sup>11</sup> Laddie 1996, at 257.

<sup>12</sup> Bowrey 2001, at 85.

*post* be determined whether, and to what degree, they have acquired a copyright in their creations may generate significant legal insecurity. Similarly, users face legal uncertainty when they use a particular object believing no copyright subsists in it, only to be informed *ex post* by the courts that it is protected by copyright.<sup>13</sup>

With the recent expansion of the domain of copyright to industrial and technical creations (e.g. software) and creations of a more obscure character (e.g. the scent of perfume and transcripts of a conversation), the need for an *ex ante* qualification of creations as copyright-protectable subject matter has become increasingly pressing. The vaguer the substantive threshold requirements for copyright protection are, the more ambiguous the claim of copyright is.<sup>14</sup> This explains why, in some countries, voluntary registers have been created for the registration of, e.g., television formats, websites and slogans.<sup>15</sup> Moreover, the recent calls for registering the source code of computer programmes must probably be understood against this background.<sup>16</sup>

For users of pre-existing works, a further complexity for establishing the validity of a copyright claim exists in the uncertainty surrounding copyright terms. Even if a creation may reasonably be assumed to come within the subject matter definition of copyright and be sufficiently original, it is not protected by copyright if the term of protection has expired. The term of protection is difficult to establish, however, if a work contains no information about the author or the date of first publication.<sup>17</sup> For various types of works, including photos and film footage, it is not uncommon that such information is lacking. Moreover, because the rules for calculating the term of protection vary from the one country to the other, it may occur that a work is in the public domain in the one country, while it is still protected in the other.<sup>18</sup> For users, the calculation of terms can be a considerable source of legal uncertainty.<sup>19</sup>

<sup>13</sup> See e.g. Sherman & Bently 1999, at 192-193, arguing that 'to this extent, unlike the other areas of intellectual property law, copyright law remains pre-modern'. See also Guibault 2006, at 95.

<sup>14</sup> See Quaedvlieg in: Dutch Supreme Court, ruling of 24 February 2006, *Technip v. Goossens*, *AMI* 2006-5, no. 13, 153-161, note A.A. Quaedvlieg, at 156, concluding that, while the boundaries of the 'objective domain' of intellectual creations (e.g., patent law) are fairly strict, the opposite is the case for the boundaries of the 'subjective domain' of intellectual creations (e.g., copyright law).

<sup>15</sup> See e.g. the UK Copyright Service's registration centre, where television formats and websites can be registered: <<http://www.copyrightservice.co.uk/>>. See also the Dutch *GVR/slagzinnenregister*, for the registration of slogans: <<http://www.gvr-slagzinnenregister.nl/>>.

<sup>16</sup> See e.g. Bond 1995 and Gibson 2005.

<sup>17</sup> In most countries, the term of copyright protection is calculated from the date of death of the author and, in specific cases, from the date of creation or the date of first publication of the work.

<sup>18</sup> See Van Eechoud et al. 2009, at 235-262.

<sup>19</sup> See e.g. Guibault 2006, at 95, questioning 'How can an average user easily know whether a work has fallen into the public domain or whether an element of information qualifies for protection?'

## 1.1.2 IMPROVING THE CLEARANCE OF COPYRIGHT

Another area in which current copyright law presents challenges is the clearance of rights. In the digital environment, reutilizing creative content has become easy, inexpensive and commonplace. Unless the use in question is covered by a copyright exception or limitation, copyright protected works cannot be used legally without the consent of the copyright owners. Identifying and locating copyright owners may be difficult, however, since not all works carry a statement indicating the authorship or ownership of rights and, even if they do, this information may be outdated due to a change of copyright ownership.<sup>20</sup> Often such information cannot be obtained from other sources, either. In the absence of copyright formalities, adequate and up-to-date copyright registers are scarce.<sup>21</sup> This problem of unidentifiable and untraceable copyright owners, also known as the problem of ‘orphan works’, may obstruct both mass-digitization and small-scale reutilization projects, thus impeding public access to cultural and scientific materials to the detriment of society at large.<sup>22</sup>

Although these licensing difficulties are certainly not new, they have exacerbated in recent times. In the pre-digital era, the production and dissemination of creative content was restricted to the relatively few authors that could exploit their works via publishers or content producers. Nowadays, almost anyone can become a creator and a distributor of creative works.<sup>23</sup> Modern technologies have enabled people to digitally record, assemble and reproduce works and make them available online. As a result, ‘[with] the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded’.<sup>24</sup> In addition, in the online world, works are increasingly exploited across borders. This means that, when reutilizing works, the rights might need to be cleared in potentially unknown foreign territories.<sup>25</sup> Hence, the number of occasions where the clearance of rights causes difficulties has grown exponentially.

Furthermore, the licensing difficulties have intensified due to the expansion of the traditional domain of copyright in recent decennia. Over the years, various new categories of rights have been introduced to adapt copyright law to the emergence of new technologies. This has added new layers of protection to existing creations and has brought new categories of right holders – software producers, performers, producers of phonograms and films, broadcasters and database producers – into the

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<sup>20</sup> See e.g. US Copyright Office 2006, at 23 et seq., summarizing the main obstacles for identifying and locating copyright owners in the current copyright system.

<sup>21</sup> See Ginsburg 2008, at 176-177 (note 8), noting that, even in the US, the information that the registers currently make available in relation to ‘old’ works may not be accurate, because, under US copyright law, the recordation of ownership has never been a prerequisite to effectuate a transfer of copyright.

<sup>22</sup> See Van Gompel 2007, at 678 and Van Eechoud et al. 2009, at 271-272.

<sup>23</sup> Gibson 2005, at 213-214.

<sup>24</sup> Samuelson 2007, at 563.

<sup>25</sup> See Hugenholtz et al. 2006, at 163-164, Van Eechoud et al. 2009, at 268 and Beunen 2010.

realm of copyright. Thus, a single object now may be protected by various layers of overlapping rights, each of which may potentially be owned by a different right holder.<sup>26</sup> Moreover, since most countries have extended the term of copyright, the practical difficulties of clearing rights have increased even more.<sup>27</sup> Not only has this term extension resulted in an increased number of works covered by an exclusive right, but with the passage of time, the ownership of rights may have also become more obscure as a result of the transferability and divisibility of copyright.<sup>28</sup>

### 1.1.3 ENHANCING THE FREE FLOW OF INFORMATION

A third important challenge for copyright law lies in preventing the automatic ‘lock up’ in the copyright system of all creative works. Without formalities, the threshold for obtaining copyright is rather low. Any literary or artistic work that is sufficiently original (and fixed in a tangible medium of expression) is protected. Consequently, copyright attaches to the vast majority of creative output.<sup>29</sup> Regardless of whether authors want to avail themselves of protection, they enjoy exclusivity in their works until fifty years and, in many countries, seventy or more years after their death. This allows them or their successors in title, to the exclusion of all others, to authorize or prohibit the reproduction and communication to the public of their works.

In the pre-digital era, it may not have made such a great difference that copyright attached to all creations that were sufficiently original. The costs of disseminating works were so high that it could well be assumed that anyone engaged in exploiting creative works desired protection against free-riding by others. While not all works merited copyright protection, especially if they were not aimed at being exploited commercially, it did not harm if they were protected. Most creations that were not exploited were simply not publicly available. Because all content was locked up in physical information products, it was accessible only to those few people that could obtain a copy of the work. Furthermore, since ‘analogue’ works do not easily lend themselves to being used as building blocks for new creative efforts, little transformative use was made of pre-existing works. Most content was still passively consumed by the public.<sup>30</sup>

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<sup>26</sup> See Hugenholtz et al. 2006, at 164, Van Gompel 2007, at 675-676 and Van Eechoud et al. 2009, at 268-269.

<sup>27</sup> In the EU, the copyright term was harmonized upward to the author’s life plus 70 years by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *OJ L* 290/9 of 24 November 1993. In the US, the copyright term has been extended by the Sonny Bono Copyright Term Extension Act, Pub.L. 105-298, 112 Stat. 2827, 27 October 1998.

<sup>28</sup> See Hugenholtz et al. 2006, at 165, Van Gompel 2007, at 674 and Van Eechoud et al. 2009, at 269.

<sup>29</sup> See Laddie 1996, at 9: ‘Another of the problems with copyright law is that ... the requirements for qualification are so low to be virtually non-existent. Virtually any written material, any sketch and any film footage or sound recording is automatically protected.’

<sup>30</sup> Gibson 2005, at 212-213.

All this has changed dramatically. Modern digital networked technologies offer the capacity to create and distribute works on a large scale and at a modest expense. Because anyone with a computer and internet access can upload content and make it available on the world wide web, works have never been more readily accessible to the public than they have now. Digitally distributed works can be used by other persons for studies, work and leisure or as raw material for new creative efforts, e.g. user-created content. Ordinary people are now able to participate in the creation and distribution of works. A key indicator is the success of personal websites, weblogs, social networking sites and online audio, photo or video communities where content is uploaded, viewed, shared and reused for the creation of derivative works.

Given this social participation in the creative process, it is questionable whether, in the digital era, all works should immediately warrant copyright protection. In the online environment, the old maxim that ‘what is worth copying is prima facie worth protecting’<sup>31</sup> seems to become ever more irrelevant. While copyright aims to protect creators and creative industries against free-riding by others, the costs of producing and disseminating content have fallen so significantly that it is doubtful whether all works necessarily merit the strong and long-term protection that copyright presently grants.<sup>32</sup> As more and more works are created, not for commercial purposes, but for the benefit of social sharing and remixing, it seems wrong to assume that ‘most of the most useful and valuable creative content’ should be protected by copyright.<sup>33</sup>

Obviously, this does not imply that copyright has now become redundant. Many works still warrant protection, because ‘[without] the law, the incentives to produce creative work would be vastly reduced. Large-budget films could not be produced; many books would not get written’.<sup>34</sup> However, that certain creations do deserve the protection of copyright is not the issue here. The point is that copyright law lacks the flexibility to assure that those works that do not necessarily merit protection – or at least not for the full duration of copyright – are not unnecessarily locked up in the copyright regime but remain free to be used by others. Although the significance of the problem depends on the degree to which copyright owners enforce their rights, users might be unwilling to take the risk of being exposed to copyright enforcement claims. The current ‘automatic’ copyright regime may thus have a chilling effect on reutilizing existing works for making new creations.<sup>35</sup> This has inspired the idea of reintroducing formalities to create additional thresholds for copyright protection.

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<sup>31</sup> See Peterson J in *University of London Press Ltd v. University Tutorial Press Ltd*, [1916] 2 Ch 601 (Chancery Division, 1916), at 610.

<sup>32</sup> See e.g. Gibson 2005, at 212 et seq.

<sup>33</sup> Lessig 2001, at 107.

<sup>34</sup> *Ibid.*, at 107

<sup>35</sup> On the ‘chilling effect’ on creativity resulting from ownership control powers conferred on copyright owners and high licensing costs, see Marshall 2005, at 92 and Elkin-Koren 2006, at 329.

## 1.2 The Current Debate about Copyright Formalities

In the last decade, various initiatives have been launched to address the challenges that copyright is facing in the digital era. One example is Creative Commons, which aims to create a more reasonable and flexible system of copyright licensing.<sup>36</sup> Apart from introducing a set of standardized licencing terms that copyright owners can attach to their works to enhance their reusability,<sup>37</sup> various supporters of the Creative Commons initiative and other open content movements have called for a reintroduction of formalities in copyright law.<sup>38</sup> Lessig, for example, has proposed subjecting copyright in published works to registration and periodic renewal, either from the outset or fifty years after first publication.<sup>39</sup> Also, he has suggested making the enforcement of copyright conditional on the use of a copyright notice.<sup>40</sup>

Moreover, calls for a reintroduction of copyright formalities have been voiced by defenders of the law and economics approach in copyright law. Landes and Posner, for example, have proposed a system of indefinitely renewable copyright, in which the copyright term is perpetual but subject to periodic renewal.<sup>41</sup> Sprigman, on the other hand, has recommended a two-tier copyright system in which full copyright is conditional on technically voluntary formalities (registration, notice and recordation of transfer), while, in default of their compliance, the system would allow works to be used under a compulsory licence against a low royalty fee.<sup>42</sup>

The advocates of copyright formalities believe that formalities may have a useful role to play in addressing the current challenges in copyright law.<sup>43</sup> They emphasize that by ‘making claims on the ownership of property clear’, formalities assure ‘that the property can be allocated in a way that makes everyone better off’.<sup>44</sup> They assert that the costs of tracing the right owner and obtaining a licence to use a work may

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<sup>36</sup> See <<http://creativecommons.org/>>.

<sup>37</sup> See Guibault 2008, at 75-77.

<sup>38</sup> See Dusollier 2011 (forthcoming), stating that the idea of reintroducing formalities so as to introduce a threshold for copyright protection has mostly appeared on the agenda of open content proponents.

<sup>39</sup> Lessig 2001, at 251-252 and Lessig 2004, at 248 et seq. and 289-290. This idea was transformed into a US bill, the Public Domain Enhancement Act (PDEA), H.R. 2601, 108th Cong., 1st Sess., 25 June 2003; H.R. 2408, 109th Cong., 1st Sess., 17 May 2005. See also Kuhne 2004, at 562.

<sup>40</sup> Lessig 2004, at 290-291.

<sup>41</sup> Landes & Posner 2003a and Landes & Posner 2003b, at 210-249. See also Goldman 2006, at 718 et seq.

<sup>42</sup> Sprigman 2004, at 554 et seq. See also Rosloff 2009, arguing for a copyright system in which authors retain an attribution right and protection against unrestricted, for-profit copying upon creation, while other rights are conditional on compliance with formalities, including registration and deposit.

<sup>43</sup> See Samuelson 2007, at 563, arguing that ‘copyright formalities may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years’.

<sup>44</sup> Lessig 2008, at 265.

be significantly reduced should copyright be conditional on formalities.<sup>45</sup> Moreover, they argue that, if the existence of copyright depends on formalities, then less works would be captured in the proprietary regime and more works would be available for everyone to be freely used and built upon in new creative efforts.<sup>46</sup> Formalities may thus reduce the ‘chilling effect’ on creativity caused by the uncertainty surrounding copyright claims in the current legal system and, in addition, boost the creative – i.e., the cultural and scientific – economy to the benefit of society at large.<sup>47</sup>

The opponents of copyright formalities, on the other hand, assert that formalities may be detrimental, in particular, for individual authors – as compared to corporate copyright owners. They maintain that copyright formalities have not been abolished for nothing.<sup>48</sup> They refer to the practical implications of formalities, arguing that it can be very burdensome and costly for individual authors to fulfil them.<sup>49</sup> Also, they contend that it is unfair that individual authors may lose protection because of mere ignorance, innocent mistakes or careless failure to complete formalities.<sup>50</sup> In support of this claim, they often entertain the theoretical argument that copyright is a natural right that arises upon the creation of a work and, consequently, ought to be protected independently from compliance with formalities.<sup>51</sup> Furthermore, they state that reintroducing copyright formalities is close to impossible, given the prohibition on formalities that is contained in the main international copyright treaties.<sup>52</sup>

### 1.3 Definition of the Problem

The previous section has demonstrated that the calls for reintroducing formalities in copyright law have engendered quite some controversy. While many scholars agree that copyright formalities are ‘unquestionably beneficial and desirable’,<sup>53</sup> various scholars are also concerned about the legal and practical-economic implications of

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<sup>45</sup> See e.g. Lessig 2001, at 252, Landes & Posner 2003a, at 477-480, Lessig 2004, at 249, Lévêque & Ménière 2004, at 105, Sprigman 2004, at 500-502, Gibson 2005, Goldman 2006, at 720-721, Khong 2007, at 61, Netanel 2008, at 141-142 and Rosloff 2009, at 45-51.

<sup>46</sup> See e.g. Lessig 2001, at 252, Landes & Posner 2003a, at 517-518, Lessig 2004, at 252, Gibson 2005, Goldman 2006, at 721-722, Boyle 2008, at 48 and Rosloff 2009, at 51-52. For empirical evidence in support of this, see Sprigman 2004, at 502-521 and Landes & Posner 2003a, at 473 and 499-500.

<sup>47</sup> See Netanel 2008, at 55, explaining this from a historical US perspective.

<sup>48</sup> See Levine 1995, Karp 1995, Perlmutter 1995 and Austin 2005, at 414 et seq.

<sup>49</sup> See Karp 1995, at 522, Austin 2005, at 416, Ginsburg 2010a, at 342-343 and Ginsburg 2010b, at 457.

<sup>50</sup> See Perlmutter 1995, at 573, Ginsburg 2010a, at 342 and Ginsburg 2010b, at 457. See also Rosloff 2009, at 38-39.

<sup>51</sup> See e.g. Dietz 1978, at 24-25 (nos 53 and 54), Ginsburg 1994, at 133-134 and 147 and Von Lewinski 2008, at 43 (no. 3.25) and 119 (no. 5.58). See also Lessig 2004, at 250-251, Sprigman 2004, at 543 et seq., Austin 2005, at 415, Rosloff 2009, at 57-58 and Hishinuma 2010, at 466, referring to such ‘natural rights’ claims in relation to (the abolition of) copyright formalities.

<sup>52</sup> See Austin 2005, at 416-417.

<sup>53</sup> Ginsburg 2010a, at 342 and Ginsburg 2010b, at 457.

copyright formalities. This book contributes to this debate by examining, from a legal perspective, whether and to what degree reintroducing formalities in copyright law is feasible. By so doing, it aims to establish the extent to which the current copyright system allows for a reintroduction of copyright formalities with a view to addressing the three challenges in copyright law considered above.

To answer the main research question, the book focuses on a number of separate but interrelated topics. First it explains how formalities can contribute to addressing the challenges that copyright is facing by describing the role and functions that they can fulfil. Second, it explores the rationales behind the abolition of formalities and the adoption of the Berne prohibition on formalities by conducting a legal-historical analysis. Third, it analyzes the substantive legal framework of the Berne prohibition on formalities to establish how much space the international copyright framework leaves for reintroducing formalities. Fourth, to determine if reintroducing copyright formalities is acceptable from a legal-theoretical point of view, it examines whether copyright, even if it does qualify as a natural right, can be subject to formalities.

Hence, the book addresses some key preliminary questions to determine whether reintroducing copyright formalities is legally feasible. Its purpose is not to devise a concrete plan for implementing a system of copyright formalities. Therefore it does not look at the question of which type of copyright formalities should be introduced to most adequately address the challenges that copyright law is facing today.

Because the objective of the book is not to propose an actual implementation of a regime of copyright formalities, it undertakes neither an economic analysis nor an analysis of their procedural aspects. Only if the features of a system of formalities are concretized in more detail can the practical and economic implications be tested accurately. Although the practical and economic feasibility of reinstating copyright formalities certainly must also be studied before the idea is taken to the next level, such assessment can be made at a later stage.<sup>54</sup> To see whether formalities actually fit the substantive legal framework and the doctrine of copyright, however, the legal feasibility of reintroducing copyright formalities should first be explored. Since this question has been neglected or only marginally addressed in recent proposals, it is time to examine it now. This is where this book aims to make a contribution.

For the purpose of the book, the term ‘copyright formalities’ is defined as formal requirements that the law imposes on authors and copyright owners for the purpose of securing or maintaining copyright protection or enforcing this right before the courts. Examples include registration, deposit and notice requirements. Domestic manufacturing clauses, which require that (foreign) works have to be manufactured in the territory of the protecting state before they acquire copyright protection, are not considered, since they are aimed not at addressing the challenges for which this book attempts to find a solution, but at protecting the local content industries.<sup>55</sup> The

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<sup>54</sup> For a good and interesting example of an economic study of copyright formalities, see King et al. 1986, examining the costs and benefits of formalities in US copyright law in the 1980s.

<sup>55</sup> See e.g. Samuels 1993, at 153.

definition is clearly focused on mandatory formalities. Purely voluntary formalities are excluded from the scope of this book,<sup>56</sup> because they can produce limited effects only, given that their compliance relies on good will and proactivity on the part of authors and copyright owners.<sup>57</sup> Furthermore, the book is limited to formalities in copyright law. It does not consider formalities in related areas of protection, such as the protection of related ('neighbouring') rights of performers, phonogram and film producers and broadcasters or the *sui generis* database protection in the EU.

## 1.4 Methodology and Outline of the Book

In questioning whether reintroducing copyright formalities is legally feasible, the book assumes that formalities can play a useful role in addressing the challenges that copyright is facing today. This hypothesis is tested in Chapter 2, which studies the possible role and functions of formalities by analyzing twentieth-century US copyright formalities and drawing a comparison with formalities imposed in other fields of intellectual property law. The results of this analysis allow a distinction to be made between the various types of formalities, the differences in nature and legal effects and the functionalities of formalities in the rest of the book.

Next, a legal-historical analysis is conducted to unravel the rationales behind the abolition of formalities in national copyright law (Chapter 3) and the introduction of the prohibition on formalities in international copyright law (Chapter 4). The book examines the history of copyright formalities in France, Germany, the Netherlands, the UK and the US from the time of the invention of the printing press until the present day. The international part focuses on copyright formalities in nineteenth-century bilateral agreements, the debates on formalities at the main international conferences preceding the adoption of the Berne Convention and the development of rules on formalities in the Berne Convention and the other key copyright treaties that were adopted in the twentieth century, including the Universal Copyright Convention, the TRIPS Agreement and the WIPO Copyright Treaty.

After the reasons behind the abolition of formalities at the national level and the prohibition of formalities at the international level are explained, the book explores how much leeway exists for reintroducing formalities in current copyright law. To this end, it examines the substantive requirements of the prohibition on formalities in the main international copyright treaties (Article 5(2) of the Berne Convention as incorporated by reference in the TRIPS Agreement and WIPO Copyright Treaty) so as to define its scope and limits (Chapter 5). The chapter concludes that, while the international copyright treaties do not completely ban formalities, they provide too

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<sup>56</sup> For a global overview of voluntary copyright registers, see WIPO, 'Survey of national legislation on voluntary registration systems for copyright and related rights', WIPO document (SCCR/13/2), 9 November 2005.

<sup>57</sup> See Sprigman 2004, at 518.

little room for contracting parties to reinstitute copyright formalities with the aim of addressing the challenges that copyright is facing in the current digital age.

Therefore, the book also looks beyond the existing legal framework. It questions whether the idea that copyright is a natural right stands in the way of subjecting this right to formalities (Chapter 6). If not, that would – at least from a theoretical point of view – open the door for altering or even abrogating the international prohibition on formalities so as to enable contracting states to reintroduce copyright formalities. To resolve whether copyright as a natural right ought to be protected independently from formalities, the book examines the property and personality rights theories of copyright, which lie at the heart of the natural rights claim. It analyzes from a philosophical, a legal-historical and a legal-theoretical viewpoint whether copyright formalities are compatible with these theories. Since this analysis steers close to the idea of copyright as a human right, it also examines whether copyright can be made conditional on formalities, if this right is accorded the status of a human right.

Chapter 7 concludes with an assessment of the research findings, answering the question of whether it is legally feasible to reintroduce copyright formalities, taking account of the challenges that copyright is facing in the digital era. It deduces from Chapters 5 and 6 that, while from a theoretical perspective, subjecting the economic aspect of copyright to formalities is perfectly acceptable, in practice, the prohibition on formalities does not allow the challenges identified in Chapter 1 to be adequately addressed by means of a reintroduction of copyright formalities. This culminates in a discussion of the future sustainability of the prohibition on formalities, taking into consideration the functions that formalities can perform to tackle the challenges in current copyright law, as evidence in Chapter 2, and the validity of the historical rationales behind the abolition of formalities in national and international copyright law, as identified in Chapters 3 and 4, in today's digital environment.

## Chapter 2

# The Role and Functions of Formalities in Intellectual Property Law

As explained in Chapter 1, this book starts from the hypothesis that formalities may play a useful role in addressing the challenges that copyright is facing today. These challenges, which have been outlined above, rise from the need to establish legal certainty over copyright claims, improve rights clearance and enhance the free flow of information. It must be understood that the degree to which formalities can cater to these needs hinges largely on how they are shaped. Depending on the aims to be achieved, the lawmaker must choose which type(s) of formalities shall be imposed and what their legal consequence(s) shall be. Those two specifications determine to a great extent what role and functions formalities may eventually fulfil.

This chapter tests the above hypothesis by identifying, classifying and describing the role and functions that formalities may play in addressing the various challenges in copyright law. To this end, an analysis is made of twentieth-century and current US copyright formalities and a comparison is drawn with formalities in other fields of intellectual property law, namely, in patent, design and trademark law.

The reason for studying US copyright formalities is that they take different forms and have only fairly recently been abolished or recast so as to fit the requirements of the Berne Convention. Many of the twentieth-century US copyright formalities can still be found, albeit with different legal effects, in contemporary US copyright law. In contrast with most European countries, where copyright formalities were abolished already in the beginning of the twentieth century, the US experience with copyright formalities can therefore supply more and better information about their role and functions. The statutory materials that are analyzed here are the federal US Copyright Acts of 1909<sup>58</sup> and 1976,<sup>59</sup> as amended, inter alia, by the 1988 Berne

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<sup>58</sup> Act of 4 March 1909, 60<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (in: Copyright Enactments 1963, at 64-86). In 1947, the provisions of the 1909 Act, as amended, were laid down in Title 17 of the United States Code [17 USC] by Public law 281, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., c. 391 (in: Copyright Enactments 1963, at 102-121).

<sup>59</sup> Copyright Revision Act of 19 October 1976, Pub. L. 94-553, 90 Stat. 2541, as amended by the Act of 1 October 1977. This Act became effective on 1 January 1978.

Convention Implementation Act.<sup>60</sup> It should be noted that this chapter concentrates purely on the role and functions of formalities, not on the historical reasons for their change or abolition. These reasons are examined in Chapter 3 below.

A comparison with formalities in other areas of intellectual property can further our insight into the role and functions of copyright formalities, given that these too have intangible, intellectual subject-matter as their object. The fields of law that are chosen for this purpose are patent, design and trademark law, because these are the most important areas of intellectual property law. Studying these areas allows us to extend our analysis of the role and functions of formalities beyond the jurisdiction of the United States. This chapter examines patents, designs and trademarks law in France,<sup>61</sup> the Netherlands,<sup>62</sup> Germany,<sup>63</sup> the United Kingdom<sup>64</sup> and US federal law.<sup>65</sup> In addition, it looks into the European Patent Convention,<sup>66</sup> the Community Trade Mark Regulation<sup>67</sup> and the Community Designs Regulation.<sup>68</sup> Again, it must be

<sup>60</sup> Berne Convention Implementation Act of 31 October 1988, Pub. L. No. 100-568, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 102 Stat. 2853. This Act became effective on 1 March 1989.

<sup>61</sup> French Intellectual Property Code, legislative (L) and regulatory (R) parts, as amended, containing rules on designs and models (book V), patents (book VI) and trademarks (book VII).

<sup>62</sup> Kingdom Act of 15 December 1994, containing rules with respect to patents, as amended [Dutch Patents Act 1995]; Benelux Convention concerning Intellectual Property (Trademarks and Designs) of 25 February 2005, as amended [Benelux Convention on Intellectual Property 2005]; Implementing Regulations to the Benelux Convention on Intellectual Property (Trademarks and Designs) of 1 June 2006 [Implementing Regulations under the Benelux Convention on Intellectual Property].

<sup>63</sup> Patents Act of 16 December 1980, BGBl. 1981 I at 1, as amended [German Patents Act]; Ordinance on Patent Procedures before the German Patent and Trade Mark Office of 1 September 2003, BGBl. I at 1702, as amended [German Patent Ordinance]; Act on the protection of trade marks and other signs of 25 October 1994, BGBl. I at 3082, as amended [German Trade Marks Act]; Ordinance Implementing the Trade Marks Act of 11 May 2004, BGBl. I at 872, as amended [German Trade Mark Ordinance]; Act on the legal protection of designs and models of 12 March 2004, BGBl. I at 390, as amended [German Designs Act]; Ordinance Implementing the German Designs Act of 11 May 2004, BGBl. I at 884, as amended [German Designs Ordinance].

<sup>64</sup> Patents Act 1977, c. 37, as amended [UK Patents Act 1977]; Trade Marks Act 1994, c. 26, as amended [UK Trade Marks Act 1994]; Registered Designs Act 1949, c.88, as amended [UK Registered Designs Act 1949]; Registered Designs Rules, Statutory Instrument 2006, no. 1975 [UK Registered Designs Rules 2006].

<sup>65</sup> Title 35 of the United States Code on Patents [35 USC]; Trademark Act of 1946 (Lanham Act), Public law 79-489, c. 540, approved 5 July 1946, 60 Stat. 427, currently laid down in Chapter 22 of Title 15 of the United States Code on Commerce and Trade [US Trademark Act 1946; 15 USC]; Title 37 of the Code of Federal Regulations on Patents, Trademarks, and Copyrights [37 CFR]. In the US, there is no specific regime to protect designs. Designs can either be protected by design patents (35 USC §§ 171 to 173) or by copyright law (17 USC § 1301 et seq.).

<sup>66</sup> Convention on the Grant of European Patents of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000 [European Patent Convention]; Implementing Regulations to the European Patent Convention as adopted by decision of the Administrative Council of the European Patent Organisation of 7 December 2006 [Implementing Regulations to the European Patent Convention].

<sup>67</sup> Council Regulation (EC) no. 207/2009 of 26 February 2009 on the Community trade mark, *OJ L* 78/1 of 24 March 2009 [Community Trade Mark Regulation]; Commission Regulation (EC) no.

emphasized that our focus is on the role and functions of formalities only. Since the objective of this book is not to propose an actual implementation of formalities, but rather to study the legal-theoretical boundaries of their possible reintroduction, no detailed analysis of the procedural aspects of formalities shall be made.

This chapter first describes the system of formalities, from which their role and functions are afterwards distilled. It therefore starts with providing an outline of the types of formalities that are common in intellectual property law (para. 2.1) and follows with an examination of their nature and legal consequences (para. 2.2). This provides the groundwork for the subsequent exploration of the role and functions of formalities (para. 2.3). The latter shall be scrutinized in detail. In order to determine to what extent formalities may help to address the three challenges identified above, the various functions of formalities shall be grouped into five general categories.

## 2.1 The Different Types of Formalities

Formalities in intellectual property law can take various forms. The most prominent examples are registration, renewal, recordation of transfers or assignments of rights, deposit and notice requirements. This section identifies and describes these types of formalities as they are currently laid down in patent, design and trademark law and have been imposed in twentieth-century and current US copyright law.

### 2.1.1 REGISTRATION

One example of formalities that is very common in intellectual property law is the requirement to register intellectual property. In patent law, for example, a patent is granted only after a patent application has been filed, examined and approved by a patent office (or other registering authority) and on condition that the patent grant is published in a register that is open for public inspection.<sup>69</sup> Likewise, trademark law typically requires the registration of a trademark in a public register.<sup>70</sup> The same

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2868/95 of 13 December 1995 implementing the Community Trade Mark Regulation, *OJ L* 303/1 of 15 December 1995, as amended [Community Trade Mark Implementing Regulation].

<sup>68</sup> Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community designs, *OJ L* 3/1 of 5 January 2002, as amended [Community Designs Regulation]; Commission Regulation (EC) no. 2245/2002 of 21 October 2002 implementing the Community Designs Regulation, *OJ L* 341/28 of 17 December 2002, as amended [Community Designs Implementing Regulation].

<sup>69</sup> See e.g. art. L 611-1 in conjunction with art. L 612-1 et seq. French Intellectual Property Code; art. 24 et seq. Dutch Patents Act 1995; art. 34 et seq. German Patents Act; sec. 14 et seq. UK Patents Act 1977; 35 USC § 111 et seq. and art. 75 et seq. European Patent Convention.

<sup>70</sup> See e.g. art. L 712-1 et seq. French Intellectual Property Code; art. 2:2 of the Benelux Convention on Intellectual Property 2005; art. 4 German Trade Marks Act (recognizing that a trademark can also be acquired by the use of a sign in the course of trade); sec. 2 UK Trade Marks Act 1994 (indicating that this Act does not affect the law relating to passing off, protecting signs that acquired a reputation by use in trade) and art. 6 Community Trade Mark Regulation. US federal trademark protection arises

applies to the acquisition of a design right, which normally is subject to the registration of the filing or deposit of a design with the relevant registering authority.<sup>71</sup> Patent, design and trademark laws do not rely on a 'plain' registration of title. Applications must typically be accompanied by a representative description or a representation of the invention, design or mark and other relevant information, e.g., as to the goods or services for which a trademark is to be registered (see para. 2.3.2.1 below).

Registration requirements have also been provided for, and are still laid down, in US copyright law. Although neither the 1909 nor the 1976 Copyright Acts required registration as a condition to protection, no action for copyright infringement could be instituted until after the work had been registered with the Copyright Office.<sup>72</sup> In addition, the Copyright Act of 1976 stated that, unless a work was registered within three months after first publication, no award of statutory damages or attorney's fees could be made for any pre-registration infringement.<sup>73</sup> In 1989, upon the US implementation of the Berne Convention, the latter rule was maintained for all works, but the rule that registration is a condition to sue for copyright infringement was altered so as to relate to US works only.<sup>74</sup> These rules still apply at present.

### 2.1.2 RENEWAL

For most intellectual property rights, registration must be periodically renewed in order to prolong their protection. Intellectual property law therefore designates specific moments in time at which right holders must take affirmative steps to prevent the extinction of their rights. In patent law, periodic maintenance fees must usually be paid to continue enjoying protection for the maximum statutory term of 20 years.<sup>75</sup> In trademark law, protection may endure indefinitely as long as the trademark is being used, but the registration must be renewed after each successive

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from the use in commerce of a trademark. Registration is therefore not required, but is encouraged by providing several advantages to trademark registrants. See para. 2.2.3 below.

<sup>71</sup> See e.g. art. L 511-9 et seq. French Intellectual Property Code; art. 3:5 of the Benelux Convention on Intellectual Property 2005; art. 27(1) German Designs Act; sec. 1 UK Registered Designs Act 1949 and art. 35 et seq. Community Designs Regulation.

<sup>72</sup> See sec. 12 US Copyright Act 1909, 17 USC § 13 (1947) and 17 USC § 411 (1976). Even though registration was not constitutive of copyright, registration before or within five years after the first publication of a work repaired an omission of notice, thus avoiding loss of copyright under the 1976 Copyright Act (see para. 2.1.5 below). See 17 USC § 405(a)(2) (1976).

<sup>73</sup> 17 USC § 412 (1976).

<sup>74</sup> See sec. 9 of the Berne Convention Implementation Act 1988.

<sup>75</sup> In several countries, it concerns annual maintenance fees, sometimes to be paid after a certain period (e.g., three or four years) after the filing date. See e.g. art. L 612-19 in conjunction with art. L 613-22 French Intellectual Property Code; arts 61 and 62 Dutch Patents Act 1995; art. 17 in conjunction with art. 20(1) under 3 German Patents Act; sec. 25 UK Patents Act 1977; and art. 86 European Patent Convention. In the US, maintenance fees must be paid 3.5 years, 7.5 years and 11.5 years after the date of issuance of the patent. See 35 USC § 41(b).

period of ten years.<sup>76</sup> The protection of registered designs commonly terminates after five years, but the registration may be renewed for four successive periods of five years.<sup>77</sup>

Renewal registration was also a key constituent of the 1909 US Copyright Act. Following an initial statutory term of protection of twenty-eight years from the date of first publication with copyright notice (see para. 2.1.5), the author or copyright owner could obtain a second statutory term of protection of twenty-eight years by applying for renewal registration with the Copyright Office within one year prior to the expiration of the initial term.<sup>78</sup> Although, in theory, registration of the copyright in the initial term was not required, in practice, it was essential to form the basis of a renewal registration.<sup>79</sup> In default of renewal registration, the 1909 Act stated that the copyright would terminate and the work would enter the public domain.<sup>80</sup>

The 1976 US Copyright Act abolished the renewal registration and provided for a single term of the life of the author plus fifty years, but only for works created on or after 1 January 1978.<sup>81</sup> Accordingly, renewal registration remained necessary for continuing the copyrights in works that were still in their first term on that date. For these works, the Act extended the renewal term from twenty-eight to forty-seven years.<sup>82</sup> In 1992, renewal registration became optional and works that were still in their first term on that date were automatically renewed.<sup>83</sup> Since 1998, copyright is protected for seventy years after the author's death or, for certain works, for ninety-five years after first publication or 120 years after creation. Moreover, the automatic renewal term has been extended from forty-seven to sixty-seven years.<sup>84</sup>

<sup>76</sup> See e.g. art. L 712-1 in conjunction with art. L 712-9 French Intellectual Property Code; art. 2:9 Benelux Convention on Intellectual Property 2005; art. 47 German Trade Marks Act; secs 42 and 43 UK Trade Marks Act 1994; sec. 9 US Trademark Act 1946 (15 USC § 1059); and arts 46 and 47 Community Trade Mark Regulation.

<sup>77</sup> See e.g. art. L 513-1 French Intellectual Property Code; art. 3:14 Benelux Convention on Intellectual Property 2005; art. 28 German Designs Act; sec. 8 UK Registered Designs Act 1949; and arts 12 and 13 Community Designs Regulation.

<sup>78</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>79</sup> See Ringer 1960, at 579, indicating that original registration can be made 'as late as the last year of the first term'. Since renewal registration must be made within one year prior to the expiration of the initial term, this assumes that the two may be completed at – or around – the same time.

<sup>80</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>81</sup> 17 USC § 302(a) and (b) (1976). For anonymous works, pseudonymous works and works made for hire, the law lays down fixed terms. See 17 USC § 302(c) (1976).

<sup>82</sup> 17 USC § 304(a) (1976). The total term of protection for was thus fixed at seventy-five years. This follows a tendency to extend the renewal term of subsisting copyrights. Starting in 1962, the renewal term was repeatedly extended so as to keep copyrights whose renewal term would otherwise expire in force until a general revision of US copyright law has been enacted. The 1976 US Copyright Act finally extended the renewal terms of subsisting copyrights to endure for a term of seventy-five years from the date copyright was originally secured. See 17 USC § 304(b) (1976).

<sup>83</sup> Copyright Renewal Act of 26 June 1992, Pub. L. No. 102-307, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., 106 Stat. 264.

<sup>84</sup> Sonny Bono Copyright Term Extension Act of 27 October 1998, Pub. L. No. 105-298, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 112 Stat. 2827.

## 2.1.3 RECORDATION

Closely associated with the registration requirement is the requirement of recording transfers of rights. Most intellectual property laws relying on registration encourage right owners to register an assignment, grant or conveyance of their rights, so as to keep the registers up-to-date. While most laws on trademarks, patents and designs do not require a recordation of transfers of intellectual property, the majority orders that as long as a transfer has not been entered on the registers, it has no legal effect against third parties.<sup>85</sup> Sometimes however an exception applies if a third party had knowledge of the transfer.<sup>86</sup> Other laws state that, until such time as the transfer has been entered on the registers, a successor in title cannot invoke the transferred right or enforce it in a legal proceeding.<sup>87</sup> Alternatively, certain laws establish priority in relation to a recordation of assignments. If an assignment is recorded, the assignee is protected against earlier unrecorded transfers of rights. However, if he fails to do so within a certain period, a subsequent recorded transfer will take priority.<sup>88</sup> Also, a few laws order that, unless a transfer is recorded, the transferee of an intellectual property right shall not be awarded costs in an infringement proceeding.<sup>89</sup>

The 1909 US Copyright Act also instructed the Register of Copyrights to record assignments of copyright and issue certificates thereof to any person so requesting. Any assignment of copyright not recorded within three months after its execution in the US, or six months after its execution outside the US, was void as against any subsequent purchaser or mortgagee in good faith whose assignment had been duly recorded.<sup>90</sup> The 1976 US Copyright Act contained similar rules.<sup>91</sup> As a novelty, it also made recordation a condition to sue for anyone claiming to be the right owner

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<sup>85</sup> See e.g. in patent law: art. L 613-9(1) French Intellectual Property Code and arts 64(2) and 65(3) Dutch Patents Act 1995; in trademark law: art. L 714-7 French Intellectual Property Code, art. 2:33 Benelux Convention on Intellectual Property 2005, sec. 25(3)(a) UK Trade Marks Act 1994 and art. 23 Community Trade Mark Regulation; and in designs law: art. L 513-3 French Intellectual Property Code, art. 3:27 Benelux Convention on Intellectual Property 2005 and art. 33(2) Community Designs Regulation.

<sup>86</sup> See e.g. art. L 613-9(2) French Intellectual Property Code (with respect to patents), sec. 25(3)(a) UK Trade Marks Act 1994, art. 23(1) Community Trade Mark Regulation and art. 33(2) Community Designs Regulation.

<sup>87</sup> See e.g. art. 28(2) German Trade Marks Act; art. 17(6) Community Trade Mark Regulation; and art. 28 under (b) Community Designs Regulation. See also art. 30(3) German Patents Act, stating that as long as a transfer of title has not been recorded, the former patentee remains subject to the rights and obligations as provided for in the law. Pursuant to sec. 19(5) UK Registered Designs Act 1949, no unrecorded documents of assignment are accepted as evidence of title in court proceedings.

<sup>88</sup> See e.g. in patent law: sec. 33 UK Patents Act 1977 and 35 USC § 261; and in trademark law: sec. 10(a)(4) US Trademark Act 1946 (15 USC § 1060).

<sup>89</sup> See e.g. sec. 68 UK Patents Act 1977; and sec. 25(4) UK Trade Marks Act 1994.

<sup>90</sup> Secs 44 and 45 of the US Copyright Act 1909; 17 USC §§ 30 and 31 (1947).

<sup>91</sup> See 17 USC § 205 (1976). See, in particular, 17 USC § 205(e) (1976), as to the priority between two conflicting transfers of ownership, and 17 USC § 205(f) (1976), as to the priority between a conflicting transfer of ownership and a non-exclusive licence.

by virtue of a transfer of copyright. Yet, after recordation, legal action could always be instituted on a cause of action arising before recordation.<sup>92</sup> When the US joined the Berne Convention, the requirement that recordation of assignment be obtained before instituting an infringement action was eliminated altogether.<sup>93</sup> Now, the law merely provides that recordation may give constructive notice of the facts stated in the recorded document and priority in case of conflicting assignments.<sup>94</sup>

#### 2.1.4 DEPOSIT

Another formality commonly applied in intellectual property law, although usually not in isolation, is that of deposit. In patents, designs and trademarks law, the requirement to deposit a sample of a design, trademark or invention can be an integral part of the application for registration. If necessary for identification or clarification purposes, for example, a registering authority can invite a patent applicant to supply a model or sample to accompany the specification of an invention for which protection is sought.<sup>95</sup> Likewise, in designs and trademarks law, registration is often preceded by a deposit of a graphic representation (e.g., a drawing or photograph) or a specimen of the relevant design or trademark.<sup>96</sup> Hence, in intellectual property law, deposit is often closely linked to and sometimes even inseparable from registration.

Similarly, under the 1909 US Copyright Act, deposit and registration were very much tied together.<sup>97</sup> Following publication with copyright notice, the Act required two complete copies of the best edition of a work to be promptly deposited with the

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<sup>92</sup> 17 USC § 205(d) (1976).

<sup>93</sup> See sec. 5 of the Berne Convention Implementation Act 1988.

<sup>94</sup> 17 USC § 205(c), (d) and (e).

<sup>95</sup> See e.g. 35 USC § 114 and sec. 16 German Patent Ordinance. For specific inventions e.g. those involving (the use of) biological material, deposit is typically required. See e.g. art. L 612-5 French Intellectual Property Code; art. 25 Dutch Patents Act 1995; art. 34(8) German Patents Act; sec. 125A UK Patents Act 1977; and rule 31 Implementing Regulations to the European Patent Convention.

<sup>96</sup> See e.g. in trademark law: art. R 712-3 French Intellectual Property Code, art. 2:5 Benelux Convention on Intellectual Property 2005 in conjunction with rule 1.1 Implementing Regulations under the Benelux Convention on Intellectual Property, art. 8(1) German Trade Marks Act in conjunction with secs 7 to 13 German Trade Mark Ordinance, sec. 32(2)(d) UK Trade Marks Act 1994, 37 CFR § 2.51 et seq. (US) and art. 26 Community Trade Mark Regulation in conjunction with rule 3 Community Trade Mark Implementing Regulation; and in designs law: arts L 512-2 and R 512-3 French Intellectual Property Code, art. 3:9 Benelux Convention on Intellectual Property 2005 in conjunction with rule 2.1 Implementing Regulations under the Benelux Convention on Intellectual Property, art. 11(2) German Designs Act in conjunction with secs 6 and 7 German Designs Ordinance, sec. 4 UK Registered Designs Rules 2006 and art. 36(1)(c) Community Designs Regulation in conjunction with arts 1(1)(c) and 4 Community Designs Implementing Regulation.

<sup>97</sup> See Kaplan 1958, at 357-358. See also sec. 10 of the US Copyright Act 1909 and 17 USC § 11 (1947), which refer to registration 'including the deposit of copies'.

Copyright Office.<sup>98</sup> This deposit was to be accompanied by a ‘claim of copyright’, which, in all likelihood, referred to an application for registration.<sup>99</sup> If the copies were not promptly deposited, the Register of Copyrights could, at any time after the publication of the work, demand that the copyright owner deposit them. In default of the deposit of copies of the work within three months of the demand,<sup>100</sup> the right owner would be liable to a fine and the copyright would become void.<sup>101</sup> Moreover, the Act provided that until the deposit and registration had been complied with, no legal action could be maintained for infringement of copyright in the work.<sup>102</sup>

The 1976 US Copyright Act distinguished more clearly between deposit required for registration purposes and deposit for the use or disposition of the US Library of Congress.<sup>103</sup> The former was an essential part of and had to be observed to complete the registration (see para. 2.1.1). However, in practice, the library deposit could be used for the same purpose.<sup>104</sup> To satisfy the library deposit, two complete copies of a work needed to be deposited with the Copyright Office within three months after the date of publication in the United States.<sup>105</sup> The Register of Copyrights could at any time after publication demand that the required deposit be made, but failure to do so no longer rendered the copyright void.<sup>106</sup> Rather, it made the copyright owner liable to a fine and payment of the reasonable cost of acquiring the copies.<sup>107</sup>

In substance, the library deposit remained unchanged when the US joined the Berne Convention in 1989.<sup>108</sup> Thus, the owner of a copyright in a work published in

<sup>98</sup> Sec. 12 of the US Copyright Act 1909; 17 USC § 13 (1947). For certain works e.g. contributions to periodicals for which special registration was requested and works of foreign origin, only one copy had to be deposited. For the latter type of works, this rule was introduced in 1914. See Amendatory Act of 28 March 1914, 63<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (in: Copyright Enactments 1963, at 91-92).

<sup>99</sup> What the ‘claim of copyright’ exactly referred to is unclear, but there was at least some indication that it signified an application for registration. See Kaplan 1958, at 357-358.

<sup>100</sup> The period was six month, if the deposit was to be made from an outlying territorial possession of the US or a foreign country. See sec. 13 of the US Copyright Act 1909; 17 USC § 14 (1947).

<sup>101</sup> Sec. 13 of the US Copyright Act 1909; 17 USC § 14 (1947). Thus, the copyright in a work would not become void as a result of a late deposit, but only because of a failure to deposit after a demand by the Register. See *Washingtonian Pub. Co. v. Pearson*, 306 US 30, 59 S.Ct. 397 (US Supreme Court, 1939); and *Lumiere v. Pathe Exchange*, 275 Fed. 428 (Second Circuit, 1921), at 430.

<sup>102</sup> Sec. 12 of the US Copyright Act 1909; 17 USC § 13 (1947). Tardy deposit constituted no ground for preventing the institution of an infringement action. See *Washingtonian Pub. Co. v. Pearson*, 306 US 30, 59 S.Ct. 397 (US Supreme Court, 1939), at 42, 403: ‘while no action can be maintained before copies are actually deposited, mere delay will not destroy the right to sue’. For an extensive discussion of, and interesting comments to, the *Washingtonian* case, see Kaplan 1958, at 346-351.

<sup>103</sup> But see Ginsburg 2010a, at 336 and Ginsburg 2010b, at 451, arguing that ‘the dichotomy between these two deposit provisions may not be quite as sharp as initially thought’.

<sup>104</sup> 17 USC § 408(b) (1976).

<sup>105</sup> 17 USC § 407(a) (1976).

<sup>106</sup> *Ibid.*, indicating explicitly that the library deposit is no condition of copyright protection.

<sup>107</sup> 17 USC § 407(d) (1976).

<sup>108</sup> However, a small technical amendment was made. To ensure that all works protected by copyright and published in the US were subjected to mandatory deposit, whether affirmatively marked with a

the US is still required to deposit copies for the use or disposition of the Library of Congress and for completing the ‘voluntary’ registration requirement.<sup>109</sup>

### 2.1.5 NOTICES

A last type of formalities that is used widely, although often not required by law, is notice requirements. The most common notices in intellectual property law, apart from the ©-sign in copyright law, are the indication ‘patented’ in patent law, the symbols ® and ™ in trademark law and the ‘d-in-a-circle’ in designs law.<sup>110</sup> These notices are often voluntarily used by right owners to indicate that a certain object is protected by intellectual property. Nevertheless, in some countries, the law attaches legal consequences to their use. Some laws state that, if a product has been marked with a prescribed notice, an innocent intent defense in mitigation of damages cannot be relied upon in an infringement proceeding.<sup>111</sup> Other laws more generally provide that, in the event of failure to mark a product with a prescribed notice, no damages or profits shall be recovered by the right owner in a suit for infringement, except on proof that the defendant had actual notice of the registration of the right.<sup>112</sup>

Since fulfilling notice requirements does not involve a registering authority but is purely self-initiated, most intellectual property laws containing notice requirements also impose fines for falsely using a notice with the intent of deceiving the public or inducing them to believe that a product is protected by a patent, design or trademark right.<sup>113</sup> Interestingly, even in countries where no statutory notice requirements are provided for, but where the use of notices has nevertheless become customary, the courts have at times condemned the false marking of a product with an intellectual property notice. The courts held this to be an unfair commercial practice.<sup>114</sup>

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copyright notice or not, the Act eliminated the qualification ‘with notice of copyright’ in 17 USC § 407(a) (1976). See sec. 8 of the Berne Convention Implementation Act 1988.

<sup>109</sup> 17 USC §§ 407 and 408(b).

<sup>110</sup> See e.g. 35 USC § 287(a): the word ‘patent’ or the abbreviation ‘pat.’, together with the number of the patent; sec. 29 US Trademark Act 1946 (15 USC § 1111): the words ‘Registered in US Patent and Trademark Office’ or ‘Reg. US Pat. & Tm. Off.’ or the letter R enclosed within a circle, thus ®; and 17 USC § 1306(a): the words ‘Protected Design’, the abbreviation ‘Prot’d Des.’, or the letter ‘D’ with a circle, or the symbol ‘\*D\*’, together with the registration number or the year in which design protection commenced plus the name of the owner of the right in the design.

<sup>111</sup> See e.g. sec. 24B(2) UK Registered Designs Act 1949 and sec. 62(1) UK Patents Act 1977.

<sup>112</sup> See e.g. 35 USC § 287(a) and sec. 29 US Trademark Act 1946 (15 USC § 1111).

<sup>113</sup> See e.g. secs 110 and 111 UK Patents Act 1977, sec. 95 UK Trade Marks Act 1994, sec. 35 UK Registered Designs Act 1949 and 35 USC § 292(a). In the US, the notice ® is a federal registration symbol and can be used with registered trademarks only. See sec. 29 US Trademark Act 1946 (15 USC § 1111). Using it with unregistered trademarks may result in claims of fraud. See *Copelands’ Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563 (US Court of Appeals, Federal Circuit, 1991).

<sup>114</sup> See e.g. German Federal Supreme Court, decision of 26 February 2009, I ZR 219/06 (*Thermoroll*): ‘Any person who uses a sign with the suffix ®, without being the owner or licensee of the trademark, regularly misleads the public in an anticompetitive manner. This may be different if the person is the owner of a similar trademark and the use of the sign with the suffix ® can be qualified as a genuine

In contrast to notice requirements in patents, designs and trademarks law, which typically are the complement of the formalities to which intellectual property rights are subject, copyright notices normally are stand-alone formalities. Publication with copyright notice, for example, was the sole condition for securing protection under the 1909 US Copyright Act.<sup>115</sup> Likewise, as we shall see in more detail below, at the international level, the Universal Copyright Convention provides that, to qualify for protection in contracting states that subject copyright to formalities, all copies of a published works must be marked with a copyright notice (see para. 4.4).

In the US, the 1909 Copyright Act carefully prescribed the form and position of placement of the copyright notice. The notice should consist of three elements, i.e., the indication ‘copyright’, ‘copr.’ or the symbol ©, the name or initials of the right owner and the year of publication.<sup>116</sup> It should be placed on the title page – or other visible part – of each copy of the work published or offered for sale in the US by authority of the copyright owner.<sup>117</sup> Publication without notice normally caused a copyright to be held invalid by the courts,<sup>118</sup> but the law provided limited relief in case of the omission by accident or mistake of the copyright notice from a particular copy or copies.<sup>119</sup> Still, this rule was rather narrowly interpreted.<sup>120</sup> Also, failure to affix the notice in the correct form and location on each copy of the work could lead to a loss of copyright.<sup>121</sup> However, in some cases, the courts held a copyright to be valid, even if the notice was not in the specified form or position.<sup>122</sup> Fraudulent use, alteration or removal of copyright notices was treated as a criminal offence.<sup>123</sup>

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use.’ In the original: ‘*Wer ein Zeichen mit dem Zusatz ® verwendet, ohne Inhaber dieser Marke oder einer Lizenz an dieser Marke zu sein, führt den Verkehr regelmäßig in wettbewerblich relevanter Weise irre. Etwas anderes kann gelten, wenn der Betreffende Inhaber einer ähnlichen Marke ist und die Verwendung des Zeichens eine rechtserhaltende Benutzung dieser Marke darstellt.*’

<sup>115</sup> See secs 9 and 18 to 20 of the US Copyright Act 1909; 17 USC §§ 10 and 19 to 21 (1947).

<sup>116</sup> Sec. 18 of the US Copyright Act 1909; 17 USC § 19 (1947). For sound recordings, the notice had to consist of the symbol ©. See Act of 15 October 1971, Public law 92-140, 85 Stat. 391. The name of the copyright owner could be substituted by that of the assignee, if the copyright was assigned and recorded in the Copyright Office. See sec. 46 of the US Copyright Act 1909; 17 USC § 32 (1947).

<sup>117</sup> Secs 9 and 19 of the US Copyright Act 1909; 17 USC §§ 10 and 20 (1947).

<sup>118</sup> See e.g. *Sieff v. Continental Auto Supply*, 39 F.Supp. 683 (District Court, D. Minnesota, 1941); and *Superfine Products v. Denny*, 54 F.Supp. 148 (District Court, N.D. Georgia, Atlanta Division, 1943).

<sup>119</sup> See sec. 20 of the US Copyright Act 1909; 17 USC § 21 (1947), providing that the omission by accident or mistake of the notice ‘from a particular copy or copies’ would not invalidate the right, but only prevent the recovery of damages against innocent infringers who are misled by the omission.

<sup>120</sup> See Weil 1917, at 350, indicating that the application of the rule hinged on the facts in each case. In practice, courts applied the provision only where the notice was omitted from one or perhaps a very limited number of copies. See *United Thrift Plan v. National Thrift Plan*, 34 F.2d 300 (District Court, E.D. New York, 1929), at 302; *Goes Lithographing Co. v. Art Lithographic Co.*, 14 F.Supp. 620 (District Court, S.D. New York, 1936); *Krafft v. Cohen*, 117 F.2d 579 (Third Circuit, 1941).

<sup>121</sup> See e.g. *Goes Lithographing Co. v. Apt Lithographic Co.*, 14 F.Supp. 620 (District Court, S.D. New York, 1936); *Wildman v. New York Times Co.*, 42 F.Supp. 412, (District Court, S.D. New York, 1941); *Group Publishers v. Winchell*, 86 F.Supp. 573 (District Court, S.D. New York 1949). For an exhaustive overview of court decisions on defective notices, see Doyle et al. 1957, at 237-249.

<sup>122</sup> See e.g. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (Second Circuit, 1946), certiorari denied, 331 US 820 (US Supreme Court, 1947); *Harry Alter Co. v. Graves Refrigeration*,

In 1976, publication with copyright notice, while still required, no longer formed the decisive element for the coming into being of copyright.<sup>124</sup> Although copyright could still be lost by publication without notice, an omission of notice could always be cured by registration within a five-year grace period.<sup>125</sup> The Act protected good faith users who innocently infringed a copyright in reliance upon copies from which the notice was omitted.<sup>126</sup> Furthermore, it relaxed the conditions as to the placement and form of the copyright notice<sup>127</sup> and protected good faith users against defective notices and notices containing erroneous information.<sup>128</sup> Use, removal or alteration of copyright notices with fraudulent intent was considered a criminal offence.<sup>129</sup>

When the US adhered to the Berne Convention, the mandatory copyright notice was removed and replaced with an incentive for voluntary notice.<sup>130</sup> This incentive is still contained in current US copyright law. It accords evidentiary weight to the voluntary use of copyright notices to preclude innocent intent defenses in mitigation of damages. Therefore, if a copyright notice appears on copies of a work to which a defendant in an infringement suit had access, no weight is given to a defense based on innocent infringement in mitigation of actual or statutory damages.<sup>131</sup>

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*Inc.*, 101 F.Supp. 703 (US District Court, N.D. Georgia, 1951); *Ziegelheim v. Flohr*, 119 F.Supp. 324 (US District Court, E.D. New York, 1954).

<sup>123</sup> Secs 29 and 30 of the US Copyright Act 1909; 17 USC §§ 105 and 106 (1947).

<sup>124</sup> Although it was stated out front in 17 USC § 102(a) (1976) that US federal copyright protection automatically attached upon fixation of a creative work in tangible form, 17 USC §§ 401(a) and 402(a) (1976) provided that a notice of copyright should be placed on all publicly distributed copies of a work when these were published by authority of the copyright owner.

<sup>125</sup> See 17 USC § 405(a)(2) (1976). The copyright owner should make reasonable efforts to add notices to all copies distributed in the US after the omission was discovered. The Act further provided that copyright would not be held invalid if the notice was omitted from a small number of copies or if the omission violated an express requirement in writing that the right owner did not consent to the public distribution of copies of his work without notice. See 17 USC § 405(a)(1) and (3) (1976).

<sup>126</sup> See 17 USC § 405(b) (1976), limiting the right to claim actual or statutory damages against good faith users. See also Gorman 1978, at 869-870.

<sup>127</sup> See 17 USC §§ 401(c) and 402(c) (1976), requiring the notice to be affixed 'in such manner and location as to give reasonable notice of the claim of copyright'. The 1976 Act directed the Register of Copyrights to prescribe specific methods of affixation and positions of the notice on various types of works, but these specifications were meant as examples and were non-exhaustive.

<sup>128</sup> See 17 USC § 406 (1976), providing good faith users who would be misled by a wrong name in the copyright notice with a complete defense to any action for infringement. Use of the wrong name was no defense, however, if the name of the true copyright owner was registered before the infringing use began. Notices that postdated the year of first publication with more than one year or that contained no date or no name were dealt with as if the notice was omitted altogether.

<sup>129</sup> 17 USC §§ 506(c) and (d) (1976).

<sup>130</sup> See sec. 7 of the Berne Convention Implementation Act 1988.

<sup>131</sup> See 17 USC §§ 401(d) and 402(d), as amended by the Berne Convention Implementation Act 1988.

## 2.2 The Nature and Legal Effects of Formalities

The overview in para. 2.1 has revealed that formalities may not only take different forms, but can also vary greatly in nature, depending on the legal consequences that the lawmaker attaches to them. In general, the lawmaker can subject the existence (para. 2.2.1) and/or the continuation (para. 2.2.2) of intellectual property rights to formalities. Alternatively, he can leave the existence of these rights unaffected, but make their exercise (para. 2.2.3) or the scope of a specific exploitation right (para. 2.2.4) conditional on formalities. This section briefly describes these four variations of the nature of formalities. It is important to note that, since the legal consequences of formalities can be changed by the lawmaker, they have no fixed nature. Instead, formalities are flexible instruments that can be adapted to specific needs.

### 2.2.1 CONSTITUTIVE FORMALITIES

A first type of formalities, which is often perceived as the most rigid type, is those that constitute ownership titles. This type of formalities functions as a *sine qua non* for protection. If they are not completed in accordance with the statutory conditions and time limits, no protection is established. Nowadays, most intellectual property rights, with the exception of copyright, are subject to this type of formalities.

Formalities that are constitutive of the right include the registration requirements in patent, design and trademark law (see para. 2.1.1). In patent law, for example, registration is the source of the right. A patent cannot be acquired without a patent application having been examined, approved and registered by a patent office.<sup>132</sup> The same applies to design and trademark rights, which in most countries are obtained by registration as well.<sup>133</sup> A notable exception, however, is the US trademark right, which arises from the use of a mark. Here, registration has merely declaratory effect (see para. 2.2.3). Also, in design law, certain laws confer protection on unregistered designs, but this protection is usually weaker than for registered designs.<sup>134</sup>

In US copyright law, the copyright notice for a long time was constitutive of the right. No protection was accorded to a work, unless published with copyright notice (see para. 2.1.5). This changed in 1976 when copyright automatically attached upon fixation of a work in tangible form. Nonetheless, until the US implementation of the Berne Convention in 1989, publication without notice could still result in a loss of protection.

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<sup>132</sup> See the references in note 69 above.

<sup>133</sup> See e.g. art. 6 Community Trade Mark Regulation: 'A Community trade mark shall be obtained by registration.' For further references, see notes 70 (trademarks) and 71 (designs) above.

<sup>134</sup> See e.g. art. 1(2) under (a) in conjunction with arts 11 and 19(2) Community Designs Regulation; and Part III, UK Copyright, Designs and Patents Act 1988. See also Bently & Sherman 2009, at 616.

### 2.2.2 MAINTENANCE FORMALITIES

Other formalities are necessary prerequisites for the continuation of protection. This is the case, for example, with renewal registration (see para. 2.1.2). If an intellectual property right that is subject to renewal is not renewed in a timely manner, that is, if the renewal formalities are not fulfilled on time, the protection will lapse. For example, a patent expires by operation of law if the periodic maintenance fees are not paid within a certain time frame of the due date.<sup>135</sup> Likewise, the owners of a trademark or design right lose protection if they fail to periodically renew the registration.<sup>136</sup> Finally, in US copyright law, until 1976, copyright protection also terminated if the right was not renewed in the last year of the initial twenty-eight year term of protection.<sup>137</sup>

Maintenance formalities often follow initial registration. This is the case, e.g., in patent, design and trademark law, where initial registration is followed by a fixed or unlimited number of renewal terms. However, they can also exist independently of such registration. In relation to US copyright law, some scholars recently suggested the imposition of an initial formality-free term of protection of a limited number of years following first publication, with the option of renewing this term a number of times, upon the requirement of registering the work.<sup>138</sup> In general, these proposals aim at advancing the moment at which works for which copyright protection is no longer desired enter the public domain. Thus, renewal formalities bear directly on the term of protection. They seem to be suitable instruments for the purpose of differentiating the length of copyright according to the commercial value of the work (see para. 2.3.1).<sup>139</sup>

### 2.2.3 DECLARATORY FORMALITIES

In contrast with constitutive and maintenance formalities, declaratory formalities do not impinge on the existence of rights. Non-compliance with this type of formalities

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<sup>135</sup> See the references in note 75 above.

<sup>136</sup> See the references in notes 76 (trademarks) and 77 (designs) above.

<sup>137</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>138</sup> See e.g. Landes & Posner 2003a, at 473, proposing a system of indefinitely renewable copyright but recognizing that such system can also have an 'upper bound' by laying down an initial term of twenty years plus a maximum of six renewal terms of ten years each; Kuhne 2004, at 562, suggesting the same, with the exception that he proposes an initial term of thirty years plus a maximum of seven renewal terms of ten years each; and Lessig 2004, at 248-56, advocating a regime in which the author is required to register his work fifty years after first publication and every ten years thereafter until the currently prescribed copyright term would have lapsed. This proposal found its way into the Public Domain Enhancement Act, H.R. 2601, 108th Congress, 1st Session, 25 June 2003.

<sup>139</sup> See e.g. Landes & Posner 2003a, at 503-507, articulating that, because the commercial life cycle of different kinds of works (e.g., books, musical and graphic arts) may vary greatly, renewal registration can lead to more differentiated terms of protection for different kinds of works; and Sprigman 2004, at 521-523, examining the effect of renewal registration on the real term of copyright.

will not result in a defeat of copyright. Declaratory formalities rather help to declare that existing rights are legal and protected by law. This does not imply, however, that they are without legal effect. To induce compliance, most laws prescribe that a failure to fulfil a declaratory formality incurs consequences, which may vary from a fine to the impossibility to institute action to enforce copyright before the courts. In the latter event, while the protection of copyright is certainly also in danger, the law can provide that, once the formalities are completed, copyright owners may proceed even against earlier infringements, thus mitigating the adverse effects of declaratory formalities (see para. 2.3.1). Additionally, the law can also reward compliance with declaratory formalities with some important procedural advantages.

A well-known example of a mere declaratory formality is the registration system in US federal trademark law. US federal trademark protection arises from the use in commerce of a trademark and is not created by registration. Registration is neither required by law, nor is constitutive of the trademark right.<sup>140</sup> Nevertheless, it has some important legal consequences. First of all, federal registration is designed to give nationwide protection, as opposed to state protection under common law.<sup>141</sup> In addition, it constitutes constructive use of the mark and is constructive notice of the registrant's claim of ownership.<sup>142</sup> Further, it is prima facie evidence of the mark's validity, the registrant's ownership of the mark, and the registrant's exclusive right to use the mark.<sup>143</sup> After five consecutive years of unopposed use, a registered mark can become 'incontestable'.<sup>144</sup> This means, inter alia, that instead of mere prima facie proof, the registration becomes conclusive evidence of the mark's validity and legal protectability, as well as of the registrant's ownership of the mark.<sup>145</sup>

The overview of para. 2.1 demonstrates that, except for constitutive formalities, US copyright has been subject to various declaratory formalities. Registration, for example, was – and for works of US origin still is – a prerequisite for initiating a copyright infringement action. Furthermore, the recovery of statutory damages and attorney's fees was and still is limited to instances of infringement occurring after registration. Recordation, which gives constructive notice and establishes priority in case of conflicting transfers, also has only declaratory effect. The same applies to copyright notices. Since their constitutive nature has been removed, no more than evidentiary weight is accorded to the voluntary use of such notices. Finally, right holders failing to complete the free library deposit incur only a fine.

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<sup>140</sup> See e.g. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 21 F. Supp. 2d 1247 (US District Court of Kansas, 1998) and *S Industries, Inc. v. Stone Age Equipment, Inc.*, 12 F. Supp. 2d 796 (US District Court of Illinois, 1998).

<sup>141</sup> *Fleming Companies, Inc. v. Thriftway, Inc.*, 809 F. Supp. 38 (US District Court of Ohio, 1992).

<sup>142</sup> See secs 7(c) and 22 US Trademark Act 1946 (15 USC §§ 1057(c) and 1072).

<sup>143</sup> See secs 7(b) and 33(a) US Trademark Act 1946 (15 USC §§ 1057(b) and 1115(a)); and *Gateway, Inc. v. Companion Products, Inc.*, 320 F. Supp. 2d 912 (US District Court of South Dakota, 2002).

<sup>144</sup> See sec. 15 US Trademark Act 1946 (15 USC § 1065).

<sup>145</sup> Sec. 33(b) US Trademark Act 1946 (15 USC § 1115(b)); and *Brookfield Communications, Inc. v. West Coast Entertainment Corporation*, 174 F.3d 1036 (US Court of Appeals, Ninth Circuit, 1999).

#### 2.2.4 SITUATION SPECIFIC FORMALITIES

A last category of formalities that has not yet been introduced in para. 2.1 above is situation specific formalities, which are peculiar to copyright law. They are related, not to copyright as a whole, but to a particular type of exploitation right, usually of a particular category of works. Examples include notices of reservation to retain a public performance right in musical compositions or a translation right in literary works, which in the history of copyright played a key role (Chapter 3). A modern example of situation specific formalities is the notice of reservation to retain a reproduction right in articles in newspapers and weekly journals.<sup>146</sup> Sometimes the rights of reproduction and communication to the public in works communicated by or on behalf of public authorities are also subject to a notice of reservation.<sup>147</sup>

The consequence of non-compliance with situation specific formalities is not as catastrophic as with constitutive or maintenance formalities. If the copies of a work are not marked with a notice of reservation of the particular exploitation right, this right cannot be invoked against third parties. Hence, non-compliance with situation specific formalities does not cause entire works to enter the public domain, as do constitutive or maintenance formalities. It only has the effect that a particular limitation applies, which otherwise would not. This means that, to the extent that the limitation applies, authors can no longer prevent third parties from making unauthorized use of their works.

### 2.3 The Functions of Formalities

Formalities may fulfil a number of important functions, depending on their type and the legal effects that the law attaches to them. This section examines these functions in the light of the challenges described in Chapter 1. This means that we endeavour to identify the functions that formalities generally perform, without highlighting the functions that are specific to one or the other formality. Examples of formalities that have specific functionalities are deposit requirements, which obviously also aim at enriching national libraries,<sup>148</sup> renewal formalities, which may be imposed to protect the interests of original right owners,<sup>149</sup> and recordation requirements, which, from

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<sup>146</sup> See e.g. art. 49 German Copyright and Neighbouring Rights Act 1965; art. 15(1) Dutch Copyright Act. This notice of reservation is expressly permitted pursuant to art. 10bis(1) Berne Convention.

<sup>147</sup> See e.g. art. 15b Dutch Copyright Act.

<sup>148</sup> See e.g. Ginsburg 2010a, at 336-337 and Ginsburg 2010b, at 451-452.

<sup>149</sup> By designating the author or, if not living, his relatives (i.e., the widow(er), child(ren), executors or next of kin) as beneficiaries of copyright renewal, the 1909 US Copyright Act clearly aimed at giving these beneficiaries an opportunity to benefit from the success of the author's work and to renegotiate disadvantageous contracts. See Ringer 1960, at 517 and 521. In practice, however, the beneficiaries did not always profit, as the author's renewal interest could be assigned during the original copyright term. See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 US 643 (US Supreme Court, 1943).

the point of view of property law, can also be a legal condition to complete the transfer of title.<sup>150</sup> Hence, instead of meticulously analyzing which formality fulfils what function, this section studies the functions of formalities in general. These are the filtering function (para. 2.3.1), the demarcation function (para. 2.3.2), the signalling and publicity function (para. 2.3.3), the evidentiary function (para. 2.3.4) and the information function (para. 2.3.5).

### 2.3.1 FILTERING FUNCTION

Formalities may, first of all, play an important role as filtering instruments between subject matter for which beneficiaries desire protection and those for which they do not.<sup>151</sup> Constitutive formalities, in particular, operate as ‘one-way switches’ between non-protection and protection.<sup>152</sup> Since constitutive formalities are initial conditions for the coming into being of the right, protection is accorded only upon their timely fulfilment. Otherwise, the subject matter will be part of the public domain.

Because, at present, the acquisition of most intellectual property rights depends on registration or other formalities, there is a clear separation between – allegedly – protected and unprotected subject matter.<sup>153</sup> Under the patent, design and trademark laws of most countries, no invention, design or trademark will be protected unless it is registered.<sup>154</sup> Hence, a prospective beneficiary must make an initial assessment of whether the relevant subject matter is sufficiently valuable to warrant protection.<sup>155</sup> That is, he must determine whether the benefits resulting from registration (e.g., the exclusivity of use of the invention, design or trademark; the expected revenues from sale and royalties; the esteem of being recognized as an inventor or designer; etc.) would exceed the costs of applying for registration.<sup>156</sup> In general, if this assessment appears favourable, the invention, design or trademark will likely be registered, so as to secure protection. In contrast, all subject matter that remains unregistered will be part of the public domain and, consequently, is free to be used by all.

For a long time, this filtering mechanism also existed in US copyright law. Since publication with copyright notice was the essence of securing copyright under the

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<sup>150</sup> In most countries, however, transfer of intellectual property is effectuated by signing a valid contract. It does not have to be recorded in the registers to take legal effect. See e.g. art. 3:95 Dutch Civil Code (*Burgerlijk Wetboek*). Often, recordation is only relevant for establishing third party effect.

<sup>151</sup> Sprigman 2004, at 502 et seq.

<sup>152</sup> Van Gompel 2010a, at 164.

<sup>153</sup> The reason for using the word ‘allegedly’ is that, even if the formalities have been fulfilled, subject matter may still fail to satisfy the substantive requirements of protection. This can be detected either in an examination or opposition procedure or in a court proceeding. See para. 2.3.2 below.

<sup>154</sup> See paras 2.1.1 and 2.2.1 above. But see para. 2.2.3, in respect of the US trademark system.

<sup>155</sup> Kawohl & Kretschmer 2003, at 221-22; Sprigman 2004, at 514.

<sup>156</sup> See e.g. Bently & Sherman 2009, at 370-372 and 616-617, describing the benefits and costs that may be relevant to the decision as to whether to apply for a patent or to register a design.

1909 Copyright Act,<sup>157</sup> publication without copyright notice was typically regarded as amounting to an ‘abandonment of the right and a dedication of one’s work to the public.’<sup>158</sup> Or, as the court stated in *Bell v. Combined Registry Co.*:

‘A publication ... which fails to include the correct notice of copyright forfeits the copyright protection and places the material into the public domain.’<sup>159</sup>

Publication without notice therefore ‘imposed an initial filter separating works with significant potential commercial value for which authors desired protection from other works for which protection was irrelevant’.<sup>160</sup> The copyright notice thus had a critical role to play in ‘placing in the public domain a substantial body of published material that no one is interested in copyrighting’.<sup>161</sup> This conclusion is supported by empirical evidence which shows that, under the pre-1976 US copyright regime, authors often abstained from marking their works with a copyright notice.<sup>162</sup>

The filtering function of formalities is not limited to constitutive formalities. The various maintenance formalities perform a similar function, although at a later stage in the lifecycle of the protected object. Since many intellectual property rights are to be periodically renewed to prolong protection, the beneficiaries of renewal ought to assess, each time the right comes up for renewal, whether the subject matter of protection is valuable enough to justify the cost of renewal.<sup>163</sup> Especially in patent law, renewal plays a key role as a ‘filter’, as is evident from the renewal fees, which escalate each year during the patent term.<sup>164</sup> Copyright renewal formalities can thus play a central role in regulating the term of protection according to the commercial value of the work,<sup>165</sup> since right holders that hold no realistic expectation of future

<sup>157</sup> *Unedea Doll Co., Inc., v. Goldfarb Novelty Co., Inc. and Walgreen Eastern Co., Inc.*, 373 F.2d 851 (US Court of Appeals, Second Circuit, 1967), certiorari dismissed, 389 US 801 (1967), describing the copyright notice as ‘the cornerstone of the formal prerequisites to obtaining a copyright’.

<sup>158</sup> *Group Publishers, Inc. v. Winchell*, 86 F.Supp. 573 (US District Court of New York, 1949), at 577. See also *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (US District Court of New York, 1914), affirmed, 218 Fed. 577 (Circuit Court of Appeals, Second Circuit, 1914); *Smith v. Bartlett*, 18 F.Supp. 35, 37 (US District Court of Maine, 1937); *Wildman v. New York Times Co.*, 42 F.Supp. 412, 414 (US District Court of New York, 1941); *Milton H. Carter v. Hawaii Transportation Co.*, 201 F.Supp. 301, 304 (US District Court of Hawaii, 1961).

<sup>159</sup> *Bell v. Combined Registry Co.*, 397 F.Supp. 1241 (US District Court of Illinois, 1975), at 1248; affirmed 536 F.2d 164 (US Court of Appeals, Seventh Circuit, 1976), certiorari denied 429 US 1001 (US Supreme Court, 1976). See also *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (US Court of Appeals, Second Circuit, 1960); and *American Fabrics Co. v. Lace Art, Inc.*, 291 F.Supp. 589 (US District Court of New York, 1968).

<sup>160</sup> Sprigman 2004, at 502.

<sup>161</sup> H.R. Report No. 94-1476, 94th Cong., 2nd Sess. (1976), at 143.

<sup>162</sup> See Sprigman 2004, at 502-519, examining the importance of the filtering function of the registration and notice requirements in the US in the period between 1790 and 1976.

<sup>163</sup> See Landes & Posner 2003a, in respect of copyright and trademark renewals, and Sprigman 2004, at 519-521, in respect of copyright renewals.

<sup>164</sup> See e.g. art. 2 of the Rules relating to fees under the European Patent Convention of 20 October 1977 as adopted on 7 December 2006 and last amended on 9 December 2008.

<sup>165</sup> See H.R. Rep. No. 2222, S. Rep. 1108, 60th Cong., 2d Sess. (1909), quoted in Ringer 1960, at 517.

benefits will presumably not renew their copyrights.<sup>166</sup> This may greatly expedite subject matter entering the public domain, as can be witnessed, for example, in pre-1976 US copyright law, where only a fraction of copyrights was ever renewed.<sup>167</sup>

Even if formalities are only declarative of the right, they can still fulfil a filtering function. Obviously, since declaratory formalities do not affect the existence of the right, a failure to comply with these formalities shall not cast subject matter into the ‘structural’ public domain, i.e., the domain that is not protected by any intellectual property right.<sup>168</sup> However, if non-compliance results in the impossibility of enforcing an intellectual property right before the courts, thereby preventing the plaintiff from maintaining an infringement action for acts occurring prior to the fulfilment of the formalities,<sup>169</sup> declaratory formalities may nonetheless enrich the ‘functional’ public domain, i.e., the domain that is protected by intellectual property but still permits an unrestricted, though clearly defined, access or use.<sup>170</sup> If no infringement action can be maintained for acts occurring prior to the fulfilment of formalities, a third party relying on incomplete formalities can use the subject matter, despite being protected by intellectual property, until the formalities have been duly completed.<sup>171</sup>

The above examples clearly demonstrate that formalities directly help to preserve the balance between protected and unprotected subject matter. Because intellectual property, in many cases, is granted upon completion of formalities only, the public domain is constantly enlarged with subject matter the formalities of which have not

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<sup>166</sup> Sprigman 2004, at 519.

<sup>167</sup> See H.R. Rep. No. 2222, S. Rep. 1108, 60th Cong., 2d Sess. (1909), quoted in Ringer 1960, at 517, Landes & Posner 2003a, at 496-513 and Sprigman 2004, at 519-521, who concludes: ‘Historically, approximately 15% of works were renewed, meaning that 85% of works moved into the public domain – by consent of rightsholders – after a relatively short term of protection’ (at 519).

<sup>168</sup> Dusollier 2011 (forthcoming). See also Benabou & Dusollier 2007, at 171.

<sup>169</sup> For some time, it was uncertain whether late deposit (and accompanying registration) under the 1909 US Copyright Act impaired the copyright previously secured by publication with notice to the extent of preventing suits for infringement antedating the late deposit. In 1939, however, the Supreme Court ruled that it is necessary only that works be deposited at any time prior to initiating the infringement suit. See *Washingtonian Pub. Co. v. Pearson*, 306 US 30, 59 S.Ct. 397 (US Supreme Court, 1939). Hence, once a work is deposited and registered, legal action can be instituted for acts of infringement occurring prior to deposit and registration. This rule still applies at present. See *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338 (US Court of Appeals, Ninth Circuit, 1981).

<sup>170</sup> Dusollier 2011 (forthcoming). See also Benabou & Dusollier 2007, at 171 et seq.

<sup>171</sup> An interesting question is whether and to what extent declaratory formalities of this kind truly enrich the functional public domain for users that want to incorporate a work for which no formalities have been fulfilled into a derivative work. Because they can be exposed to injunction proceedings after a subsequent completion of the formalities, supplementary measures should be taken to prevent legal uncertainty to arise. While this topic exceeds the scope of this book, it seems that important lessons can be learned from the recent discussions regarding orphan works, where the law is confronted with similar problems. See e.g. Van Gompel 2007 and Van Eechoud et al. 2009, at 263-296.

been duly or timely fulfilled. Accordingly, in their capacity as filtering instruments, formalities may significantly enhance the free flow of information.<sup>172</sup>

### 2.3.2 DEMARCATION FUNCTION

Other than merely filtering out the subject matter for which the formalities have not been completed, formalities may also play an important role in defining, identifying and outlining protectable subject matter, on the one hand, and excluding subject matter that does not satisfy the substantive requirements of protection, on the other hand. This is done in a threefold process. First, by way of the claim for protection in the application for registration, which defines the scope of protection and marks the boundaries of the subject matter (para. 2.3.2.1). Second, through an examination procedure, which allows registering authorities to test the validity of a claim (para. 2.3.2.2). Third, by giving third parties the opportunity to challenge the registration either in an opposition process or in a court proceeding (para. 2.3.2.3). These three procedures attempt to ensure that only subject matter which satisfies the substantive requirements of protection is registered and thus granted protection. This ultimately serves the purpose of improving the accuracy and reliability of the registers.

#### 2.3.2.1 *THE APPLICANT'S CLAIM FOR PROTECTION*

In patent, design and trademark law, the application for registration is indispensable for demarcating the subject matter and defining the scope of protection. In general, an application must contain an adequate description of the subject matter for which the applicant claims protection as well as accompanying drawings or representative specimens. This should make the abstract subject matter of the intellectual property right more concrete. The idea is that no protection can be conferred on an invention, design or trademark unless it is clearly defined in the application.<sup>173</sup>

Thus in a patent application, the subject matter which the applicant regards as his invention must be particularly pointed out and distinctly claimed and, if necessary, be accompanied by a drawing.<sup>174</sup> Together with the description of the invention, the

<sup>172</sup> See e.g. Lessig 2001, at 106-107 and 251-252, Lessig 2004, at 137-138, Landes and Posner 2003a, at 517-518, Lévêque & Ménière 2004, at 105 and Sprigman 2004, at 502-528, who emphasize that, in contrast with current copyright law, which extends copyright to each and every original work of authorship, formalities may substantially enlarge the number of works in the public domain.

<sup>173</sup> See e.g. Pakuscher 1986, at 92, in respect of the concretization of inventions, stressing that it cannot be merely an idea in the mind of the inventor that is subject to protection. Rather, the inventor must concretize his idea and put it into a specific form before the invention can be patented.

<sup>174</sup> See e.g. art. L 612-1 in conjunction with art. R 612-3 French Intellectual Property Code; art. 24 Dutch Patents Act 1995; art. 34(3) German Patents Act; sec. 14(2) UK Patents Act 1977; 35 USC §§ 111 to 113; and art. 78 European Patent Convention.

patent claim forms the core of the patent.<sup>175</sup> While the description ensures that the invention is disclosed in such a manner that it is of practical use to people skilled in the art,<sup>176</sup> the patent claim eventually demarcates and defines the scope of protection of the patented invention.<sup>177</sup> Hence, it must at least show that the invention satisfies the substantive requirements for patentability (i.e. subject matter, novelty, inventive step and susceptibility of industrial use).<sup>178</sup> If an application is not submitted in the correct form and content, the registering authority shall order the applicant to make the necessary adjustments and, if he fails to do so, reject the application.<sup>179</sup>

Likewise, an application for the registration of a trademark must at least contain a representation of the mark and a statement of the goods or services for which the mark is to be registered.<sup>180</sup> While the representation of the mark defines the subject matter of protection (i.e. the protected sign), the statement of the goods and services delineates the scope of protection (i.e. the commercial spheres in which the sign is to be protected).<sup>181</sup> Signs that cannot adequately be represented graphically, such as smells and tastes, are generally barred from trademark registration. Even if they can be fixed in a chemical formula, described in words or locked in a sample, this does not make them registrable. The European Court of Justice has ruled that the graphic representation of a mark ought to be clear, precise, self-contained, easily accessible, intelligible, durable and objective, so as to allow anyone to unambiguously identify and determine the nature of a trademark on the basis of its registration.<sup>182</sup> Chemical formulas, written descriptions and odour samples do not satisfy these requirements, since they are not sufficiently intelligible, objective and stable or durable.<sup>183</sup> Sound signs that are represented by a stave divided into bars and showing a clef, notes and

<sup>175</sup> Bently & Sherman 2009, at 360-361.

<sup>176</sup> See e.g. art. L 612-5 French Intellectual Property Code; art. 25(1) Dutch Patents Act 1995; art. 34(4) German Patents Act; sec. 14(3) UK Patents Act 1977; 35 USC § 112 and art. 83 European Patent Convention.

<sup>177</sup> See e.g. art. L 612-6 French Intellectual Property Code; art. 24(1) under e Dutch Patents Act 1995; art. 34(3) under 3 German Patents Act; sec. 14(5) UK Patents Act 1977; 35 USC § 112 and art. 84 European Patent Convention.

<sup>178</sup> Bently & Sherman 2009, at 368.

<sup>179</sup> See e.g. art. 612-12 French Intellectual Property Code; art. 30 Dutch Patents Act 1995; art. 42(1) and (3) German Patents Act; sec. 15A UK Patents Act 1977; and art. 90 European Patent Convention. On the effect of defective execution of documents in the US, see 35 USC § 26.

<sup>180</sup> See e.g. art. L 712-2 French Intellectual Property Code; art. 2:5 Benelux Convention on Intellectual Property 2005 in conjunction with rule 1.1 Implementing Regulations under the Benelux Convention on Intellectual Property; art. 32 German Trade Marks Act; sec. 32 UK Trade Marks Act 1994; sec. 1 US Trademark Act 1946 (15 USC § 1051); and art. 26 Community Trade Mark Regulation. Incomplete applications may be amended, but failure to do so will cause the application to be refused or to be treated as having not been filed. See art. L 712-7 French Intellectual Property Code; art. 2:5 Benelux Convention on Intellectual Property 2005; art. 36(1) and (2) German Trade Marks Act; sec. 37 UK Trade Marks Act 1994; 35 USC § 26; and art. 36 Community Trade Mark Regulation.

<sup>181</sup> Bently & Sherman 2009, at 781.

<sup>182</sup> See European Court of Justice, judgment of 12 December 2002, case C-273/00, *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, [2002] ECR I-11737, paras 45 to 55.

<sup>183</sup> *Ibid.*, paras 69 to 73.

other musical indications may constitute a faithful representation of the sequence of sounds which form the melody in respect of which registration is sought.<sup>184</sup>

In design law, it is common that applications at least contain a representation of the design and an indication of the products to which it is intended to be applied.<sup>185</sup> Because design protection is not limited to the specific product that is indicated in the application, design applications are merely procedural and have no substantive effects.<sup>186</sup> The representation of the design, on the other hand, is an essential part of the application, as it defines the subject matter of design protection. It is 'the means to specify the features of the design for which protection is sought'.<sup>187</sup> To this end, some laws allow applications to be accompanied by a partial disclaimer, indicating that the application for registration relates to a design that forms only a part of the appearance of a product or otherwise limits the scope or extent of protection.<sup>188</sup>

Unlike patent, trademark and design law, no system of representative registration is known in copyright law. Because the subject matter of copyright is too abstract to be formulated in a representative claim, the law cannot require a copyright claimant to indicate precisely for which elements of a work he claims protection. Rather, it is left to the courts to define the subject matter and scope of protection of copyright *ex post*.<sup>189</sup> To nevertheless allow the contours and perimeters of a work to be identified *ex ante*, US copyright law requires the registration to be accompanied by a deposit of copies or, for some types of works, of photographs or other identifying material of a work.<sup>190</sup> This makes the subject matter of works, for which the applicant seeks

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<sup>184</sup> See European Court of Justice, judgment of 27 November 2003, case C-283/01, *Shield Mark*, [2003] ECR I-14313, paras 51 to 64.

<sup>185</sup> See e.g. art. L 512-2 French Intellectual Property Code; art. 3:9 Benelux Convention on Intellectual Property 2005 in conjunction with rule 2.1 Implementing Regulations under the Benelux Convention on Intellectual Property; art. 11(2) German Designs Act; sec. 3 UK Registered Designs Act 1949 in conjunction with secs 4 and 5 UK Registered Designs Rules 2006; and art. 36 Community Designs Regulation. Incomplete applications may be amended, but failure to do so will cause the application to be refused or to be treated as having been abandoned. See art. L 512-2 French Intellectual Property Code; art. 3:9 Benelux Convention on Intellectual Property 2005; art. 16 German Designs Act; sec. 3(5) UK Registered Designs Act 1949 and arts 45 and 46 Community Designs Regulation.

<sup>186</sup> Bently & Sherman 2009, at 619-620.

<sup>187</sup> See Office for Harmonization in the Internal Market, 'Guidelines for the examination of Community designs', <<http://oami.europa.eu/en/office/aspects/pdf/ExamGuidelines.pdf>>, para. 4.4.

<sup>188</sup> See e.g. sec. 6 of the UK Registered Designs Rules 2006. See also Bently & Sherman 2009, at 618, stating that: 'The representations can be conceived as the positive claims, from which the disclaimer excludes matter, so that in combination they define the property.'

<sup>189</sup> Sherman & Bently 1999, at 191-193.

<sup>190</sup> See 17 USC §§ 408(b) and 408(c)(1) in conjunction with 37 CFR § 202.21. See also secs 11 and 12 of the US Copyright Act 1909. By allowing the deposit of photographs or other identifying material in lieu of copies of a work, the Act of 29 March 1956, Public law 452, 84<sup>th</sup> Cong., 2<sup>nd</sup> Sess., c. 109 (in Copyright Enactments 1963, at 132-133) alleviated the burden of deposit in respect of works, for which it would be impracticable to deposit copies due to their size, weight, fragility, or monetary value (e.g., works of art, models, designs, drawings, plastic works, prints or pictorial illustrations).

copyright protection, available for pre-registration inspection by the US Copyright Office (see below) and post-registration examination by third parties.<sup>191</sup>

### 2.3.2.2 THE EXAMINATION PROCEDURE

While the claim in an application for registration may clearly indicate the subject matter for which right holders seek protection, this obviously does not imply that it automatically satisfies the substantive requirements for protection. Most registration systems in intellectual property law therefore give registering authorities the power to test the validity of a claim, before registering – and conferring protection on – the relevant subject matter. This may be a full examination of the substantive criteria of protection, but also a minimum ‘formal’ investigation of the application.

The grant of patents, for example, is regularly preceded by an in-depth and time-consuming examination of the substantive requirements of protection. Sometimes, a full examination of substantive requirements (i.e. subject matter, novelty, inventive step and susceptibility of industrial use) is conducted,<sup>192</sup> but it may also happen that only some substantive elements are examined.<sup>193</sup> The registering authority usually draws up a report which lists the findings and objections to the applications. The applicant is then given the opportunity to alter the application. If he does not agree with the observations of the examiner, he can appeal against the decision.<sup>194</sup> In the end, if the registering authority is satisfied that there are no substantive objections, it will grant the patent. Otherwise, it will refuse the application and decline protection.<sup>195</sup>

Similarly, in trademark law, the application for registration is typically subjected to a substantive examination. In some countries, the registering authority checks the

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<sup>191</sup> See e.g. Weil 1917, at 310: ‘The primary object of requiring the deposit of copies is that the subject matter of works in which copyright is claimed, may be made public and available, for purposes both of information and of avoiding infringement.’

<sup>192</sup> See e.g. art. 44 German Patents Act; sec. 18 UK Patents Act 1977; 35 USC § 131; and art. 94 European Patent Convention.

<sup>193</sup> See e.g. art. L 612-11 in conjunction with art. L 612-12 French Intellectual Property Code. The latter provision does not indicate lack of inventive step as a ground for refusal of a patent. See Schmidt-Szalewski 1992, at 726. Nevertheless, it is a matter that has to be included in the search report to be drawn up pursuant to art. L 612-14 French Intellectual Property Code. In the Netherlands, a search is performed of the state of the art with respect to the subject matter of the patent application prior to the grant of the patent only. See art. 32 Dutch Patents Act 1995. See also Wichers Hoeth 2007, at 42-43, indicating that, formally speaking, the search report is irrelevant for the patent grant.

<sup>194</sup> See e.g. art. 73(1) German Patents Act; sec. 97 UK Patents Act 1977; 35 USC § 134; and art. 106 European Patent Convention.

<sup>195</sup> See e.g. arts L 612-12 (grounds for refusal) and L 612-17 (patent grant) French Intellectual Property Code; arts 48 and 49 German Patents Act; sec. 18(3) and (4) UK Patents Act 1977; 35 USC §§ 131, 132 and 151; and art. 97 European Patent Convention. In the Netherlands, on the other hand, a patent is granted irrespective of the outcome of the search. See art. 36 Dutch Patents Act 1995.

trademark application against both absolute and relative grounds for refusal.<sup>196</sup> That is, it refuses registration if a trademark has no distinctive character; is merely descriptive of the kind, quality or other characteristics of the goods or services for which protection is sought; is contrary to public policy or to accepted principles of morality; etc.;<sup>197</sup> and if a trademark conflicts with a similar or identical trademark that has been registered earlier.<sup>198</sup> Other registering authorities examine applications only against absolute grounds for refusal and abstain from searching the registers to check for similar or identical trademarks.<sup>199</sup> In the latter cases, the relative grounds for refusal can be raised by third parties either in an opposition procedure or in trial (see para. 2.3.2.3). The examination process will eventually result in acceptance or refusal of the application. Appeal can be lodged against this decision.

In design law, on the other hand, it is very common that the registering authority performs a minimum examination of the application only. Often, the application for registration is accepted as it is and, without a prior examination as to subject matter, novelty or individual character of the design, recorded on the registers.<sup>200</sup> However, design registration can usually be refused on specific grounds, to be detected by the registering authority on formal examination. Depending on the law, these grounds may include the fact that the subject matter for which protection is sought does not fall within the definition of design; consists of a national emblem, flag or other item excluded from registration; is dictated by function; or is contrary to public policy or accepted principles of morality.<sup>201</sup> Since registration cannot be rejected on the basis of a lack of novelty or individual character, whether a registered design is actually protected by the law can only be established *ex post* by the courts.

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<sup>196</sup> This is the case e.g. in the UK and the United States. See sec. 37 UK Trade Marks Act 1994; sec. 12 in conjunction with sec. 2 US Trademark Act 1946 (15 USC §1062 in conjunction with §1052).

<sup>197</sup> On the absolute grounds for refusal, see arts L 711-2 and L 711-3 French Intellectual Property Code; art. 2:11(1) Benelux Convention on Intellectual Property 2005; art. 8 German Trade Marks Act; secs 3 and 4 UK Trade Marks Act 1994; sec. 2(a), (b), (c) and (e) US Trademark Act 1946 (15 USC § 1052 (a), (b), (c) and (e)); and art. 7 Community Trade Mark Regulation.

<sup>198</sup> On the relative grounds for refusal, see art. L 711-4 French Intellectual Property Code; art. 2:14 Benelux Convention on Intellectual Property 2005; art. 9 German Trade Marks Act; secs 5 and 6 UK Trade Marks Act 1994; sec. 2 (d) US Trademark Act 1946 (15 USC §1052 (d)); and art. 8 Community Trade Mark Regulation.

<sup>199</sup> This is the case e.g. in France, the Netherlands and Germany. See art. L 712-7 French Intellectual Property Code (no reference to art. L 711-4); art. 2:11 Benelux Convention on Intellectual Property 2005; and art. 37 German Trade Marks Act. See also art. 37 Community Trade Mark Regulation.

<sup>200</sup> See Bently & Sherman 2009, at 620 and 624 (with respect to UK design registration and Community design registration) and Wichers Hoeth 2007, at 159 (with respect to Benelux design registration).

<sup>201</sup> See e.g. sec. 3A UK Registered Designs Act 1949 and art. 18 German Designs Act (which does not permit the registrar to examine whether a design is dictated by function). In many countries, only a limited substantive examination as to whether the design complies with morality and public policy is carried out. See art. L 512-2 French Intellectual Property Code and art. 3:13 Benelux Convention on Intellectual Property 2005. Art. 47 Community Designs Regulation subject design applications to the test of morality and public policy and of being in compliance with the legal definition of designs.

The examination practice in design law closely resembles the one established in US copyright law. Here too, no substantive examination of the copyrightability of a work is performed before registration. That is, the US Copyright Office conducts no investigation as to the originality of a work.<sup>202</sup> Nonetheless, it is instructed by the 1976 Copyright Act to inspect the material that is deposited with the registration to see whether it constitutes copyrightable subject matter before it may register a copyright claim.<sup>203</sup> As a result, the US Copyright Office has the discretionary power to refuse registering creations that do not qualify as literary or artistic works or that, on the surface, lack sufficient originality. In particular, it entertains no applications for registration of works not subject to copyright, such as words and short phrases; ideas, plans, methods, systems or devices; and typeface as typeface.<sup>204</sup> When, after examination, the US Copyright Office believes that copyright subsists in the work, and all formalities are complied with, it registers the claim. Otherwise, registration will be refused.<sup>205</sup> While the applicant, despite the refusal of registration, is entitled to file suit for copyright infringement, the US Register of Copyrights may become a party to the action with respect to the registrability of the copyright claim.<sup>206</sup>

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<sup>202</sup> See King et al. 1986, at 35, stating that '[the] Copyright Office does not generally examine works for artistic merit or newness, nor (as misperceived by many individuals in the US) does it "examine" works to determine if the work is in fact an "original" work'.

<sup>203</sup> 17 USC § 410(a) and (b).

<sup>204</sup> See 37 CFR § 202.1, listing examples of creations that are not subject to copyright and, therefore, are not registered by the Copyright Office. This includes the following:

'(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents; (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources; and

(e) Typeface as typeface.'

<sup>205</sup> 17 USC § 410(a) and (b).

<sup>206</sup> 17 USC § 411. This is subject to the conditions (a) that the application, deposit and registration fee have been delivered to the Copyright Office in proper form; and (b) that the Register of Copyrights is notified of the civil action instituted by the applicant. By contrast, under the 1909 Copyright Act, an applicant was required to first file suit against the Register to compel issuance of the registration certificate before a copyright infringement action could be started. See e.g. *Vacheron & Constantin-Le Coultre Watches v. Benrus Watch Company*, 260 F.2d 637 (Second Circuit, 1958).

2.3.2.3 *OPPOSITION OR INVALIDATION BY THE COURT*

Although the acceptance of an application following the examination of a claim will typically result in the grant of registration, several laws give third parties the chance to formally challenge the applicant's claim in a pre-registration or post-registration opposition procedure. During this procedure, substantive defects that the examining division of the registering authority missed or that remained unexamined can be laid bare. A successful opposition will lead to a refusal of the application or a revocation of the registration, should the claim already be registered. As registration is granted only to subject matter that passes the opposition or that is not opposed, this practice effectively contributes to fine-tuning the protection conferred by registration.

Opposition procedures are available in patent and trademark law in particular. In the case of patents, some laws give third parties the chance to submit observations on the patentability of an invention during application only.<sup>207</sup> Other laws provide third parties with the opportunity to officially oppose registration within a certain period following the publication of a patent grant.<sup>208</sup> During opposition, a number of objections can be raised, including lack of patentability.<sup>209</sup> After the objections are examined, the opposition division of the registering authority decides whether the patent should be maintained, maintained with limitations or revoked.<sup>210</sup>

In trademark law, most laws provide that, after a trademark application has been examined, accepted and published by a registering authority, third parties can make observations on, or formally oppose, the proposed registration of the mark.<sup>211</sup> In countries where trademark applications are examined against absolute and relative grounds for refusal, any person can typically make observations or oppose on both absolute and relative grounds.<sup>212</sup> In systems where trademark applications are only examined against absolute grounds for refusal, opposition can normally be filed by proprietors of earlier trademarks and on relative grounds only.<sup>213</sup> If examination of

<sup>207</sup> See e.g. art. L 612-13 French Intellectual Property Code, art. 38 Dutch Patents Act 1995; and sec. 21 UK Patents Act 1977. Sometimes, third parties are allowed to make observations, even if opposition can be made. See e.g. art. 115 European Patent Convention and 35 USC § 301.

<sup>208</sup> See e.g. art. 59 German Patents Act; 35 USC § 302 and art. 99 et seq. European Patent Convention.

<sup>209</sup> See art. 59 in conjunction with art. 21 German Patents Act and art. 100 European Patent Convention. In the US it concerns a re-examination of a patent on the basis of prior art. See 35 USC § 302.

<sup>210</sup> See e.g. art. 61 German Patents Act; 35 USC § 307; and art. 101 European Patent Convention.

<sup>211</sup> In Germany, rather than a pre-registration opposition procedure, a post-registration opposition procedure is provided for, similar to the one in patent law. See art. 42 German Trade Marks Act.

<sup>212</sup> See sec. 38 UK Trade Marks Act 1994; and sec. 13 in conjunction with sec. 2 US Trademark Act 1946 (15 USC §1063 in conjunction with §1052).

<sup>213</sup> See e.g. art. L 712-4 French Intellectual Property Code; art. 2:14 Benelux Convention on Intellectual Property 2005; art. 42 German Trade Marks Act; and art. 41 Community Trade Mark Regulation. In addition to this formal opposition procedure, art. 40 Community Trade Mark Regulation also allows anyone to submit written observations, but these may relate to absolute grounds of refusal only.

the opposition reveals that a trademark should not be registered, the application for registration shall be rejected. Otherwise, the trademark shall be registered.<sup>214</sup>

Opposition is a less common feature of design law.<sup>215</sup> Instead, the law often gives third parties the opportunity to invoke the nullity of a design registration, either on absolute grounds (i.e. if the design does not meet the substantive requirements for protection) or relative grounds (i.e. if the design conflicts with an earlier right).<sup>216</sup> Depending on the law, applications for declaration of invalidity are to be made to the registrar or to the courts. If a design is declared invalid, it shall be deemed as never having existed from the outset.<sup>217</sup> In patent and trademark law, similar actions for invalidating a patent or trademark registration can be instituted.<sup>218</sup>

In US copyright law, federal courts have the power to rule on the registrability of copyright claims and on the copyrightability of the relevant subject matter.<sup>219</sup>

### 2.3.3 SIGNALLING AND PUBLICITY FUNCTION

In addition to the filtering and demarcation functions, which essentially allow for a separation to be made between protected and unprotected subject matter, formalities may play an important signalling and publicity function. By alerting third parties to the fact that an invention, design or trademark might be protected by an intellectual

<sup>214</sup> See e.g. art. L 712-7 French Intellectual Property Code; art. 2:16 Benelux Convention on Intellectual Property 2005; sec. 40 UK Trade Marks Act 1994; and arts 42 and 45 Community Trade Mark Regulation. Because, in Germany, a post-registration opposition procedure is provided for, a successful opposition will result in a cancellation of the registration. See art. 42 German Trade Marks Act.

<sup>215</sup> Nevertheless, it is sometimes applied. See Bently & Sherman 2009, at 617, referring to an opposition procedure under the Swedish Designs Act 2002.

<sup>216</sup> See e.g. art. L 512-4 French Intellectual Property Code; art. 3:23 Benelux Convention on Intellectual Property 2005; art. 33 German Designs Act; sec. 11ZA in conjunction with sec. 11ZB UK Registered Designs Act 1949; and art. 25 Community Designs Regulation.

<sup>217</sup> See Wichers Hoeth 2007, at 180. See also art. L 512-6 French Intellectual Property Code; art. 33(3) German Designs Act; sec. 11ZE(2) UK Registered Designs Act 1949; and art. 26(1) Community Designs Regulation.

<sup>218</sup> See e.g., in patent law, art. L 613-25 et seq. French Intellectual Property Code; art. 75 Dutch Patents Act 1995; art. 21 German Patents Act; sec. 72 et seq. UK Patents Act 1977; 35 USC § 282; and art. 138 European Patent Convention; and, in trademark law, art. L 714-3 French Intellectual Property Code; art. 2:28 Benelux Convention on Intellectual Property 2005; arts 50 to 52 German Trade Marks Act; sec. 47 UK Trade Marks Act 1994; and arts 52, 53 and 55(2) Community Trade Mark Regulation. Sec. 33 US Trademark Act 1946 (15 USC § 1115) provides only limited grounds for invalidation, depending on whether registration is prima facie or conclusive evidence of validity.

<sup>219</sup> See 17 USC § 411(a), with respect to the registrability of copyright claims. Recently, it was held by the Supreme Court that, despite the pre-suit registration requirement of 17 USC § 411, a copyright holder's failure to comply with that requirement does not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works in a class-action infringement suit. See *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (US Supreme Court, 2010).

property right, they contribute significantly to establishing legal certainty.<sup>220</sup> This is elementary, given the intangible character of intellectual property rights.

The underlying principle is fairly simple. Upon public dissemination of a product that incorporates a patent or a design or is labelled with a trademark, the respective owner of the patent, design or trademark loses physical control over his intellectual property.<sup>221</sup> Even so, pursuant to the law, he has the right to prevent other persons from reusing and exploiting the patent, design or trademark. However, third parties that purchase, obtain or otherwise take possession of a product that includes subject matter protected by intellectual property may have no knowledge of the existence of such a right and of the possible intention of its right holder to enforce it. Therefore, to enable third parties to ascertain whether they might be infringing another person's intellectual property, they should somehow be made aware of this fact.<sup>222</sup>

Most intellectual property systems fulfil this signalling and publicity function by advertising applications and the acceptance of applications in an official journal and by maintaining a register that is open for public inspection.<sup>223</sup> The advertisements, which usually only include the fact that an application has been made or accepted at a certain date,<sup>224</sup> aim at notifying and alarming third parties.<sup>225</sup> The registers enable them to obtain further information about the current status of pending applications and registered patents, designs or trademarks.<sup>226</sup> This has great advantages, both for society at large, which is duly informed about the subject matter that is protected by intellectual property, and for traders and competitors, who, on timely notification of

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<sup>220</sup> See e.g. European Commission, Green Paper on the Legal Protection of Industrial Design, Working document of the services of the Commission, III/F/5131/91-EN, Brussels, June 1991 [Green Paper on Industrial Design 1991], at 47 (para. 4.3.9): 'The purpose of registration is to create legal certainty as to which designs are protected and which are not.'

<sup>221</sup> With respect to movable property, mere possession (e.g. of a bicycle) fulfils the publicity function. See e.g. art. 3:119(1) of the Dutch Civil Code, stating that the possessor of a good is presumed to be the proprietor ('*De bezitter van een goed wordt vermoed rechthebbende te zijn.*') and art. 2014 of the old Dutch Civil, stating that possession qualifies as a perfect title ('*Bezit geldt als volkomen titel.*').

<sup>222</sup> See Bently & Sherman 2009, at 375.

<sup>223</sup> *Ibid.*, at 381-382 and 383-384 (with respect to UK and European patent registration), 620-621 and 624 (with respect to UK and Community design registration) and 791-792, 794, 782 and 798-800 (with respect to UK and Community trademark registration). See also Wichers Hoeth 2007, at 44-45 (with respect to Dutch patent registration), 159 (with respect to Benelux design registration) and 252-253 (with respect to Benelux trademark registration).

<sup>224</sup> See e.g. secs 16(1) and 24(1) UK Patents Act 1977, indicating that the Official Journal advertises the fact and date of publication of a patent application and a notice of the patent grant, respectively.

<sup>225</sup> That the objective of notifying third parties is taken seriously can be seen e.g. in art. 97(3) European Patent Convention, which states that the decision to grant a European patent takes no effect until the date on which the mention of the grant is published in the European Patent Bulletin.

<sup>226</sup> See e.g. art. 19(1) Dutch Patents Act 1995: 'The Office shall be responsible for maintaining a patent register from which the current status with respect to patent applications and patents can be derived and from which information can be provided to third parties for that purpose.'

the fact that an application is filed or protection is granted, may be able to decide on whether to oppose or otherwise challenge the application or registration.<sup>227</sup>

Furthermore, the owners of intellectual property rights often voluntarily mark the products that incorporate their intellectual property rights with a notice, such as the word ‘patented’, the symbol ® or ™ or the ‘d-in-a-circle’. By so doing, they intend to alarm third parties of the fact that an intellectual property right applies.

An additional publicity function is performed by the recordation of assignments of rights. This signals to the public that, from a particular moment in time, another person than the original right holder owns the rights in the intellectual property. By inquiry of the registers, third parties can ascertain changes of title.

In US copyright law the mandatory copyright notice for a long time played a key role as a signalling mechanism informing the public as to whether or not a particular work was protected by copyright.<sup>228</sup> Since the law required a copyright notice to be attached to the copies of a work to obtain protection (see para. 2.2.1), anyone could easily ascertain whether a work was protected. The courts consistently held that the object of the copyright notice was ‘to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work.’<sup>229</sup> If a copyright notice was omitted, it could instantly be recognized that a work resided in the public domain and therefore could be used without prior authorization. Even though the copyright notice at present is no longer required, it can still function as an important ‘No Trespassing’ sign, used by authors to signal to the public that they are serious about enforcing their rights.<sup>230</sup>

Likewise, depending on whether copyrights have been registered and transfers of copyrights have been recorded, the records of the US Copyright Office may provide further publicity about existing statutory copyrights and about changes of copyright ownership (see also para. 2.3.5 below).

#### 2.3.4 EVIDENTIARY FUNCTION

Just as third parties must be notified of the existence of intellectual property rights, so are owners of intellectual property in need of confirmation of existence of their

<sup>227</sup> See e.g. European Court of Justice, judgment of 12 December 2002, case C-273/00, *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, [2002] ECR I-11737, para. 51: ‘economic operators must [...] be able to find out about registrations or applications for registration made by their current or potential competitors and thus to receive relevant information about the rights of third parties’.

<sup>228</sup> See H.R. Report No. 94-1476, 94th Cong., 2nd Sess. (1976), at 143.

<sup>229</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (Circuit Court of Appeals, Second Circuit, 1946), at 409; certiorari denied 331 US 820 (US Supreme Court, 1947). See also *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F.Supp. 703 (US District Court of Georgia, 1951), at 705; and *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (Circuit Court of Appeals, Second Circuit, 1934), at 277; certiorari denied 294 US 717 (US Supreme Court, 1935).

<sup>230</sup> See Goldstein 2001, at 189 and Goldstein & Hugenholtz 2010, at 222.

rights. In essence this follows the same rationale. Once the intangible subject matter of intellectual property is publicly disseminated, it cannot easily be traced back to its rightful proprietor. Hence, to be able to prove that they actually own the rights, right owners need evidence linking them to the intellectual property and identifying them as the legal proprietors. Formalities may help to provide this evidence.

Several laws, for example, presume that the person registered as proprietor in the respective register is entitled to the rights conferred by the registration of a patent, design or trademark.<sup>231</sup> Although a legal presumption of this kind is not a guarantee that the registration is valid,<sup>232</sup> it may provide prima facie or constructive evidence of the registrant's title of ownership.<sup>233</sup> Often, the registrant can obtain a certificate of registration, which typically has similar evidentiary weight as the entrance in the registers.<sup>234</sup> This enables right owners to easily assert their rights and claim the title of property in intangible subject matter. This may be particularly useful in conflicts where the anteriority or priority of a property claim needs to be resolved.

To prevent fraudulent registration by a person who is not entitled to register, the law often makes provision for persons who believe that they have a right in an invention, design or trademark that is registered, or for which registration has been applied, to claim ownership, e.g., by bringing legal proceedings before a civil court.<sup>235</sup> In some countries, the law also penalizes the deliberate falsification of the registers.<sup>236</sup>

In US copyright law, formalities also fulfil important evidentiary functions.<sup>237</sup> If a copyright claim is registered before or within five years after first publication, the certificate of registration constitutes prima facie proof of the validity of copyright and of the facts that it contains.<sup>238</sup> Similarly, recordation gives constructive notice of

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<sup>231</sup> See e.g., in patent law, sec. 32(9) UK Patents Act 1977; in trademark law, art. 28(1) German Trade Marks Act, sec. 72 UK Trade Marks Act 1994, and secs 22 and 33 US Trademark Act 1946 (15 USC §§ 1072 and 1115); and, in design law, sec. 17(8) UK Registered Designs Act 1949 and art. 17 Community Designs Regulation.

<sup>232</sup> See Bently & Sherman 2009, at 781 and 794.

<sup>233</sup> Although entries in the registers usually provide prima facie evidence of the property title only, they sometimes may constitute constructive notice of the registrant's property claim or property title. See e.g. secs 22 and 33(b) US Trademark Act 1946 (15 USC §§ 1072 and 1115(b)).

<sup>234</sup> See e.g., in patent law, sec. 24(2) in conjunction with sec. 32(10) UK Patents Act 1977; in trademark law, sec. 7(a) US Trademark Act 1946 (15 USC § 1057(a)); and, in design law, sec. 18(1) in conjunction with 17(9) UK Registered Designs Act 1949.

<sup>235</sup> See e.g. art. L 511-10 (design law), art. L 611-8 (patent law) and art. L 712-6 (trademark law) French Intellectual Property Code. In UK patent law, anyone having or claiming a proprietary interest in an invention may refer to the register's comptroller, either before or after the grant, the question of who is properly entitled to be granted a UK patent. See secs 8(1) and 37(1) UK Patents Act 1977.

<sup>236</sup> See e.g. sec. 109 UK Patents Act 1977, sec. 94 UK Trade Marks Act 1994, sec. 34 UK Registered Designs Act 1949.

<sup>237</sup> See King et al. 1986, at viii and 105-109.

<sup>238</sup> 17 USC § 410(c). Before 1976, a certificate of registration had similar evidentiary weight. See sec. 55 of the US Copyright Act 1909, as amended by the Act of 2 March 1913, 62nd Cong., 3rd Sess. (in Copyright Enactments 1963, at 90-91); 17 USC § 209 (1947).

the facts stated in the recorded document, provided that it specifically identifies the work to which it pertains and that this work has been registered.<sup>239</sup> The law further states a penalty for any person who knowingly makes a false representation of a material fact in any written statement filed in the process of registration.<sup>240</sup>

### 2.3.5 INFORMATION FUNCTION

A last function that is inherent to formalities is that they supply an important source of information. This generally concerns information pertaining to the subject matter and scope of protection, the ownership of rights and the term of protection.<sup>241</sup>

Most formalities inform the public about the subject matter of protection and the ownership of intellectual property rights. Patent, design and trademark registers are typical examples of formalities that provide for such information. By allowing these registers to be searched, third parties are able to identify existing patent, design and trademark rights, ascertain their scope of protection and determine whether a new application conflicts with an earlier entry.<sup>242</sup> Furthermore, the registers may contain current information about the names and addresses of applicants, right owners and, if applicable, their appointed representatives.<sup>243</sup> This makes it easier for third parties to identify and locate the relevant proprietors of the intellectual property.

In US copyright law the copyright notice for a long time also informed the public of the existence of the copyright and the name of the copyright owner.<sup>244</sup> This name could be substituted by that of the assignee, in case the copyright was assigned and recorded in the US Copyright Office.<sup>245</sup> In addition, information about the work and the copyright owner was – and still is – made publicly available through the records of the US Copyright Office. Although registration was and is not required, the 1909 and 1976 US Copyright Acts contain(ed) a number of incentives to register.<sup>246</sup> Until

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<sup>239</sup> 17 USC § 205(c). Before 1976, the catalogues of copyright entries at the US Copyright Office were admitted in any court as prima facie evidence of the facts they contained as regards copyright registration and recordation. See sec. 56 of the US Copyright Act 1909; 17 USC § 210 (1947).

<sup>240</sup> 17 USC § 506(e).

<sup>241</sup> Except for providing information on the ownership of rights and the subject matter, scope and term of protection, patent registers are an important source of public scientific and technical knowledge.

<sup>242</sup> See Bently & Sherman 2009, at 785, referring to the ‘information function’ of a representation of the mark that must accompany the application for trademark registration.

<sup>243</sup> See e.g. art. 30 German Patents Act. Sometimes, inventors or designers are also given the right to be named as such in the registers. See e.g., in patent law, art. L 611-9 French Intellectual Property Code and art. 62 European Patent Convention; and, in design law, art. 18 Community Designs Regulation.

<sup>244</sup> See H.R. Report No. 94-1476, 94th Cong., 2nd Sess. (1976), at 143 and *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F.Supp. 703 (US District Court of Georgia, 1951), at 705.

<sup>245</sup> Sec. 46 of the US Copyright Act 1909; 17 USC § 32 (1947), as amended by the Act of 15 October 1971, Public law 92-140, 85 Stat. 391, which took effect on 15 February 1972.

<sup>246</sup> See para. 2.1.1 above.

1976, registration was also a prerequisite for the renewal of copyright.<sup>247</sup> Therefore, the records of the US Copyright Office were – and still are – regularly updated with relevant information about copyrighted works and copyright ownership.

However, this is not to say that the registered information is always adequate and up-to-date. First of all, the records of the US Copyright Office provide no detailed information about the scope of protection. Unlike other intellectual property rights, the scope of copyright cannot directly be derived from the registers, but must rather be inferred from the work itself (see para. 2.3.2.1). Second, recordation of transfers was not mandatory in twentieth-century US copyright law.<sup>248</sup> Consequently, there is no guarantee that the information about copyright ownership is up-to-date.<sup>249</sup>

Nevertheless, the records of the US Copyright Office are a useful starting point for third parties to establish the ownership of copyrighted works.<sup>250</sup> Especially if the law prescribes that supplementary registration augments rather than supersedes the information contained in an earlier registration,<sup>251</sup> the records may help third parties to trace the chain of title. Even if the records are not fully up-to-date, this may ease the identification and location of the current copyright owner of a work.

Formalities may also offer important information about the term of protection.<sup>252</sup> Most intellectual property rights are protected for a fixed term, which is calculated either from the date of filing of the application,<sup>253</sup> or from the date of registration.<sup>254</sup> Since these dates are usually recorded in the registers,<sup>255</sup> it can easily be ascertained whether a patent, design or trademark is still protected. If an earlier expiry, waiver, revocation or invalidation by the court of a patent, design or trademark right is also

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<sup>247</sup> See para. 2.1.2 above.

<sup>248</sup> See para. 2.1.3 above.

<sup>249</sup> See Ginsburg 2008, at 176-177 (note 8), concluding: ‘Thus, the information identifying the author or copyright owner of a work published with notice in 1930 whose registration was renewed in 1958 (and whose copyright will endure until 2025) will today be 50 years old. The likelihood that the information in the 1958 renewal certificate remains accurate may not be very high.’

<sup>250</sup> See King et al. 1986, at ix and 109-113.

<sup>251</sup> See e.g. 17 USC § 408(d).

<sup>252</sup> See e.g. Green Paper on Industrial Design 1991, at 82-83 (para. 6.2.4.2), concluding that calculating the terms of unregistered designs from the date of first public disclosure is more difficult and causes more legal uncertainty than calculating the terms of registered designs from the date of filing.

<sup>253</sup> See e.g., in patent law, art. L 611-2 under (1) French Intellectual Property Code; art. 36(6) Dutch Patents Act 1995; art. 16(1) German Patents Act; sec. 25(1) UK Patents Act 1977; 35 USC § 154(a)(2); and art. 63(1) European Patent Convention; in trademark law, art. L 712-1 French Intellectual Property Code; art. 2:9(1) Benelux Convention on Intellectual Property 2005; art. 47(1) German Trade Marks Act; and art. 46 Community Trade Mark Regulation; and, in design law, art. L 513-1 French Intellectual Property Code; art. 3:14(1) Benelux Convention on Intellectual Property 2005; art. 27(2) German Designs Act; and art. 12 Community Designs Regulation.

<sup>254</sup> See e.g., in trademark law, sec. 42(1) UK Trade Marks Act 1994 and sec. 8 US Trademark Act 1946 (15 USC § 1058); and, in design law, sec. 8(1) UK Registered Designs Act 1949.

<sup>255</sup> See e.g. art. 19(1) Dutch Patents Act 1995.

filed in the registers,<sup>256</sup> it can moreover be determined whether an invention, design or trademark has entered the public domain before the official expiry date.

Until 1976, formalities also greatly facilitated the calculation of copyright terms in the US. The 1909 Copyright Act laid down a fixed term of protection of twenty-eight years, which began at the date of first publication.<sup>257</sup> As all copies of a work were to be marked with a copyright notice, including the date of first publication, the time of commencing of copyright was immediately displayed. Hence, the initial term of protection could easily be calculated.<sup>258</sup> Additionally, upon registration with the US Copyright Office, the copyright could be renewed for another twenty-eight years.<sup>259</sup> It could be inferred from the records of the US Copyright Office, therefore, whether a copyright was in its second term or whether it had already expired.

This changed when, pursuant to the 1976 US Copyright Act, the copyright terms were no longer measured from the date of first publication, but from the date of the author's death.<sup>260</sup> Since then, term calculation has been dependent on information about the author's death, which cannot be directly deduced from the registers or the copyright notice. To nevertheless facilitate the calculation of the copyright term, the US Register of Copyrights is instructed to maintain current records of information relating to the death of authors of copyrighted works, based on recorded statements made by interested parties and, in so far as it is practicable, on data contained in any of the records of the US Copyright Office or in other reference sources.<sup>261</sup>

## 2.4 Conclusion

The previous sections have demonstrated that, within the framework of intellectual property, formalities may perform a number of important functions. First, if subject matter for which formalities have not been completed is excluded from protection, they impose an initial filter separating protected from unprotected subject matter. In addition, formalities can help to demarcate and outline the subject matter and scope of protection, both positively, by requiring applicants to clearly specify the features of an invention or design for which they claim protection and the goods or services for which they seek trademark registration, and negatively, by refusing registration for subject matter that does not meet the substantive requirements of protection.

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<sup>256</sup> See e.g. art. 62 Dutch Patents Act 1995, indicating that the expiry of patents resulting from a failure to pay the maintenance fees before the prescribed due date shall be recorded in the patent register. See also art. 30(1) German Patents Act.

<sup>257</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>258</sup> See H.R. Report No. 94-1476, 94th Cong., 2nd Sess. (1976), at 143 and *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F.Supp. 703 (US District Court of Georgia, 1951), at 705.

<sup>259</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>260</sup> 17 USC § 302(a) and (b). Nonetheless, for anonymous works, pseudonymous works and works made for hire, the law lays down fixed terms of protection. See 17 USC § 302(c).

<sup>261</sup> 17 USC § 302(d).

Moreover, by identifying and making more visible the intangible subject matter of intellectual property, formalities may fulfil an important signalling and publicity function. They can alarm third parties of the existence of intellectual property or of a change of intellectual property ownership, of which they might otherwise have had no knowledge. Similarly, for right owners, they may perform an important evidentiary function. By connecting them with the intellectual property and identifying them as the legal proprietors, formalities can help right owners to prove their title. This may significantly enhance legal certainty for both right owners and third parties.

Finally, formalities may provide a useful source of information from which third parties, by inquiry, can identify the subject matter of protection, ascertain its scope, calculate the term of protection and discover the names and contact details of right owners. This can facilitate the regular exercise of intellectual property rights and, in the end, improve the functioning of intellectual property law as a whole.

Accordingly, it seems safe to conclude that formalities may well be fit to address the challenges that copyright is facing in the current digital era. First, depending on how they are shaped, formalities may contribute greatly to enhancing the free flow of information, by enlarging the public domain and enabling the public to separate protected from unprotected works. Second, by identifying copyrighted works, they may also help to establish more legal certainty over copyright claims. If they also included a provision for excluding subject matter that does not qualify as literary or artistic works or clearly lacks originality, they moreover would help to prevent all kinds of trivial works from entering the copyright arena. Third, by supplying information about copyrighted works, their authors and current right owners plus their contact details, formalities may play a key role in facilitating the licensing of copyright.

In view of these benefits, several – in particular US – scholars have argued that formalities are ‘unquestionably beneficial and desirable’.<sup>262</sup> But this is just one side of the coin. Even if reinstating copyright formalities may have become something worthy of consideration, this does not change the reality of today, namely, that in nearly all countries around the world, copyright formalities have been abolished or reduced to a minimum. This did not happen for no reason. Therefore, to understand why copyright formalities lost their significance, the next two chapters examine the reasons behind their change or abolition at the national and the international level.

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<sup>262</sup> See Ginsburg 2010a, at 344 and Ginsburg 2010b, at 458, who, despite acknowledging the benefits of formalities, petitions strongly against reintroducing mandatory opt in formalities, as she believes that the burden should ‘not be on the author to acquire rights, but rather to *disclaim* them’. Therefore, she seems to endorse formalities only to the extent that they allow the author or right owner to opt out of the copyright system.

## Chapter 3

# The History of Formalities in National Copyright Law

For the longest time in the history of copyright, the protection of works was subject to formalities. Nowadays it may perhaps be difficult to grasp, but until the early twentieth century and beyond many countries around the world, including, in particular, countries in continental Europe, made the enjoyment and/or the exercise of copyright conditional on formalities.<sup>263</sup> While some countries (e.g., the US) have retained formalities until this day, several European countries abolished formalities or limited their use around the time of the transition from the nineteenth to the twentieth century.

One reason for this was obviously the introduction of the prohibition on formalities in the Berne Convention in 1908 (see Chapter 4). However, this cannot be the only explanation. For one thing, the Berne Convention prohibits contracting states from subjecting foreign works to formalities, but it does not force them to stop imposing formalities on domestic works. Nevertheless, most countries that joined the Berne Convention eliminated formalities with respect to domestic works as well. A few even did so already before the introduction of the Berne prohibition on formalities. Thus, at that time, there appears to have been some understanding at the national level of several countries that copyright could well be protected without formalities.

This raises the question of where this understanding originates. What were the reasons for the change or abolition of copyright formalities in various countries in the early twentieth century? And why was the impact less significant or totally absent in other countries? An investigation into the history of formalities in national copyright law may resolve these questions. Accordingly, this chapter examines how formalities found their way into the copyright system, what their role and functions were at various stages in the history of copyright law and why their hold on copyright gradually weakened in the nineteenth and twentieth centuries.

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<sup>263</sup> For state-of-the-art overviews of formalities in national copyright law in the 1850s, 1900s and 1950s, see Volkmann 1855, at 132-136; Röthlisberger 1904; and 'Formalities for acquisition, maintenance and transfer of copyright', in *World Copyright: An Encyclopedia* 1953-1960, II (1954), at 672-703.

The countries analyzed in this chapter are France, the Netherlands, Germany, the UK and the US. These countries were selected because, from a historical point of view, they influenced to a greater or lesser degree the development of copyright law. Although, traditionally, they can be grouped in two categories, namely, that of countries following the ‘copyright’ tradition (i.e., the UK and the US) and that of countries following the ‘*droit d’auteur*’ tradition (i.e., France, the Netherlands and Germany),<sup>264</sup> this distinction is not relevant here. As this chapter shows, for present purposes it is more appropriate to distinguish between European countries (the UK included), on the one hand, and the US, on the other hand. Most European countries removed copyright formalities in the early twentieth century, while the US made copyright conditional on formalities until the end of the last century and continues to impose certain copyright formalities in the present day. Therefore, this chapter does not differentiate between copyright and *droit d’auteur* countries in substance or in terminology,<sup>265</sup> but instead examines each country separately. However, for reasons of simplicity, the three continental European countries (i.e., France, the Netherlands and Germany) are sometimes discussed jointly in this chapter.

This chapter focuses exclusively on the protection conferred on domestic authors by national copyright law. The protection of works of foreign origin, which began somewhere around the mid-nineteenth century, is analyzed in Chapter 4.

For systematic reasons, this chapter is split in three parts, covering the periods of the pre-history of copyright law, which runs from the invention of the printing press (ca. 1450) until the enactment of the first copyright laws in the eighteenth century (para. 3.1), early modern copyright law, which runs from the enactment of the first copyright laws in the eighteenth century until the mid-nineteenth century (para. 3.2) and modern copyright law, which runs from the mid-nineteenth century until today (para. 3.3).<sup>266</sup> For each of these three periods, the chapter examines how copyright formalities developed in the five countries discussed. However, US copyright law is not examined until the period of early modern copyright law, for it played no significant role in the pre-history of copyright law.<sup>267</sup> The chapter concludes with a summary and discussion of the main findings of our examination (para. 3.4).

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<sup>264</sup> See e.g. Goldstein 2001, at 3-10 and Goldstein & Hugenholtz 2010, at 14-21.

<sup>265</sup> Without intending to favour the one doctrine over the other, this chapter uses the term ‘copyright’ as a common denominator referring to both the ‘copyright’ and the ‘*droit d’auteur*’ doctrine.

<sup>266</sup> This distinction is inspired by Sherman & Bently 1999, at 3, who draw a general distinction between ‘pre-modern’ and ‘modern’ intellectual property law, the transformation of which took place around the mid-nineteenth century. In this chapter, the ‘pre-modern’ era is split in two periods.

<sup>267</sup> See Bracha 2010, at 97, concluding that while book privileges were occasionally granted in the North American British colonies, these grants ‘remained isolated and case-specific occurrences. No general copyright regime, either statutory or under the common law, appeared during the colonial period’.

### 3.1 The Origins of Formalities in the Pre-History of Copyright Law

The invention of the printing press brought many changes to the cultural and social life in Europe in the sixteenth and seventeenth centuries.<sup>268</sup> In contrast with manual reproductions in the Middle Ages and earlier times, the printing technology allowed copies of books to be made in a fraction of time and without the risk of their contents being altered. The printing press thus became an important and powerful instrument for large-scale production and widespread dissemination of information.<sup>269</sup>

For secular and ecclesiastical authorities, this created considerable threats, for the growing supply of books induced an acceleration of cultural and scientific advances. From the sixteenth century onwards, the literate community steadily expanded from the erudite upper part of society, the aristocratic elite, to the upcoming bourgeoisie, i.e., the growing middle class of merchants and traders.<sup>270</sup> This created the risk of an increasing number of people being exposed to ideas that could defy or undermine the authority of the state and church.<sup>271</sup> Consequently, both authorities felt the need to adequately regulate the printing and dissemination of printed works.

The printing regulations took different forms. In some countries, special printers to the Crown were appointed.<sup>272</sup> Later, the art of printing could be practised only by designated printers.<sup>273</sup> This allowed the state to patronize the book trade and extend the control of the press.<sup>274</sup> Systems of preventive censorship were also established. No book was allowed to be published, unless it was screened and approved by the censor.<sup>275</sup> In addition, book privileges were issued to printers and booksellers loyal to the Crown.<sup>276</sup> These privileges, which were promulgated in the exercise of a royal prerogative, provided them with a temporary exclusivity to print and publish a

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<sup>268</sup> See Eisenstein 1979, at 3-159 and Eisenstein 2005, at 3-120.

<sup>269</sup> Dommering 2000, at 29-32. In communications history, the invention of printing is referred to as the 'third cognitive revolution', the arrival of language and speaking abilities and the advent of text and writing abilities being the first and second, respectively. See Harnad 1991, at 39-40.

<sup>270</sup> The growth of the literate community is closely linked to the spread of education in the sixteenth and seventeenth century. On the rise of education in England in this period, see Cressy 1976.

<sup>271</sup> In fact, many of the writings of the sixteenth and seventeenth centuries were of a religious or political nature advocating the Reformation or the Counter-Reformation. See Stewart 1989, at 15. See also Eisenstein 1979, at 303-450, Gilmont 1990 and Febvre & Martin 1993, at 287-319.

<sup>272</sup> See Judge 1934, at 6, indicating that, in England, by Proclamation of 5 December 1485, Henry VII appointed Peter Actors as the first printer to the Crown.

<sup>273</sup> In England, for example, exercising the art of printing was reserved for the members of the Company of Stationers. See e.g. Patterson 1968, at 28-41 and Whale 1971, at 4 et seq.

<sup>274</sup> See Ransom 1956, at 25.

<sup>275</sup> See para. 3.1.1.1 below.

<sup>276</sup> See Patterson 1968, at 5-6 and 79, noting that book privileges were habitually granted to prominent members of publishers' guilds. In England, this favoured in particular the London stationers.

particular book, or a specific class of books,<sup>277</sup> in the territory where the privilege was issued.<sup>278</sup> This exclusivity was something for which printers and booksellers had strongly petitioned. They complained that their books, often the most profitable editions, were reprinted and sold on the market by local and foreign competitors.<sup>279</sup> By granting protection against reprints, the sovereign tried to retain control of printers and book publishers and keep them satisfied.<sup>280</sup> Moreover, by linking the book privilege system with regulations of pre-publication censorship, the sovereign could exercise strict and effective control over the output produced by the printing industry.

In addition to the protection of book privileges, many countries in early modern Europe witnessed the emergence of a parallel system of protection. This was the so-called stationers' copyright. While book privileges were royal grants, the stationers' copyright was essentially a private matter of the guilds in which printers and publishers were organized. In the mid-sixteenth century, the Company of Stationers in London created its own set of rules to protect the books published by its members against unauthorized reprinting. This protection was based on the recognition of a 'right to copy', which accrued to the printer or publisher who first registered the work.<sup>281</sup> On the European mainland, a similar right – here known as *droit de copie*, *Verlagsrecht* or *kopijrecht* – emerged in customary law in the course of the seventeenth and eighteenth centuries. The right was deemed to arise with the sale of a manuscript by the author. It was believed that, alongside the manuscript, the publisher acquired an exclusive right to print the author's work and distribute it to the public.<sup>282</sup> This right then belonged to the person who first published or first registered the book.<sup>283</sup>

The systems of book privileges and stationers' copyright were the first to confer exclusive rights on printed works.<sup>284</sup> In this respect, they resemble modern systems of copyright.<sup>285</sup> Still there are some important differences. First, the exclusive rights accrued not to the author, but to a privilege holder or the person who first registered or first published a work. These were typically printers and booksellers, who largely

<sup>277</sup> Book privileges could be conveyed by warrant but also by letters patent. The latter ordinarily granted rights in certain classes of books, such as Bibles, Psalters, grammars, law books and almanacs.

<sup>278</sup> This follows the old maxim '*leges non valent extra territorium*'. See Briggs 1906, at 34.

<sup>279</sup> See e.g. Baelde 1962, at 20 et seq.

<sup>280</sup> Book privileges conveyed by royal grant could be enforced in the monarch's conciliar courts. This, however, did not prevent the unauthorized reprinting of privileged works from remaining a profitable business. See Ransom 1956, at 46, defining the main causes of piracy in the early days of printing.

<sup>281</sup> See e.g. Patterson 1968, at 42 et seq. and Rose 1993, at 12.

<sup>282</sup> See Gieseke 1995, at 93-105, Schriks 2004, at 23, 75-82 and 511-512 and Peeperkorn 2009, at 21.

<sup>283</sup> See para. 3.1.2 below.

<sup>284</sup> De Beaufort 1909, at 1.

<sup>285</sup> See Kawohl 2008a, para. 9.

controlled the book trade.<sup>286</sup> Second, protection was not automatic, but often subject to a personal request, as was the case with the privilege system, or the registration of a work, as was the case with the system of stationers' copyright.<sup>287</sup> Third, any book could be protected regardless of its originality. In fact, several privileges were granted for books of classic Greek or Roman authors, as well as for the Bible.<sup>288</sup> Fourth, the subject matter and scope of protection were limited. Often, protection was confined to books and printed matter. The privileges and stationers' copyright protected these works against unauthorized reprinting, importation and distribution, but rarely against adaptation, translation or public performance.<sup>289</sup> Thus, the two systems did not protect works *qua abstractum*, but the printed matter as such.<sup>290</sup> Lastly, in comparison with the duration of modern copyright, the term of protection of book privileges was fairly short.<sup>291</sup> Stationers' copyright, on the other hand, was deemed to grant protection in perpetuity.<sup>292</sup>

This section examines the systems of book privileges (para. 3.1.1) and stationers' copyright (para. 3.1.2) with a view to identifying the formalities with which the two systems were surrounded. It will be demonstrated that several formalities, including registration, deposit and notice requirements, were contained in the two regulatory systems. Para. 3.1.3 concludes on the legal nature of these early formalities.

### 3.1.1 THE SYSTEM OF BOOK PRIVILEGES

The oldest grant of a book privilege on record was made by the Senate of Venice in 1469.<sup>293</sup> Shortly afterwards, privilege systems were established in various European

<sup>286</sup> Although book privileges were sometimes issued to authors (see De Beaufort 1909, at 18, Patterson 1968, at 79, Armstrong 1990, at 79 et seq. and Rose 1993, at 10-11), the book privilege system was not primarily designed for their benefit. See Grosheide 1986, at 52.

<sup>287</sup> See e.g. Kohler 1907, at 59 and Schriks 2004, at 63-64.

<sup>288</sup> De Beaufort 1909, at 7-8.

<sup>289</sup> *Ibid.*, at 14. As a result, printed plays and sheet music could be protected against reprinting, but there was no protection for 'dramatic works' or 'musical works' against public performance.

<sup>290</sup> See e.g. Kohler 1907, at 59, stating that the protection against reprinting of a book did not relate to its contents, but rather to its book-technical appearance.

<sup>291</sup> The terms of book privileges usually varied between three and ten years, although shorter terms of a few months to a year sometimes applied. Later, especially in the eighteenth century, longer terms of fifteen to thirty years were granted. See De Beaufort 1909, at 17; Gieseke 1995, at 39; Schriks 2004, at 54. In some countries, book privileges could also be renewed. See Birn 1971, at 137 et seq.

<sup>292</sup> See e.g. Holdsworth 1920, at 844 and Rose 1993, at 12. Often, however, the protection was subject to a certain 'use it or lose it' clause. If a book was out of print and the copyright owner did not reprint it within a certain period after a warning by a competing publisher, the latter was allowed to reprint the book, provided that the author of the work did not refuse. See e.g. sec. 5 of the Internal orders of the Stationers' Company concerning printing, spring 1588 (in: Arber 1875-1894, II, at 43-44) and art. 6 of the Frankfurt Printers' and Booksellers' Ordinance of 1588 (in: Kawohl 2008a, para. 5).

<sup>293</sup> On the early Venetian book privileges, see Brown 1891, at 50-82 and Gerulaitis 1976, at 31-56.

countries. The first grant of a book privilege in Germany is recorded in 1479,<sup>294</sup> in France in 1498,<sup>295</sup> in the Netherlands in 1516<sup>296</sup> and in England in 1518.<sup>297</sup> Although it appears that, at the outset, only few book privileges were granted, in the course of the sixteenth century, book privileges in Europe became more widespread.<sup>298</sup>

Book privileges were awarded either by the sovereign or by local authorities. In most states, privileges were issued in the exercise of a royal prerogative. This was the case, e.g., in France and England, where the Crown assumed exclusive authority to grant them.<sup>299</sup> However, in some countries, privileges were increasingly issued by local authorities. In Germany, for example, although the Holy Roman Emperor was the central authority for granting book privileges, local sovereigns, especially those of Frankfurt am Main and Leipzig (i.e., the main centers of book trade in Germany) gradually also began to issue privileges.<sup>300</sup> Similarly, in the Dutch Republic, book privileges were granted both by the central administration, the *Staten-Generaal*, and the administration of the provinces, which enjoyed a far-reaching autonomy.<sup>301</sup>

In the beginning, application for a book privilege was a voluntarily act. It was a request of individual printers or booksellers for a private favour of the sovereign to protect specific books against reprinting.<sup>302</sup> When the first regulations on control of the press and the book trade were adopted, however, the procedures for acquiring a book privilege were gradually codified and formalized. The grant of a privilege was often subject to the acquisition of a licence to print from the censor. Moreover, the authorities frequently required printers or booksellers to mark the copies of a book with prescribed notice. Sometimes, protection was also dependent on registration of the privilege and the licence to print. Lastly, printers and booksellers were typically required to deposit free copies of books. Thus, printers and booksellers not only had

<sup>294</sup> Privilege of the Prince-Bishop of Würzburg (1479), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org. The first imperial privilege was granted to Conrad Celtes in 1501 for the printing of the works of Hrosvitha von Gandersheim. See Pütter 1774, at 170, Kohler 1907, at 56 and Gieseke 1995, at 41.

<sup>295</sup> See Armstrong 1990, at 7. The book privilege appeared in the preface of a commentary on the *Canon of Avicenna* by Dr. Jacques Despars, of which the printing was completed on 24 December 1498.

<sup>296</sup> See Van den Velden 1835, at 290-293, De Beaufort 1909, at 4 and Schriks 2004, at 62. The privilege was granted by Charles V, the Emperor of the Holy Roman Empire, to Jan Severs for the book *Die Cronycke van Hollandt, Zeelandt en Vrieslandt, beghinnende van Adams tiden tot de jare 1517*.

<sup>297</sup> See Pollard 1916, at 20 and Clegg 1997, at 8, indicating that Richard Pynson was the first in England to receive a royal privilege to print *Oratio Richardi Pacei in pace nuperime composita*.

<sup>298</sup> See Armstrong 1990, at 21-22 and 206, stating that, after 1507, more French books were imprinted with an abstract or the full text of a royal grant or a notice that a book privilege had been issued.

<sup>299</sup> See e.g. Ransom 1956, at 25 and Birn 1971, at 137.

<sup>300</sup> See Ulmer 1980, at 52. See also Gieseke 1995, at 56, who explains the supremacy of the Emperor as privilege granting authority by the fact that imperial privileges could cover the entire territory of the Holy Roman Empire, while local privileges were valid only in the state in which they were granted.

<sup>301</sup> Schriks 2004, at 64-65. To secure protection in one of the Dutch provinces, a book privilege had to be obtained from the relevant Provincial States. A book privilege covering the entire Dutch Republic could be acquired from the States-General. See also De Beaufort 1909, at 4-5.

<sup>302</sup> Armstrong 1990, at 100.

to formally apply for a privilege to obtain protection, but also to complete a number of associated formalities. These formalities are described in detail below.

### 3.1.1.1 LICENCE TO PRINT FROM THE CENSOR

The obligation to acquire permission to print from the censor dates back to the early days of printing. In France, an edict of King Francis I of 1521 forbade the printing of religious books unless authorized by the Theological Faculty of the University of Paris.<sup>303</sup> The penalty was banishment from the Kingdom or 500 pounds of fine. In the same way, a 1535 decree prohibited the printing of medical books that did not pass a prior inspection of three doctors of the Medical Faculty of the University of Paris, on pain of ten silver marks, imprisonment or an arbitrary fine.<sup>304</sup> These obligations were recurrently reinforced by the Parisian *Parlement*<sup>305</sup> and repeated in subsequent royal edicts.<sup>306</sup> In 1563, this ultimately resulted in a general prohibition to print any book without permission of the King, on pain of being hung or strangled.<sup>307</sup>

Although the penalties imposed by these early censorship edicts were relentless, they were not yet linked to the grant of book privileges. The Ordinance of Moulins of 1566 changed this. It ordered that no book privilege could be acquired unless it had been officially approved by the censor.<sup>308</sup> Accordingly, ‘the separate identity of the privilege ... was merged in that of a license to print.’<sup>309</sup> This rule was reaffirmed by many subsequent edicts and ordinances.<sup>310</sup> Until the end of the *Ancien Régime*, the motto was that no book privilege was granted and, more generally, no book was allowed to be printed, until the express consent of the King, the Parisian *Parlement* or the Theological Faculty of the University of Paris had been acquired.<sup>311</sup>

In England, the first press licensing system was established by King Henry VIII in 1538. To prevent the printing of objectionable texts ‘set forth with privilege’ and to suppress seditious and heretical opinion in general, he prohibited the importation, sale or publication ‘without his Majesties special license’ of English books printed

<sup>303</sup> Edict of Francis I of 18 March 1521. The terms of this edict reappeared both in the registers of the University of Paris of 13 June 1521 (in: Renouard 1838-1839, I, at 35 and Pouillet 1908, at 7, note 1) and in a Royal Order in the *Parlement* of Paris on 4 November 1521. See Armstrong 1990, at 100.

<sup>304</sup> See Renouard 1838-1839, I, at 37 and Dock 1962, at 68.

<sup>305</sup> See e.g. the Decree of the *Parlement* of Paris of 1 July 1542 (in: Weiss 1884, at 18-19). See also Renouard 1838-1839, I, at 35 et seq. and Higman 1979, at 23 et seq.

<sup>306</sup> See e.g. the Edict of Fontainebleau of 11 December 1547 (in: Higman 1979, at 64) and the Edict of Chateaubriant of 26 June 1551 (in: Higman 1979, at 64-66), which were issued by King Henri II.

<sup>307</sup> Renouard 1838-1839, I, at 47.

<sup>308</sup> Art. 78 of the Ordinance of Moulins of February 1566 (in: Renouard 1838-1839, I, at 48).

<sup>309</sup> Armstrong 1990, at 100.

<sup>310</sup> See Renouard 1838-1839, I, at 48, 58 and 68-69, referring to edicts and ordinances of 1570, 1571, 1586, 1626 and 1629 and to the Letters patent of Fontainebleau of 2 October 1701.

<sup>311</sup> Armstrong 1990, at 100.

abroad.<sup>312</sup> Moreover, he ordered that royal book privileges could only be obtained if a licence to print was issued by the Privy Council or other person appointed by the King.<sup>313</sup> This marked the beginning of a system of strict censorship that was to last until 1695.<sup>314</sup> In the sixteenth and seventeenth centuries, the Crown enacted various proclamations, orders and injunctions, requiring prior examination and approval by an official authority of all books printed in England.<sup>315</sup> This applied to books printed under privilege and, later, also to books protected by stationers' copyright (see para. 3.1.2 below). The penalty for non-compliance varied from imprisonment and a fine to the prohibition of further exercising the art of printing. The Star Chamber Decree of 1637 and the Press Licensing Act of 1662 included similar rules.<sup>316</sup> The latter Act was renewed a number of times, until it finally expired in May 1695.<sup>317</sup>

As in most European states, the grant of book privileges in Germany was linked to censorship. In 1521, Emperor Charles V issued the Edict of Worms, in which he ordered that Lutheran books were to be burned and that no books should be printed unless with the prior permission of the secular or ecclesiastical authorities.<sup>318</sup> Later, imperial censorship decrees were introduced in many German states. Examples are the Diets (*Reichstags-Abschieden*) of Nuremberg (1524), Speyer (1529 and 1570), Augsburg (1530), Regensburg (1541) and Erfurt (1567). These decrees ordered that before printing, a book was to be screened by the local authorities.<sup>319</sup> Anyone who disregarded these rules could await severe punishment.<sup>320</sup> Since the local authorities that were held responsible for exercising censorship began to see the duty imposed

<sup>312</sup> Proclamation of Henry VIII of 16 November 1538 (in: Pollard 1911, no. XXXVII, at 240-242).

<sup>313</sup> Patterson 1968, at 87.

<sup>314</sup> *Ibid.*, at 23-24.

<sup>315</sup> See e.g. the Proclamation of Henry VIII of 8 July 1546, the Proclamation of Edward VI of 28 April 1551 and the Proclamation of Mary of 18 August 1553 (in: Pollard 1916, at 24-26). See also secs 6 and 51 of the Elizabethan injunctions of 1559 (in: Arber 1875-1894, I, at xxxviii-xxxix).

<sup>316</sup> See secs II and III of the Star Chamber Decree of 11 July 1637 (in: Arber 1875-1894, IV, at 528-536) and sec. II of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435). See also, for interim regulations, the Parliamentary ordinance of 14 June 1643 (in: Firth & Rait 1911, I, at 184-187), the Parliamentary ordinance of 30 September 1647 (in: Firth & Rait 1911, I, at 1021-1023) and the Act for Regulation of Printing of 20 September 1649, which was revived by the Act of 7 January 1653 (in: Firth & Rait 1911, II, at 245-254 and 696-699).

<sup>317</sup> See Deazley 2008b. The 1662 Press Licensing Act was renewed by the Press Licensing Act (1665), 17 Car. II, c. 4 (in: Raithby 1819, V, at 577), sec. XV of the Expiring Laws Continuance Act (1685), 1 Jac. II, c. 17 (in: Raithby 1819, VI, at 19-20) and sec. XV of the Expiring Laws Continuance Act (1692), 4 & 5 W. & M., c. 24 (in: Raithby 1819, VI, at 416-19).

<sup>318</sup> Edict of Worms of 8 May 1521, as formally announced by Imperial Mandate on 26 May 1521. See Kapp & Goldfriedrich 1886-1913, I, at 534 et seq. and Eisenhardt 1970, at 24-27.

<sup>319</sup> See art. 28 of the Diet of Nuremberg of 18 April 1524; art. 9 of the Diet of Speyer of 22 April 1529; art. 58 of the Diet of Augsburg of 19 November 1530; art. 40 of the Diet of Regensburg of 29 July 1541; arts 61-63 of the Diet of Erfurt of 27 September 1567 and arts 154-159 of the Diet of Speyer of 11 December 1570 (in: Kapp & Goldfriedrich 1886-1913, I, at 775-783).

<sup>320</sup> Defiance could lead to corporal punishment (art. 58 of the Diet of Augsburg of 1530), a *großer Straff* (Diet of Speyer of 1529) or an *ernstliche und härtliche Straff* (Diet of Regensburg of 1541).

on them as an obtained right to also grant book privileges,<sup>321</sup> many printers applied for a privilege on submitting the book to the censor.<sup>322</sup> Until the eighteenth century, the licence from the censor remained a condition for acquiring a privilege.<sup>323</sup>

During the first half of the sixteenth century, under the reign of the Holy Roman Empire, the Netherlands witnessed ‘some of the most draconian legislation for book censorship anywhere in Europe.’<sup>324</sup> By Imperial Edict of 14 October 1529, Charles V introduced a strict regime of pre-publication censorship. No book was allowed to be printed or published unless it was officially approved by the censor. Moreover, a book privilege needed to be obtained.<sup>325</sup> Disobedient printers were threatened with rigorous penalties. They could be condemned to the scaffold or stigmatized with a burning iron cross, have an eye stuck out or a hand cut off, to the judge’s discretion.<sup>326</sup> In addition, the Edict of 18 December 1544 imposed the death penalty.<sup>327</sup>

The situation changed when in 1579 the Northern Netherlands joined together the Union of Utrecht. This marked the beginning of the Dutch Republic, which was known for its liberty of thought and religion and the fairly moderate censorship of books.<sup>328</sup> As a result, the book privilege system in the Dutch Republic was primarily intended to regulate the book trade and to counteract unfair competition. It was not linked to censorship.<sup>329</sup> As a rule, the authorities undertook no prior examination of the content of a manuscript before issuing a privilege.<sup>330</sup> The only exception was the Bible, for which the motto remained ‘no book privilege without consent’.<sup>331</sup>

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<sup>321</sup> See Eisenhardt 1970, at 9.

<sup>322</sup> See Kohler 1907, at 58 and Esselborn 1907, at 1.

<sup>323</sup> Gieseke 1995, at 58. The pre-publication censorship (*Vorzensur*) was mainly a practice of territorial sovereigns. Imperial book privileges were also granted without prior examination. However, if, after publication, it appeared that a book contained objectionable contents, it could be confiscated and the book privilege could be withdrawn (*Nachzensur*). See Eisenhardt 1970, at 11-13 and 72 et seq.

<sup>324</sup> Pettegree & Hall 2004, at 795-796. See also Bodel Nyenhuis 1892, at 73-95 and Kenney 1960.

<sup>325</sup> See Van den Velden 1835, at 2-3, Bodel Nyenhuis 1892, at 75 et seq., Kenney 1960, at 100 et seq., Voet 1969-1972, II (1972), at 255-256, Machiels 1997, at 32 and 90-92 and Schriks 2004, at 115.

<sup>326</sup> These penalties were laid down by the Edict of 7 October 1531. See e.g. Van den Velden 1835, at 3-4, Kenney 1960, at 123 and Machiels 1997, at 92-93.

<sup>327</sup> See Bodel Nyenhuis 1892, at 78 and Kenney 1960, at 150. The death sentence could be imposed if a printer published a book without privilege and the book contained objectionable content. If no such content was found, the penalty was banishment from the country and a fine of 300 guilders.

<sup>328</sup> See, in general, ‘La Hollande et la liberté de penser et d’écrire aux 17<sup>e</sup> et 18<sup>e</sup> siècles’, [1884] *Bulletin de l’Association Littéraire et Artistique Internationale*, 1<sup>e</sup> série, no. 22, at 11-14. This freedom of thought attracted many foreign authors, printers and booksellers to have their books printed in the Netherlands. As a result, the printing trade flourished and the book market was large, proportional to the size of the Dutch population. See e.g. Pettegree & Hall 2004, at 796. See also Van den Velden 1835, at 8, De Beaufort 1909, at 32-33 and 37 and Schriks 2004, at 59-60.

<sup>329</sup> Schriks 2004, at 60, 73 and 509. However, if it would appear later that the contents of the book were objectionable, the book privilege could always be withdrawn. See De Beaufort 1909, at 6.

<sup>330</sup> The application for a book privilege had to include the name of the author and the title of the book, but the manuscript itself or a description of its contents was not to be submitted. Hence, it seemed as

## 3.1.1.2 EARLY NOTICE REQUIREMENTS

The possession of a privilege was frequently announced by the enclosure of a print of the royal warrant or an abstract of it, or by the phrase '*cum privilegio regali*' or a variant of this, inside the book.<sup>332</sup> As the latter formula was widely applied, however, it caused much misunderstanding. Books appeared as being marked as printed '*cum privilegio*', while in fact no privilege had been obtained. Because these books often contained objectionable content or offensive addenda, many authorities required a copy of the privilege and licence to print to be placed in the book. This was intended to ease control of their authenticity and the source from which they were obtained.<sup>333</sup> In addition, all copies of a book had to carry the names of the printer and author. This was intended to facilitate their prosecution if the book were later to be prohibited.<sup>334</sup>

Thus, the first notice requirements relating to books took the form of instruments of press regulation. However, they also served an important signalling and publicity function, by warning competing booksellers that a particular book was protected by privilege. Moreover, the imprinted privilege usually contained relevant information about the content and the duration of protection.<sup>335</sup> In view of this, these notices also played a key role in pointing out the legal protection conferred on books.

In France, the Edict of Chateaubriant of 1551 required each printer to imprint, in each copy of a book, the certificate of the licence to print, together with the name of the author, the date of printing and a mark and address of the master printer under whose control the book had been produced.<sup>336</sup> Similar requirements appeared in the Ordinance of Moulins of 1566, the Declaration of 11 May 1612 and the Orders of 1618, 1649, 1686 and 1723.<sup>337</sup> These regulations ordered that, besides the licence to print, the privilege or an abstract of it had to be inserted in each copy of the book. The penalties for omitting a notice ranged from corporal punishment to destruction or confiscation of the books, or any other sanction deemed appropriate.<sup>338</sup>

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if the Dutch authorities wanted to avoid even the semblance of exercising pre-publication censorship.

See e.g. Van den Velden 1835, at 14, Bodel Nyenhuis 1892, at 29 and De Beaufort 1909, at 6.

<sup>331</sup> Schriks 2004, at 73 and 116-117. After the expiration of the privilege for the Authorized Version of the Bible in 1652, consent remained required. See art. 2 of the Regulation of the States of Holland of 19 March 1655 (in: Bodel Nyenhuis 1892, at 34-35). See also De Beaufort 1909, at 9.

<sup>332</sup> See e.g. Albright 1919, at 97, Ransom 1956, at 25-26 and Clegg 1997, at 8-9.

<sup>333</sup> Clegg 1997, at 10.

<sup>334</sup> Eisenhardt 1970, at 29.

<sup>335</sup> Imprints did not always provide adequate information about the duration of protection. In France, for example, privileges could be renewed. See Birn 1971, at 137 et seq. This complicated the assessment of terms. For this reason, art. 10 of the Decree of 17 March 1650 (in: Renouard 1838-1839, I, at 128) required renewed book privileges to be registered and copies of such books to be deposited.

<sup>336</sup> Secs VIII and XII of the Edict of Chateaubriant of 26 June 1551 (in: Higman 1979, at 64-66).

<sup>337</sup> See Renouard 1838-1839, I, at 48, 55, 57, 65-66, and 84.

<sup>338</sup> See e.g. art. 78 of the Ordinance of Moulins of February 1566 (in: Renouard 1838-1839, I, at 48) and art. 12 of the Order of 1 June 1618 (in: Renouard 1838-1839, I, at 55). It is unclear whether a failure to imprint a book privilege, or an abstract of it, would also cause the loss of protection.

In England, if a book had passed the examination of the royal censor, the printer was also obliged to give appropriate notice of the privilege and licence to print. The Proclamation of Henry VIII of 1538 obliged printers to mark each copy of the book with the notice ‘*cum privilegio regali ad imprimendum solum*’<sup>339</sup> and to include a copy or abstract of the privilege and licence in the book.<sup>340</sup> Pursuant to later statutes and decrees, including the 1637 Star Chamber Decree and the 1662 Press Licensing Act,<sup>341</sup> each copy of a book printed in England had to carry the names of the author, printer and publisher and date of printing on the title page. Moreover, the licence to print and the name of the licensor had to appear in the opening of the book.<sup>342</sup> This also applied to books protected by stationers’ copyright (see para. 3.1.2 below). An omission of the required notifications could lead to a fine, imprisonment, forfeiture of all copies of a book or a prohibition against further engaging in the printing trade.

Notification requirements were also laid down in the imperial censorship decrees in Germany. Several decrees required the name of the printer, the place of printing and, sometimes, the name of the author and year of publication to be inserted on the title page of any book.<sup>343</sup> Some decrees also required the text of a book privilege to be imprinted in the copies of the book.<sup>344</sup> These rules were strongly enforced. In the seventeenth and eighteenth centuries, the Imperial Books Commission of Frankfurt, which was instituted to control compliance with the imperial decrees concerning the book trade,<sup>345</sup> and the Leipzig Books Commission, which controlled the book trade

<sup>339</sup> See Greg 1954, concluding that the formula ‘*cum privilegio regali ad imprimendum solum*’ indicated the royal privilege (‘for sole, or exclusive, printing’) and not the required licence to print. Previously, this was heavily debated in scholarly circles. See e.g. Pollard 1916, at 22-24, Pollard 1919, Albright 1919, Albright 1923 and Reed 1917-1919, at 178 et seq. See also Clegg 1997, at 9-11.

<sup>340</sup> Proclamation of Henry VIII of 16 November 1538 (in: Pollard 1911, no. XXXVII, at 240-242). See also the proclamation of Henry VIII of 8 July 1546 (in: Pollard 1916, at 24-25).

<sup>341</sup> Secs IV and VIII of the Star Chamber Decree of 11 July 1637 (in: Arber 1875-1894, IV, at 528-536) and secs. III and VI of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435). See also the various interim regulations mentioned in note 316 above.

<sup>342</sup> Patterson 1968, at 134, argues that the Act of 1662 was, in fact, named the ‘Licensing Act’, because of the requirement in sec. III that the licence be printed verbatim at the beginning of each book.

<sup>343</sup> See e.g. art. 58 of the Diet of Augsburg of 1530, art. 156 of the Diet of Speyer of 1570 (see note 319 above), art. 1 of title XXXIV of the Imperial Regulation Order (*Reichspolizeiordnung*) of Augsburg of 30 June 1548, art. 2 of title XXXV of the Imperial Regulation Order (*Reichspolizeiordnung*) of Frankfurt of 9 November 1577 (in: Kapp & Goldfriedrich 1886-1913, I, at 777-779 and 783-785), art. 2 of the Imperial Mandate of Rudolph II of 15 March 1608 (in: Kaspers 1965, at 268-270) and the Imperial Edict of Charles VI of 18 July 1715 (in: Kapp & Goldfriedrich 1886-1913, II, at 455).

<sup>344</sup> See e.g. the Decree of 27 February 1686 (in: Kapp & Goldfriedrich 1886-1913, II, at 189), requiring any privilege issued in Saxony to be imprinted in the copies of each book. See also the Imperial Edict of Franz I of 10 February 1746, which seems to have proclaimed the loss of any book privilege, the certificate of which had not been imprinted in the copies of the book. See Franke 1889, at 70.

<sup>345</sup> The Frankfurt Books Commission was established by Decree of Maximilian II of 1 August 1569 (in: Kapp & Goldfriedrich 1886-1913, I, at 783-785). Its tasks were formalized in a Charter, the *Bücher-Konstitution*, by Imperial Mandate of Rudolph II of 15 March 1608 (in: Kaspers 1965, at 268-270). See Pütter 1774, at 176-177, Eisenhardt 1970, at 40 and 64-69 and Gieseke 1995, at 83-84.

in Saxony,<sup>346</sup> were instructed to ban from the Frankfurt and Leipzig book fairs all unlicensed books and books that did not carry the name of the author or printer and the place of printing.<sup>347</sup> Furthermore, the Frankfurt Books Commission also had the power to confiscate all books that were unjustly marked ‘*cum gratia et privilegio*’.<sup>348</sup>

During the time of occupation by the Holy Roman Empire, Dutch printers were also required to imprint, in each copy of a book, the names of the privilege granting authority, author and printer and the place of printing. Failure to do so could result in the withdrawal of the book privilege.<sup>349</sup> After the creation of the Dutch Republic, some decrees and ordinances also required printers to insert their names and places of residence, the name of the author or translator and dates of printing in each copy of the book, but this had no consequences for the grant of book privileges.<sup>350</sup> Rather these requirements seem to be the remains of earlier censorship regulations.

### 3.1.1.3 REGISTRATION OF LICENCES AND BOOK PRIVILEGES

Around the period of the transition from the sixteenth to the seventeenth century, a number of initiatives aimed at registering book privileges and licences to print were brought about. Pursuant to the Frankfurt Printers’ Ordinance of 1598, for example, the censorship authority in Frankfurt seems to have kept a register of books which had successfully passed pre-publication censorship.<sup>351</sup> Moreover, it appears that, in France, several book privileges were voluntarily registered. Printers and booksellers understood that the certificate, by which a royal privilege was granted, carried great value. Therefore, they decided to have it formally secured by an ‘*entérinement*’, i.e., an official confirmation and registration, in the court of a royal officer.<sup>352</sup>

In the first half of the seventeenth century, the registration of book privileges in France acquired a more compulsory character. By decree of 1608, the *Parlement* of Rouen judged that royal privileges had no force unless examined by and registered with the *Parlement*.<sup>353</sup> In Paris, the *Chambre Syndicelle* of the Guild of Booksellers

<sup>346</sup> See Kawohl 2002, at 276, note 59 and Kretschmer & Kawohl 2004, at 24.

<sup>347</sup> Art. 2 of the Imperial Mandate of Rudolph II of 15 March 1608 (in: Kaspers 1965, at 268-270) and the Saxonian Decree of 27 February 1686 (in: Kapp & Goldfriedrich 1886-1913, II, at 189).

<sup>348</sup> See Kapp & Goldfriedrich 1886-1913, I, at 620 and Gieseke 1995, at 84.

<sup>349</sup> See the Edict of 18 December 1544. Notification was also required by the Edict of 29 April 1550, but this time under pain of death. See Kenney 1960, at 150 and 179 and Machiels 1997, at 98-99.

<sup>350</sup> See Bodel Nyenhuis 1892, at 100 et seq., referring, inter alia, to the Ordinance of 20 December 1581.

<sup>351</sup> See Kawohl 2008a, para. 6.

<sup>352</sup> Armstrong 1990, at 68-69, stating that it is unclear how widely this ‘*entérinement*’ was applied.

<sup>353</sup> Renouard 1838-1839, I, at 115. In 1609, the Guild of Booksellers of Rouen was instructed to create a register, in which any person planning to print a book not yet printed in Rouen was required, before printing, to register the title and name of that book. If the printer failed to do so, the authorities could stop or interrupt the printing. See the Decree of the *Parlement* of Rouen of 23 March 1609, the terms of which were reaffirmed by the Decree of the *Parlement* of Rouen of 22 December 1644.

and Printers was also instructed to establish a register for recording privileges and licences to print.<sup>354</sup> The register was open for anyone to inspect. At first, it recorded only abstracts of documents, but since 1703, all entrances in the register had to be accurate and in full length, without erasures or additions in the margin. In addition, all transfers of rights needed to be recorded within three months.<sup>355</sup> The *Code de la Librairie* of 1723 strengthened these provisions by prohibiting anyone from selling or advertising books that were unregistered. Failure to comply with the registration requirements could lead to nullity of the book privilege or licence to print.<sup>356</sup>

In the mid-eighteenth century, the Council of State centralized the registration of book privileges and licences to print in Paris. In 1744, the *Code de la Librairie*, which initially applied to Paris only, was declared enforceable in the entire territory of France.<sup>357</sup> Consequently, all printers in France were obliged to record their book privileges and licences to print in the registers of the Parisian Guild of Booksellers and Printers. In 1777, the central registration in Paris ceased. The Council of State ruled that the registration of book privileges and licences to print had to take place, within two months, in the registers of the *Chambre Syndicelle* in the district where a privilege holder held residence.<sup>358</sup> This attracted criticism from the *avocat-général* of the Parlement of Paris, Antoine-Louis Séguier, who argued that the decentralized registration greatly endangered the consultation function of the registers, since few people would actually be able to refer to the different local registries.<sup>359</sup>

#### 3.1.1.4 LEGAL DEPOSIT OF COPIES OF BOOKS

Another event of great importance was the establishment of the first system of legal deposit of books by King Francis I. In 1537, he issued an ordinance requiring every French printer or bookseller to deliver a copy of each newly published book to the head of the Royal Library.<sup>360</sup> The penalty for non-compliance was confiscation of the entire edition of the book, plus an arbitrary fine for any copy not deposited. The main objectives of this decree were to enrich the royal collections and to preserve a permanent and tangible collection of literary works for future generations.<sup>361</sup>

<sup>354</sup> See art. 27 of the Book trade regulations of 1649 (in: Renouard 1838-1839, I, at 125). The register of the Guild of Booksellers and Printers in Paris became operational on 22 March 1653.

<sup>355</sup> See the Decree of the Council of State of 13 August 1703 (in: Renouard 1838-1839, I, at 148).

<sup>356</sup> See art. 106 of the Code regulating the book trade and printing (*Code de la Librairie*) of 28 February 1723 (in: Renouard 1838-1839, I, at 154).

<sup>357</sup> Renouard 1838-1839, I, at 86.

<sup>358</sup> Art. 10 of the Decree concerning privileges (*l'arrêt sur les privilèges*) of the Council of State of 30 August 1777 (in: Renouard 1838-1839, I, at 169-170).

<sup>359</sup> See the report of Antoine-Louis Séguier on the decrees of 1777 (in: Renouard 1838-1839, I, at 183).

<sup>360</sup> Ordinance of Montpellier of 28 December 1537 (in: Renouard 1838-1839, I, at 42-43, Lemaitre 1910, no. I, at 1-2 and Estivals 1961, no. I, at 107-108).

<sup>361</sup> See Lemaitre 1910, at ix-x and Estivals 1961, at 21.

By Edict of 1617, Louis XIII transformed the legal deposit into a prerequisite for the protection of books by royal privilege.<sup>362</sup> He required anyone who applied for a book privilege to deliver two copies of the book, at no cost, to the Royal Library.<sup>363</sup> Until the copies were deposited, the privilege was invalid and the book could not be put on sale.<sup>364</sup> Because, in practice, many books were not delivered,<sup>365</sup> the Council of State ordered the revocation of all privileges for which the deposit had not been completed.<sup>366</sup> Moreover, printers and booksellers that did not comply with the legal deposit requirement risked the confiscation of the entire edition of the book.<sup>367</sup>

The system imposed by the Edict of 1617 remained in force until the end of the *Ancien Régime*.<sup>368</sup> However, on several occasions the legal deposit requirement was expanded. While, in 1617, only two copies were to be deposited, by the end of the eighteenth century, the number of copies to be deposited was nine.<sup>369</sup> Furthermore, the penalties that could be imposed for non-compliance with the legal deposit were strengthened. In addition to the nullification of privileges and confiscation of the entire edition of a book, the failure to deliver the copies could be disciplined by corporal punishment and imprisonment or fines of up to two thousand pounds.<sup>370</sup>

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<sup>362</sup> Lemaitre 1910, at x.

<sup>363</sup> Royal Edict of 7 September 1617 (in: Lemaitre 1910, no. VI, at 4-5 and Estivals 1961, no. V, at 109).

<sup>364</sup> This was confirmed, inter alia, by the Decree of the Council of State of 19 March 1642 (in: Lemaitre 1910, no. XVII, at 9-10 and Estivals 1961, no. X, at 110).

<sup>365</sup> See Lemaitre 1910, at xv-xxiv and Estivals 1961, at 24-58.

<sup>366</sup> See the Decree of the Council of State of 29 March 1656 (in: Lemaitre 1910, no. XXI, at 11-12 and Estivals 1961, no. XII, at 111).

<sup>367</sup> See the Decrees of the Council of State of 17 May 1672 and 31 January 1685 (in: Lemaitre 1910, no. XXX, at 17-18 and no. XXXVII, at 19-20 and Estivals 1961, no. XX, at 113 and no. XXII, at 114). In practice, however, this sanction was hardly applied. See Lemaitre 1910, at xxiv-xxvii, who found only one case of a work having been confiscated, i.e., the opera of *Médée et Jason* on 13 December 1748 (in: Lemaitre 1910, no. LXX, at 34-35; Estivals 1961, no. XLIX, at 121).

<sup>368</sup> Lemaitre 1910, at x-xi.

<sup>369</sup> Arts 1 and 2 of the decree of the Council of State of 16 April 1785 (in: Lemaitre 1910, no. LXXXIII, at 37-40; Estivals 1961, no. LVII, at 122-124). Except for the two copies to be delivered at the Royal Library, one copy and, since 1703, three copies had to be delivered to the *Chambre Syndicelle* of the Parisian Guild of Booksellers and Printers (see the Orders of 1618 and 1620 and the Declaration of the King of 11 September 1703, in: Lemaitre 1910, no. VII, at 5, no. XI, at 6-7 and no. XLII, at 22; Estivals 1961, no. VI, at 109), one to the Cabinet of the King in the Louvre (see the Letters patent of Louis XIV of August 1658, in: Lemaitre 1910, no. XXIII, at 13-14; Estivals 1961, no. XIV, at 111-112), one to the Chancellor (see the Decree of the Council of State of 21 October 1638 and art. 9 of the Edict of the King of 21 August 1686, in: Lemaitre 1910, no. XV, at 8 and no. XXXVIII, at 20-21; Estivals 1961, no. IX, at 110 and no. XXIII, at 114), one to the censor (see the Decree of the Council of State of 17 October 1704 and art. 108 of the Order of 28 February 1723, in: Lemaitre 1910, no. XLIII, at 22-23 and no. LV, at 29-30; Estivals 1961, no. XXVI, at 115 and no. XXXV, at 118) and one to the Minister of Justice (see the Order of 28 February 1723 and art. 2 of the Decree of the Council of State of 16 April 1785, which have already been referred to in this footnote).

<sup>370</sup> See e.g. the Decrees of the Council of State of 19 March 1642, 29 March 1656, 17 May 1672 and 17 October 1704 and the Decree of 10 July 1745 (in: Lemaitre 1910, no. XVII, at 9-10, no. XXI, at 11-12, no. XXX, at 17-18, no. XLIII, at 22-23 and no. LXIX, at 33-34; Estivals 1961, no. X, at 110, no. XII, at 111, no. XX, at 113 and no. XXVI, at 115).

In England, the legal deposit of books had its origin in an agreement concluded in 1610 between Sir Thomas Bodley, founder of the Oxford University Library, and the London Company of Stationers.<sup>371</sup> This agreement, also known as the Bodleian Agreement, was a perpetual covenant to supply the Oxford University Library with a free copy of every new book printed by members of the Stationers' Company.<sup>372</sup> It received an official status only after its incorporation in the Star Chamber Decree of 1637. This decree required a deposit of three copies, one of which was intended for the Bodleian library.<sup>373</sup> The other two copies were to be deposited with the licensing authority, which used them to control the content of the book.<sup>374</sup> After examination, one of the copies was returned to the bookseller. The other copy was retained by the licensing authority to control whether the book was not subsequently altered.<sup>375</sup>

A similar regime was established by the Press Licensing Act of 1662. Instead of the obligation to deposit one copy for the Oxford University Library, however, this Act required three copies to be delivered for the use of the Royal Library and the public libraries of the Universities of Oxford and Cambridge.<sup>376</sup> As for the licensing authority, the deposit of copies remained the same.<sup>377</sup> The 1662 Act did not contain specific penalties for non-compliance with the deposit requirement.<sup>378</sup> A few years later, the Press Licensing Act of 1665 laid down a fine of five pounds, together with the value of the copy, for every book not received by the said libraries.<sup>379</sup> In May

<sup>371</sup> See 'A deed of grant from the Stationers' Company entitling the Bodleian Library to the first correct impression of every book printed by them' of 1610 (in: Barrington Partridge 1938, at 288-290). See also Jackson 1957, at 48-49, noting an entry of 14 March 1610 referring to the Bodleian Agreement.

<sup>372</sup> See Barrington Partridge 1938, at 17-19. That the agreement was taken seriously can be derived from a by-law adopted in 1611, requiring all stationers to deliver to the wardens, within ten days of publication, one complete copy of the first edition and reprint of every new book, for the use of the Bodleian library, on pain of a sum equal to treble the value of the copy not delivered. See 'An order at a meeting of the master wardens assistants of the company of stationers, for the better confirming the preceding deed of grant', 18 January 1611-12 (in: Barrington Partridge 1938, at 290-291).

<sup>373</sup> Sec. XXXIII of the Star Chamber Decree of 11 July 1637 (in: Arber 1875-1894, IV, at 528-536).

<sup>374</sup> This was adopted from earlier regulations. See e.g. the Proclamation of Henry VIII of 8 July 1546, ordering 'that from henceforth no printer do print any maner of englishe boke, balet or playe, but he ... shall presente the fyrst copie to the mayre of the towne where he dwelleth, and not to suffer any of the copies to go out of his handes within two dayes next folowing' (in: Pollard 1916, at 24-25).

<sup>375</sup> Sec. IV of the Star Chamber Decree of 11 July 1637 (in: Arber 1875-1894, IV, at 528-536).

<sup>376</sup> Sec. XVI of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435). The Universities of Oxford and Cambridge were chosen as repositories because they were among the greatest educational centers in England and, more importantly, were under the immediate control of the state and church. Thus, they could strictly monitor and easily detect publications of blasphemous, seditious or controversial nature. See Barrington Partridge 1938, at 24.

<sup>377</sup> Sec. III of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435).

<sup>378</sup> Sec. XV of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435) contained a general penalty clause, prohibiting anyone convicted for committing an offence against a provision of the Act from exercising his respective trade for three years and, for the second offence, forever thereafter. Further penalties included a fine, imprisonment or corporal punishment.

<sup>379</sup> Secs II and III of the Press Licensing Act (1665), 17 Car. II, c. 4 (in: Raithby 1819, V, at 577).

1695, when the 1662 Licensing Act expired, the delivery of copies ceased.<sup>380</sup> This situation would last until the adoption of the Statute of Queen Anne in 1710.

In Germany, the Frankfurt Books Commission was put in charge of receiving the free copies of books (*Plichtexemplare*) that were to be deposited on behalf of the Emperor.<sup>381</sup> Initially, the deposit obligation applied to privileged works only,<sup>382</sup> but, from 1608 onward, also to non-privileged works.<sup>383</sup> In the course of the seventeenth century, the deposit was gradually extended. While, at the outset, only two or three copies needed to be deposited for privileged works and one for unprivileged works, the number gradually increased to seven copies for privileged and three copies for non-privileged works.<sup>384</sup> This practice was codified in the Imperial Edict of 1746.<sup>385</sup> This Edict required the copies to be deposited eight days before the books were first put on sale.<sup>386</sup> This gave the Frankfurt Books Commission the chance to prohibit the trade of books the deposit of which had not been timely completed.

Later, when the book trade moved to Leipzig, the Books Commission of Leipzig was also responsible for enforcing the deposit requirement. Within the first week of the Leipzig book fair, eighteen, and later twenty, free copies of books needed to be deposited with the *Bücherfiskal*.<sup>387</sup> If the copies were not delivered in the first week, twice the number of copies had to be delivered in the second week. Moreover, if no copies were deposited during the entire book fair, the bookseller risked the loss of his book privilege and the confiscation of all copies of the relevant book.<sup>388</sup>

In the Dutch Republic, even though the book privilege system was not too much regulated, printers and booksellers were under the obligation to deposit free copies of books. In 1679, for example, the States of Holland required anyone who applied for a book privilege to deposit one copy of the book to the library of the University of Leiden, on pain of deprivation of the legal effects of the privilege.<sup>389</sup> The copies were to be delivered within six weeks after first publication. Since 1728, the deposit

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<sup>380</sup> See Barrington Partridge 1938, at 31.

<sup>381</sup> Decree of Maximilian II of 1 August 1569 (in: Kapp & Goldfriedrich 1886-1913, I, at 783-785).

<sup>382</sup> In the sixteenth century, the deposit of copies was often a condition for the grant of a book privilege and, as such, named in the certificate. See Franke 1889, at 60-61 and Flemming 1940, at 11.

<sup>383</sup> See art. 2 of the Imperial Mandate of Rudolph II of 15 March 1608 (in: Kaspers 1965, at 268-270). The Imperial Order of 21 August 1625 required the printer or bookseller to deposit free copies of any newly printed book. See e.g. Franke 1889, at 16-18.

<sup>384</sup> See Franke 1889, at 22 and Pfeiffer 1913, at 9. Of the copies collected by the Books Commission, one was retained and one was sent to the Imperial Arch Chancellor (*Reichserzkanzler*), the Elector of Mainz. The other copies were forwarded to the Imperial Chancery (*Reichshofkanzlei*) in Vienna (see the Imperial Mandate of Rudolph II of 15 March 1608, in: Kaspers 1965, at 268-270) or the Imperial Library (see the Patent of Ferdinand II of 26 August 1624, in: Franke 1889, at 16-17).

<sup>385</sup> Imperial Edict of Franz I of 10 February 1746 (in: Franke 1889, at 22 et seq. and 69-70).

<sup>386</sup> See Franke 1889, at 23 and Pfeiffer 1913, at 9.

<sup>387</sup> Franke 1889, at 85 et seq.

<sup>388</sup> See the Saxonian Decree of 27 February 1686 (in: Kapp & Goldfriedrich 1886-1913, II, at 189).

<sup>389</sup> Resolution of the States of Holland of 5 December 1679 (in: Bodel Nyenhuis 1892, at 135-136). See also Van den Velden 1835, at 14-15, note 1; De Beaufort 1909, at 7 and Schriks 2004, at 117-118.

also applied to other writings, such as maps and charts. Moreover, except for nullity of the book privilege, non-compliance could be punished with a fine of six hundred guilders. To ensure obedience, the States of Holland further decided not to issue the certificate of the grant of a book privilege until the copies were delivered.<sup>390</sup> Similar deposit requirements existed in other provinces of the Dutch Republic.<sup>391</sup>

### 3.1.2 THE SYSTEM OF STATIONERS' COPYRIGHT

As observed, in many European countries, a parallel system of protection developed alongside the book privilege system.<sup>392</sup> Safeguarded by internal ordinances and by-laws of printers' and publishers's guilds, or based on customary law, the stationers' copyright and the *droit de copie*, *Verlagsrecht* or *kopijrecht* protected printers and booksellers against the unauthorized reprinting and publication of their books.

In England, stationers' copyright ultimately exceeded privileges in importance.<sup>393</sup> One reason for this is that, in 1557, the London Stationers' Company was officially granted a monopoly on printing by the Crown. The Royal Charter of 1557 required anyone who wished to practise 'the art or mystery of printing' in England to be in the possession of a royal privilege or be a member of the Stationers' Company.<sup>394</sup> In addition, even though royal privileges granted better protection,<sup>395</sup> little by little, the stationers' copyright started to prevail.<sup>396</sup> In the period between 1666 and 1775, the courts had gradually delimited the King's prerogative of printing.<sup>397</sup> Furthermore, as stationers' copyright was deemed to exist in perpetuity,<sup>398</sup> it gained importance over temporary book privileges, as it allowed the lucrative works of Shakespeare, Milton and their contemporaries to be protected against reprinting in eternity.<sup>399</sup>

<sup>390</sup> Resolution of the States of Holland of 30 April 1728 (in: Bodel Nyenhuis 1892, at 150-151). See also Van den Velden 1835, at 14-15, note 1; De Beaufort 1909, at 7 and Schriks 2004, at 121-123.

<sup>391</sup> The States of Gelderland, for instance, required anyone to whom they had granted a book privilege to deliver one copy of the book to the library of the Provincial Academy in Harderwijk. See Resolution of the States of Gelderland of 2 October 1738, referred to in: De Beaufort 1909, at 7.

<sup>392</sup> See Schriks 2004, at 23, who strongly emphasizes that the system of stationers' copyright (or *droit de copie*, *Verlagsrecht* or *kopijrecht*) should not be identified with the system of book privileges.

<sup>393</sup> See Patterson 1968, at 113. See also Rose 1993, at 12, referring to the system of stationers' copyright as an 'ultimately more important system of trade regulation' than the system of book privileges.

<sup>394</sup> Charter of the Company of Stationers (1557), Patent Rolls, 3 & 4 Philip & Mary, part 10, membrane 46 (in: Arber 1875-1894, I, at xxvii-xxxii). This charter was officially endorsed by Queen Elizabeth I in 1559. See Confirmation Roll, 1 Elizabeth, part 4, membrane 15 (in: Arber 1875-1894, I, at xxxii).

<sup>395</sup> See Patterson 1968, at 78-79 and 80, indicating that royal privileges contained their own sanctions, were more advantageous and carried more prestige than the stationers' copyright. Moreover, in case of conflict, royal book privileges prevailed over the quasi-private stationer's copyright.

<sup>396</sup> *Ibid.*, at 113.

<sup>397</sup> *Ibid.*, at 87-90.

<sup>398</sup> See e.g. Holdsworth 1920, at 844 and Rose 1993, at 12.

<sup>399</sup> Patterson 1968, at 92.

In addition to supporting the printing monopoly of the Company of Stationers,<sup>400</sup> the Royal Charter of 1557 aimed at appointing the Stationers' Company as a central agency for censorship to assist the Crown in controlling the dissemination of books. For that reason, it gave the stationers large powers of control 'in order to have them serve as policemen of the press'.<sup>401</sup> Accordingly, the system of stationers' copyright was yet another symptom of the 'marriage' between censorship and trade regulation in the early modern days.<sup>402</sup> Even so, it also provided the members of the Stationers' Company with adequate legal protection against rival printers and publishers.<sup>403</sup>

The stationers' copyright was obtained by entrance of copy in the Hall Book, i.e., the register book of the Stationers' Company. Only manuscripts that were examined and approved by the licensing authorities were accepted by the wardens for entering into the register.<sup>404</sup> Moreover, no books were registered, until the registration fee was paid. Each book entry recorded the title of the work, the name of the right holder, the entry date and the entrance fee.<sup>405</sup> Occasionally, the register book also contained particulars about the acquisition of the manuscript by a printers or bookseller and, if relevant, about the sale, purchase or assignment of the stationers' copyright.<sup>406</sup>

Although printers and booksellers certainly acquired stationers' copyright upon registration of the work, it seems that, in the early days of the Stationers' Company, entrance of copy was a custom rather than a formal requirement for protection.<sup>407</sup> It appears that copies were entered in the register at the stationers' will and choice.<sup>408</sup> Moreover, the earlier book entries resemble receipts for registration fees rather than signalling protection.<sup>409</sup> Nevertheless, registration could provide the stationers with important evidentiary benefits. In case of conflicting interests, a priority of entrance would, in the usual course of events, substantiate a claim for protection.<sup>410</sup>

Around the end of the sixteenth century, registration became a legal obligation.<sup>411</sup> Through several decrees, the Court of Assistants, i.e., the administrative court of the Stationers' Company, summoned stationers to enter copies in the register. At first, it

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<sup>400</sup> See e.g. the Order of the Court of Assistance of 19 January 1597/1598 (in: Greg & Boswell 1930, at 59), limiting the entrance of copies in the registers to members of the Stationers' Company.

<sup>401</sup> Patterson 1968, at 6. *Ibid.*, at 36.

<sup>402</sup> Rose 1993, at 13.

<sup>403</sup> Patterson 1968, at 5 and 71.

<sup>404</sup> *Ibid.*, at 52.

<sup>405</sup> Clegg 1997, at 16.

<sup>406</sup> Sometimes, when a work was registered before it was written, the entries also indicated that the work had to be approved by the authorities before it was allowed to be printed. See Patterson 1968, at 72.

<sup>407</sup> Patterson 1968, at 56-58.

<sup>408</sup> Sisson 1960, at 18.

<sup>409</sup> See Arber 1875-1894, I, at xvi-xvii and Pollard 1937, at 256.

<sup>410</sup> Greg & Boswell 1930, at lxix-lxx. This may explain why, between 1576 and 1640, between sixty and seventy per cent of all London-printed books were entered in the registers. See Greg 1944, at 7.

<sup>411</sup> Patterson 1968, at 59-63.

imposed fines upon failure to do so.<sup>412</sup> Later, registration was firmly established as a strict requirement, on pain of forfeiture of the stationers' copyright in case of failure to enter.<sup>413</sup> Finally, when the 1637 Star Chamber Decree ordered that all books were to be lawfully licensed and authorized and duly entered into the Registers Book at Stationers' Hall, registration became an official permission, an '*imprimatur*'.<sup>414</sup> This remained so in subsequent statutes,<sup>415</sup> until the licensing system lapsed in 1695.

In most countries on the European mainland, the *droit de copie*, *Verlagsrecht* or *kopijrecht* was not as intensely regulated, or at least not accompanied by a centrally organized registration system as the stationers' copyright in early modern England. Nonetheless, in some countries, there were regional initiatives aimed at securing the rights of publishers. In the Dutch Republic, members of the Guild of Printers and Booksellers in Leiden concluded an 'Indissoluble Contract' in 1660, by which they agreed not to reprint each other's books.<sup>416</sup> To add force to this agreement, a register was created in which the *kopijrecht* could be entered.<sup>417</sup> This seems to have inspired other local publishers' guilds to establish a similar regime of protection.<sup>418</sup>

In Germany, some states had already recognized the existence of a *Verlagsrecht* in the late sixteenth century. Often, this right was conferred on the first publisher of a book.<sup>419</sup> The Frankfurt Printers' and Booksellers' Ordinance of 1588, for example, prohibited the reprinting of books 'which another printer has so far been the only one to print'.<sup>420</sup> Later, some states introduced a more formalized system. Because it often proved difficult and sometimes even impossible for publishers to demonstrate that they had legally acquired a *Verlagsrecht* from the author, the Saxonian Statute of 1773 required publishers at the Leipzig book fair to either obtain a privilege or to register their publications with the Leipzig Books Commission.<sup>421</sup> This registration had the same force and effect and enjoyed the same sovereign protection as a book privilege.<sup>422</sup> The term of protection of registered books was ten years, but could be

<sup>412</sup> See e.g. the Orders of the Court of Assistance of 2 August 1596, 7 March 1597, 2 April 1599, and September/October 1602 (in: Arber 1875-1894, II, at 826, 829 and 835).

<sup>413</sup> Order of the Court of Assistance of 3 April 1637 (in: Jackson 1957, at 293-294).

<sup>414</sup> Sec. II of the Star Chamber Decree of 11 July 1637 (in: Arber 1875-1894, IV, at 528-536).

<sup>415</sup> See e.g. sec. II of the Press Licensing Act (1662), 13 & 14 Car. II, c. 33 (in: Raithby 1819, V, at 428-435) and the various interim regulations mentioned in note 316 above.

<sup>416</sup> Schriks 2004, at 93-98.

<sup>417</sup> Art. XII of the 'Indissoluble Contract' of the *Leids Collegie* of 1660 (in: Schriks 2004, at 677-681).

<sup>418</sup> See Schriks 2004, at 98.

<sup>419</sup> See e.g. Gieseke 1995, at 93 and Kawohl 2008a, para. 2.

<sup>420</sup> Art. 2 of the Frankfurt Printers' and Booksellers' Ordinance of 1588 (in: Kawohl 2008a, para. 5). The Frankfurt Printers' and Booksellers' Ordinances of 1598 and 1660 contained a similar rule.

<sup>421</sup> See arts 2 and 3 of the Saxonian Statute (1773), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

<sup>422</sup> *Ibid.*, art. 3 and art. II of regulation A, which accompanied the Saxonian Statute.

renewed by supplementary registration.<sup>423</sup> Since this was not limited to a maximum, it seems that the protection of registered books could endure indefinitely.<sup>424</sup>

### 3.1.3 THE DUAL NATURE OF THE EARLY BOOK FORMALITIES

The preceding overview has demonstrated that both book privileges and stationers' copyright were part of a larger system of press control and trade regulation. For this reason, it is difficult to identify the exact legal nature of the formalities with which the systems of book privileges and stationers' copyright were surrounded. Probably the better answer is that the early book formalities had a twofold character.

On the one hand, as part of the system of press regulation, the various formalities helped to assist the authorities in exercising censorship. Imprinted notices of book privileges and licences to print, for example, eased the control of their authenticity and enabled the prosecution of printers and booksellers who published unlicensed books or writings with objectionable content. Similarly, the mandatory registration of privileges, licences to print and stationers' copyright facilitated the monitoring of unprivileged or unlicensed works. Finally, although legal deposit primarily served the purpose of enriching libraries, the deposited copies were also used by licensing authorities to control the content of books before and after publication.

On the other hand, as part of the system of trade regulation, the same formalities also facilitated the exercise and enforcement of rights. The imprinted notices served as warnings to competing booksellers that a book privilege had been obtained. Also, they provided information about the privilege owner and the scope and duration of protection. The registers of privileges and stationers' copyright performed identical signalling and information functions. Furthermore, the deposited copies of a book provided privilege holders or the owners of a stationers' copyright with an authentic piece of evidence to prove infringement by counterfeiters.<sup>425</sup> Hence, the formalities of the early systems of book privileges and stationers' copyright were important for printers and booksellers to establish a claim for protection and for rival printers and booksellers to detect which books were protected and which were not.

Which of the two purposes – censorship or trade regulation – prevailed largely depends on the country and era. In the early days of printing, it seems that most of the book regulations were inspired by censorship motivations. Later, the economic ordering of the printing and publishing markets also became an important objective. This was especially so in the Dutch Republic, where political and religious control was minimal.<sup>426</sup> But also in England, the regulation of the book trade became a key constituent of the system of stationers' copyright. While being linked to censorship,

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<sup>423</sup> *Ibid.*, art. IV of regulation A.

<sup>424</sup> Gieseke 1995, at 152.

<sup>425</sup> See e.g. Wünschmann 1938, at 7-8 and 18.

<sup>426</sup> Schriks 2004, at 115-116.

the stationers' copyright ultimately had a public-private character. This was due to the involvement of the Stationers' Company, for which the protection of the book trade and the economic interests of its members was of utmost importance.

### 3.2 Formalities in Early Modern Copyright Law

The first British copyright act was the Statute of Queen Anne of 1710,<sup>427</sup> which was adopted following the lapse of the licensing system in 1695.<sup>428</sup> Witnessing a loss of control of the book trade, the Company of Stationers urged Parliament to restore the exclusivity on printing it had enjoyed in the preceding decades. The Parliament also felt the need to bring back order in the book trade, but at the same time was wary of extending the stationers' monopoly.<sup>429</sup> Hence, when adopting the Statute of Anne, it conferred the right to print and reprint copies of a book not on the stationers, but on authors or their assignees.<sup>430</sup> Even though, in practice, stationers refused to publish books unless the copyright was assigned to them,<sup>431</sup> the Statute of Anne is known to be one of the first copyright laws in which the authors' rights were explicitly recognized.

In other European countries, the privilege and censorship systems came to an end at the close of the eighteenth century. This was attributable to a great extent to the liberal ideas that spread over Europe after the French Revolution of 1789. This was a decisive event in the development of the freedom of the press and, for many states in Europe, marked the beginning of an evolution towards true copyright protection. Before long, the first copyright laws were adopted. Most formalities of the privilege system found their way into these laws. This time, however, they were not linked to press regulation. Rather, they had become 'genuine' copyright formalities.

On the other side of the Atlantic Ocean, in the US, the first state copyright laws were adopted after the American War of Independence (1775-1783).<sup>432</sup> A few years later, the US Constitution authorized Congress 'to promote the progress of science and the useful arts, by securing, for limited times, to authors ... the exclusive right to their respective writings'.<sup>433</sup> In pursuance of this constitutional power, Congress passed the first Federal Copyright Act in 1790.<sup>434</sup> The federal law, which supplanted

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<sup>427</sup> An Act for the Encouragement of Learning (1710), 8 Anne, c. 19.

<sup>428</sup> See Patterson 1968, at 138-142 and Sherman & Bently 1999, at 11-12.

<sup>429</sup> See e.g. the House of Commons' session of 17 April 1695, in *Journal of the House of Commons*, vol. 11: 1693-1697 (1803), at 305-308: <<http://www.british-history.ac.uk/report.asp?compid=39156>>.

<sup>430</sup> Sec. I of the Statute of Anne (1710).

<sup>431</sup> Patterson 1968, at 151-152, concluding that, in the early days, the copyright protected by the Statute of Anne basically remained a publishers' right. See also Sherman & Bently 1999, at 12.

<sup>432</sup> For the texts of the different state copyright laws, see Copyright Enactments 1963, at 1-21.

<sup>433</sup> Art. 1, sec. 8, of the US Constitution of 17 September 1787 (in: Copyright Enactments 1963, at 21).

<sup>434</sup> Act of 31 May 1790, 1<sup>st</sup> Cong., 2<sup>nd</sup> Sess., c. 15 (in: Copyright Enactments 1963, at 22-24).

the earlier state copyright laws, regulated US copyright law ever since. Copyright in unpublished works, however, remained subject to state common law.<sup>435</sup>

This section gives an overview of formalities in the early modern copyright laws of the UK, continental European and the US (para. 3.2.1) and describes their nature and legal effects (para. 3.2.2). We shall see that, in this period, the nature and legal effects of copyright formalities varied greatly between the different countries. This section concludes by identifying the main reasons for this divide (para. 3.2.3).

### 3.2.1 AN OVERVIEW OF FORMALITIES IN NATIONAL COPYRIGHT LAW

Several formalities of the ‘old’ system of book privileges and stationers’ copyright were continued when the first copyright laws were adopted. A short overview of the early copyright laws of the UK, continental Europe and the US illustrates this.

#### 3.2.1.1 UNITED KINGDOM

The Statute of Anne of 1710, which would remain in force until the mid-nineteenth century, contained two formalities. Before publication, all copyright recipients were required to enter the titles of books in the registers of the Stationers’ Company.<sup>436</sup> In addition, nine copies of new books and reprints with additions were to be deposited with the Stationers’ Company’s warehouse keeper.<sup>437</sup> In 1801, the number of copies to be delivered was increased to eleven,<sup>438</sup> but, in 1836, was lowered again to five.<sup>439</sup>

Other types of copyright, such as that in engravings, prints and lithographs and sculptures, models and casts, were not dependent on registration or deposit. Rather, the Engravers’ Copyright Act of 1735 required the date of first publication and the name of the copyright owner to be truly engraved on each plate and printed on each print.<sup>440</sup> Equally, the Sculpture Copyright Acts of 1798 and 1814 required the name

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<sup>435</sup> This lasted until 1978, when the 1976 US Copyright Act took effect and pre-empted state common law copyright with respect to unpublished works. See Goldstein 2001, at 149 and Goldstein & Hugenholtz 2010, at 172.

<sup>436</sup> Sec. II of the Statute of Anne (1710).

<sup>437</sup> *Ibid.*, sec. V. The copies were destined for the use of the Royal Library (later: the British Museum), the university libraries of Oxford, Cambridge and four universities in Scotland, the library of Sion College in London and the library of the Faculty of Advocates at Edinburgh.

<sup>438</sup> The Copyright Act (1801), 41 Geo. III, c. 107 extended British copyright law to Ireland and required two extra copies for the use of the libraries of Trinity College and the King’s Inns in Dublin (sec. 6).

<sup>439</sup> Sec. 1 of the Copyright Act (1836), 6 and 7 Will. IV, c. 110. See Barrington Partridge 1938, at 60-79, who explains that the number of copies was reduced, so as to alleviate the burden for the book trade, which for long had tried to find a means of relief from the outrageous ‘tax’ of the deposit.

<sup>440</sup> Sec. 1 of the Engravers’ Copyright Act (1735), 8 Geo. II, c. 13.

of the right owner and the date of publication or exhibition to be put on each work before it would be published and exposed to sale or otherwise put forth.<sup>441</sup>

### 3.2.1.2 CONTINENTAL EUROPE

On the European continent, the early legislation on literary and artistic property also involved various formalities. The 1793 French decree, which conferred an exclusive right on ‘writings of all kind’ and ‘productions of the *beaux arts*’, required authors of literature and engravings to deposit two copies with the National Library or the Cabinet of Prints of the Republic, respectively.<sup>442</sup> The formality of legal deposit was also contained in early Dutch copyright law<sup>443</sup> and in the copyright laws of several German states, such as those of Bavaria, Hamburg, Holstein and Lübeck.<sup>444</sup>

Another formality that was sometimes applied was the registration of works. In Saxony, registration on the Leipzig *Eintragsrolle* (entrance roll) was a condition for the protection of literary and artistic works.<sup>445</sup> In Prussia, while literary and musical works were not subject to registration, the authors of artistic works had to register a claim at the *obersten Curatorium der Künste* of the Ministry for Cultural Affairs in order to reserve an exclusive reproduction right in their works.<sup>446</sup> A similar rule was provided for in the state copyright law of Saxe-Weimar-Eisenach.<sup>447</sup>

Some laws also contained a notice formality. In the Netherlands, the publisher’s name and the place and date of publication were to be imprinted on the work.<sup>448</sup> The Bavarian law also required all works to be marked with the author’s or publisher’s

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<sup>441</sup> Sec. 1 of the Models and Busto Act (1798), 38 Geo. III, c.71 and sec. 1 of the Sculpture Copyright Act (1814), 54 Geo. III, c. 56.

<sup>442</sup> Art. 6 of the Decree of 19 July 1793 regarding the property rights of authors to writings of all kinds, of composers of music, of painters and illustrators.

<sup>443</sup> See art. 7(b) of the Act of the Batavian Republic of 3 June 1803, art. 12 of the Sovereign Enactment of 24 January 1814 and art. 6(c) of the Dutch Copyright Act of 25 January 1817.

<sup>444</sup> See e.g. art. V of the Bavarian Act of 15 April 1840, art. 11 of the Decree of Hamburg of 1847, art. II of the Mandate of the Chancellery (*Kanzleipatent*) of 30 November 1833 for the Duchy of Holstein and art. 7 of the Regulation of Lübeck of 31 July 1841. It appears that the legal deposit requirement was also linked to the protection of literary and artistic property in Sonderhausen and Luxemburg. In other German states, legal deposit was less commonly required. See Franke 1889, at 72-73.

<sup>445</sup> Saxonian Act on the protection of rights to literary products and works of art, as promulgated on 22 February 1844. See also Kawohl 2002, at 276 (notes 61 and 62).

<sup>446</sup> Arts 27 and 28 of the Prussian Act of 11 June 1837 for the protection of property in works of science and the arts against reprinting and reproduction.

<sup>447</sup> Arts 27 and 28 of the Act of Saxe-Weimar-Eisenach of 11 January 1839.

<sup>448</sup> See art. 7(a) of the Act of the Batavian Republic of 3 June 1803, art. 5 of the Sovereign Enactment of 24 January 1814 and art. 6(b) of the Dutch Copyright Act of 25 January 1817.

name.<sup>449</sup> Additionally, some copyright laws laid down reservation requirements for retaining specific rights, such as the translation right for literary works.<sup>450</sup>

### 3.2.1.3 UNITED STATES OF AMERICA

In the US, the early state copyright laws were modeled after the Statute of Anne. As a consequence, most of them contained a requirement to register or deposit a certain number of copies of a work.<sup>451</sup> Furthermore, some laws required the author's name or a notice of registration to be affixed to books and other literary works.<sup>452</sup>

The US Federal Copyright Act of 1790 imposed various copyright formalities. In order to secure protection in published works, it first of all required pre-publication registration.<sup>453</sup> Moreover, before expiration of the initial term of fourteen and, later, twenty-eight years, the title of a work had to be registered again, so as to renew the copyright for a further term of fourteen years.<sup>454</sup> Copyright owners were obliged to advertise the registration and renewal in US newspapers.<sup>455</sup> In addition, since 1802, copies of a work had to be marked with a copy of the record of entrance or a notice of registration and an indication of the name and residence of the right owner.<sup>456</sup>

The Federal Copyright Act of 1790 also contained the requirement to deposit one copy of a work, within six months after publication, to the Secretary of State.<sup>457</sup> The copies were preserved by the Department of State and, since 1831, combined with a

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<sup>449</sup> Art. II of the Bavarian Act of 15 April 1840.

<sup>450</sup> See e.g. art. 4(b) of the Prussian Act of 11 June 1837, art. 4 of the Act of Hessen-Darmstadt of 23 September 1830, art. 4(b) of the Act of Saxe-Weimar-Eisenach of 11 January 1839; and art. 2 of the Act of Braunschweig of 1842. The French Decree of 13 January 1791 on theatrical plays, which was followed by the Decree of 30 August 1792 and repealed by the Decree of 1 September 1793, required authors who wished to retain a public performance right in their plays, to publicly announce this by a notice, which should be deposited with a notary and printed at the text of the play.

<sup>451</sup> See the Connecticut Act of January 1783, sec. 3 of the Maryland Act of 21 April 1783, sec. 1 of the New Jersey Act of 27 May 1783, sec. 4 of the Pennsylvania Act of 15 March 1784, the South Carolina Act of 26 March 1784, sec. 2 of the Virginia Act of October 1785, sec. 1 of the North Carolina Act of 19 November 1785, sec. 1 of the Georgia Act of 3 February 1786, sec. 1 of the New York Act of 29 April 1786 (registration) and the Massachusetts Act of 17 March 1783 (deposit).

<sup>452</sup> See the Massachusetts Act of 17 March 1783, the New Hampshire Act of 7 November 1783, the Rhode Island Act of December 1783 and sec. 6 of the Pennsylvania Act of 15 March 1784.

<sup>453</sup> See sec. 3 of the US Federal Copyright Act 1790. See also secs 1 and 2 of the Act of 29 April 1802, 7th Cong., 1st Sess., c. 36 (in: Copyright Enactments 1963, at 24-26) and sec. 4 of the Copyright Act of 3 February 1831, 21<sup>st</sup> Cong., 2<sup>nd</sup> Sess., c. 16 (in: Copyright Enactments 1963, at 27-31).

<sup>454</sup> See sec. 1 of the US Federal Copyright Act 1790 and secs 1 and 2 of the Copyright Act 1831.

<sup>455</sup> See secs 1 and 3 of the US Federal Copyright Act 1790. After 1831, the requirement of newspaper publication applied only to renewal registration. See sec. 3 of the Copyright Act 1831.

<sup>456</sup> See secs 1 and 2 of the Act of 29 April 1802 and sec. 5 of the Copyright Act 1831.

<sup>457</sup> See sec. 4 of the US Federal Copyright Act 1790 and secs 1 and 2 of the Act of 29 April 1802.

list of copyright entries.<sup>458</sup> These records could be used ‘at any future period, should the copyright be contested, or an unfounded claim of authorship asserted’.<sup>459</sup>

Since 1834, the law also required a recordation of deeds of transfer of copyright. Deeds that remained unrecorded were considered ‘fraudulent and void against any subsequent purchaser and mortgagee for valuable consideration without notice’.<sup>460</sup>

### 3.2.2 THE NATURE AND LEGAL EFFECTS OF THE EARLY COPYRIGHT FORMALITIES

The formalities in the early literary and artistic property laws differed significantly in nature and legal effects. While several formalities in the British copyright system had declaratory effect only, most formalities in the early-nineteenth century literary and artistic property laws in continental Europe were constitutive of copyright. This was equally the case in US federal copyright law, which from its very inception was construed by the courts as a government grant. Therefore, formalities were believed to be indispensable prerequisites for acquiring federal copyright protection.

#### 3.2.2.1 UNITED KINGDOM

In the UK, the legal effects of formalities were reasonably mild. Failure to register affected the enforcement of copyright, but not the copyright as such. The Statute of Anne ruled that ‘nothing in this act contained shall be construed to extend to subject any ... person whatsoever, to the forfeitures or penalties therein mentioned, ... unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the Company of Stationers’.<sup>461</sup> Also, if registration were not completed due to a refusal or negligence by the clerk, an advertisement in the Gazette would ‘have the like benefit, as if such entry ... had been duly made’.<sup>462</sup> Hence, unless a work was registered or advertised, the statutory forfeitures or penalties could not be invoked in a copyright infringement suit.

Beyond this purpose, registration was not required. In *Beckford v. Hood*,<sup>463</sup> the Court of King’s Bench held that an author whose literary work was pirated during the statutory term of protection could maintain an action for damages, even though the work had not been entered at Stationers’ Hall. The Court found that the statutory penalties alone were an insufficient remedy for the injury of a civil property, first, as the right of action was not given to the party grieved but to a common informer and, second, because the penalties did not attach during the full copyright term, but

<sup>458</sup> Sec. 4 of the Copyright Act 1831.

<sup>459</sup> See Mr Justice McLean in *Wheaton v. Peters*, 33 US (8 Pet.) 591 (Supreme Court, 1834), at 665.

<sup>460</sup> Act of 30 June 1834, 23<sup>rd</sup> Cong., 1<sup>st</sup> Sess., c. 157 (in: Copyright Enactments 1963, at 31-32).

<sup>461</sup> Sec. II of the Statute of Anne (1710).

<sup>462</sup> *Ibid.*, Sec. III.

<sup>463</sup> *Beckford v. Hood*, 101 *Eng. Rep.* 1164, 7 *T.R.* 620 (Court of King’s Bench, 1798).

only during the first fourteen years.<sup>464</sup> For this reason, the Court allowed a common law remedy to be applied, even though the work had not been registered.<sup>465</sup>

By this ruling, the Court of King's Bench confirmed the principle that statutory copyright was secured by publication independently of registration.<sup>466</sup> This principle was later adopted in the 1814 Copyright Act, which expressly declared that failure to register did not affect copyright, but only forfeited the statutory penalties.<sup>467</sup>

Likewise, failure to comply with the Statute of Anne's deposit obligation did not imperil the copyright. Rather the author would forfeit, in addition to the value of the copies, the sum of five pounds for every copy not received, plus the legal costs for claiming them.<sup>468</sup> Although, in 1775, the deposit became a condition for recovering statutory penalties akin to the registration requirement,<sup>469</sup> the penalty previously laid down by the Statute of Anne was reinstated by the Copyright Act of 1814.<sup>470</sup>

A different regime applied to other types of works. In the case *Newton v. Cowie*, the formality of the 1735 Engravers' Copyright Act of marking engravings, prints and lithographs with the date of first publication and the name of the proprietor was formulated as a 'hard' formality. The Court of Common Pleas held this notice to be not merely directory, but conditional for the vesting of the right.<sup>471</sup> It reasoned that, if no such notice appeared on the copies of these works, it would be impossible for rival publishers to know whether, and against whom, they were offending.<sup>472</sup> This may explain the radical nature of these formalities as compared to those for literary works. Because in books, the name of the author and publisher and the year of first publication were routinely inscribed, the ownership and duration of protection were easier to resolve than for engravings, prints and lithographs. This appears to be the main reason why the Court held the prescribed notice to be constitutive of copyright

<sup>464</sup> See, in particular, the argumentation by Justice Ashhurst, 101 *Eng. Rep.* 1164 (at 1168), 7 *T.R.* 620 (at 628) and Justice Grose, 101 *Eng. Rep.* 1164 (at 1168), 7 *T.R.* 620 (at 628-29).

<sup>465</sup> This was held to be consistent with the principle adopted in the landmark case *Donaldson v. Beckett*, 98 *Eng. Rep.* 257, 4 *Burr.* 2408; 1 *Eng. Rep.* 837, 2 *Brown's Parl. Cases* 129 (House of Lords, 1774) according to which the author's property in a published work was confined to the copyright given to him by the statute, as opposed to copyright at common law. See para. 6.2.2.1 below. The penalties laid down by the Statute of Anne were simply considered additional statutory remedies, accumulative to the common law remedies that could always be called upon for the enforcement of rights. See the argumentation by Chief Justice Lord Kenyon, 101 *Eng. Rep.* 1164 (at 1167), 7 *T.R.* 620 (at 627).

<sup>466</sup> See *Whale* 1971, at 9. This principle had also been voiced by Lord Mansfield in the case *Tonson v. Collins*, 96 *Eng. Rep.* 180; 1 *Black. W.* 321 (Court of King's Bench, 1762).

<sup>467</sup> Sec. 5 of the Copyright Act (1814), 41 *Geo. III*, c. 107.

<sup>468</sup> Sec. V of the Statute of Anne (1710).

<sup>469</sup> Pursuant to the University Copyright Act (1775), 15 *Geo. III*, c. 53, the statutory penalties could not be invoked unless the copies had actually been delivered with the Stationers' Company.

<sup>470</sup> Sec. 2 of the Copyright Act (1814).

<sup>471</sup> *Newton v. Cowie*, 130 *Eng. Rep.* 759, 4 *Bing.* 234 (Court of Common Pleas, 1827). This decision was upheld in *Brooks v. Cock* (1835), 111 *Eng. Rep.* 365, 3 *AD. and E.* 138 and subsequent decisions. In *Roworth v. Wilkes* (1807), 170 *Eng. Rep.* 889, 1 *Camp.* 94, it had been ruled that a copyright owner could maintain an action against an infringer, even if no name had been inscribed on the print.

<sup>472</sup> *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (at 760), 4 *Bing.* 234 (at 236-237).

in artistic works. The notice requirement laid down by the Sculpture Copyright Acts of 1798 and 1814 seems to have shared the same legal consequences.<sup>473</sup>

### 3.2.2.2 CONTINENTAL EUROPE

On the European mainland, the legal effects of formalities were more rigid than in the UK. The formalities in the literary and artistic property laws of the Netherlands and some German states, for example, were express conditions for the coming into being of the right. In the Netherlands, to acquire and claim the property in a literary work, copies of the work had to be deposited and the copies were to be marked with the publisher's name and the place and date of publication.<sup>474</sup> Likewise, in Bavaria, copyright did not attach to literary and artistic works unless these works were duly marked with the author's or publisher's name.<sup>475</sup> In other German states, the coming into being of literary and artistic property depended on registration or deposit.<sup>476</sup>

However, not all formalities were constitutive of the right. Some only affected its exercise. In Bavaria, legal deposit was a condition to sue (*Prozeßvoraussetzung*). In legal action against counterfeiting, the receipt of deposit needed to be presented as evidence before the court, otherwise the claim would be declared inadmissible.<sup>477</sup> In Holstein and Lübeck, on the other hand, the receipt of deposit was not a condition to sue, but legal proof of the property and publication date of the work only.<sup>478</sup>

In France, the legal deposit also seemed to be designed as a condition to sue. The law stated that failure to deposit resulted in inadmissibility of an infringement claim before a court should an author want to file suit against a counterfeiter.<sup>479</sup> However, from the outset, courts repeatedly held the deposit to be constitutive of the literary property.<sup>480</sup> It was ruled, for example, that an author who published a work without completing the legal deposit was without right vis-à-vis third parties who had later

<sup>473</sup> Copyright was granted, provided 'always' (1798 Models and Busts Act) or 'in all and in every case' (1814 Sculpture Copyright Act) that the prescribed notice appeared on the work.

<sup>474</sup> See art. 8 of the Act of the Batavian Republic of 3 June 1803 and art. 6(c) of the Dutch Copyright Act of 1817. Art. 6 of the Sovereign Enactment of 1814 had subjected the existence of copyright to compliance with the legal deposit, but not with the prescribed notifications. See Schriks 2004, at 393.

<sup>475</sup> Art. II of the Bavarian Act of 15 April 1840.

<sup>476</sup> See e.g. the Saxonian Act of 22 February 1844 and art. 11 of the Decree of Hamburg of 1847.

<sup>477</sup> Art. V of the Bavarian Act of 15 April 1840.

<sup>478</sup> See art. II of the Mandate of the Chancellery of 30 November 1833 for the Duchy of Holstein and art. 7 of the Regulation of Lübeck of 31 July 1841.

<sup>479</sup> Art. 6 of the French Decree of 19 July 1793.

<sup>480</sup> See Pouillet 1908, at 474 (no. 434) and Ginsburg 1994, at 147-148. In the beginning, courts assumed that protection could only be obtained if the statutory formalities were fulfilled. See French Court of Cassation, 30 January 1818, *Michaud v. Chaumerot*, *Sirey* (1er Sér.) 18, 1, 222 (at 224), holding that the plaintiff had observed '*toutes les formalités prescrites pour s'en assurer la vente exclusive*'.

published and deposited the work.<sup>481</sup> In 1834, the Court of Cassation ruled that even though copyright did not arise out of the deposit, the latter at least was a necessary condition to reserve its exclusive enjoyment. As the law only promised to secure the rights of those authors who had fulfilled the deposit, failure to do so would render the author's property right void.<sup>482</sup> Finally, it was held that the legal deposit was not just a condition to sue, but also a way to preserve an exclusive property. The Court of Rouen found that, by depositing the work, the author formally announced that he had not given up his exclusive right to the benefit of the public domain.<sup>483</sup>

### 3.2.2.3 UNITED STATES OF AMERICA

The nature and legal consequences of formalities in the early state copyright laws in the US varied greatly. In imitation of the Statute of Anne, formalities in some states were mere conditions to sue for copyright infringement.<sup>484</sup> In other states, however, they seemed to be strict conditions for protection, where it was stated that no person was entitled to the benefits of the law unless the formalities were completed.<sup>485</sup>

The 1790 Federal Copyright Act also provided that 'no person shall be entitled to the benefit of this act' unless the work was registered.<sup>486</sup> Since 1802, the same legal effect attached to newspaper advertisements of recorded entrances and to notice and deposit requirements.<sup>487</sup> At first, it was uncertain whether all formalities of the 1790 Copyright Act were essential conditions for securing protection.<sup>488</sup> However, before

<sup>481</sup> See e.g. Royal Court of Paris, 26 November 1828, *Troupenas*, *Gaz. trib.* 29 November 1828, which held that the author's copyright could not be restored by a subsequent deposit.

<sup>482</sup> French Court of Cassation, 1 March 1834, *Thiéry v. Marchant*, *Dalloz* 1834, 1, 113; *Sirey* (2me Sér.) 1834, 1, 65. See also French Court of Cassation, 30 March 1838, *Dalloz* 1838, 1, 194 and Imperial Court of Paris, 22 November 1853, *Escriche v. Bouret, Rosa et autres*, *Dalloz* 1854, 2, 161.

<sup>483</sup> Court of Rouen, 13 December 1839, *Rivoire*, *Sirey* (2me Sér.) 1840, 2, 74. However, courts were not unanimous in this period. Some courts allowed authors to present their case even if the deposit had been fulfilled after the counterfeit, but prior to the institution of the infringement proceeding. See e.g. Criminal Court of Paris, 8 fructidor XI (26 August 1803), *Bertrandet v. Lassaulx*, *Sirey* (1er Sér.) 4, 2, 15; Royal Court of Paris, 3 July 1834, *Jazet v. Villain*, *Gaz. Trib.* 28 May and 4 July 1834. See also Criminal Tribunal of Paris, 18 May 1836, *L'administration des postes v. Bohain* in Blanc 1855, at 142; Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger* in Blanc 1855, at 35-36; and Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc 1855, at 38-39.

<sup>484</sup> See e.g. sec. 3 of the Maryland Act of 21 April 1783 and the South Carolina Act of 26 March 1784.

<sup>485</sup> See the Connecticut Act of January 1783, sec. 1 of the New Jersey Act of 27 May 1783, sec. 4 of the Pennsylvania Act of 15 March 1784, sec. 2 of the Virginia Act of October 1785, sec. 1 of the North Carolina Act of 19 November 1785; sec. 1 of the Georgia Act of 3 February 1786; sec. 1 of the New York Act of 29 April 1786 (registration), the Massachusetts Act of 17 March 1783 (deposit) and sec. 6 of the Pennsylvania Act of 15 March 1784 (notice of registration).

<sup>486</sup> See sec. 3 of the US Federal Copyright Act 1790.

<sup>487</sup> See secs 1 and 2 of the Act of 29 April 1802 and secs 4 and 5 of the Copyright Act 1831.

<sup>488</sup> See e.g. *Nichols v. Ruggles*, 3 Day 145 (Supreme Court of Errors of Connecticut, 1808), ruling that copyright vested upon registration, whereas the newspaper advertisements and the delivery of copies were merely directory and did not constitute essential requisites for securing copyright.

long, the courts ruled that federal copyright vested only if all formalities were duly completed.<sup>489</sup> The courts basically assumed that copyright was ‘a government grant’ which authors received in return for completing the statutory prerequisites.<sup>490</sup>

Nevertheless, it remained ambiguous whether, in the absence of compliance with statutory formalities, common law remedies could be invoked, along the lines of the *Beckford v. Hood* decision in the UK. This was the subject of the *Wheaton v. Peters* case, which was decided before the US Supreme Court in 1834.<sup>491</sup> Confronted with the question of whether an author was entitled to copyright at common law, the Court ruled that there was no common law at the federal level.<sup>492</sup> While holding that the common law could be made part of the federal system only by legislative adoption, it emphasized that, in passing the 1790 Copyright Act, Congress did not legislate in reference to pre-existing legal rights. Instead, the Supreme Court conclusively ruled that federal copyright was a creation of the Congress.<sup>493</sup> This consideration formed the basis for a strict construction of the law and the formalities it contained.

Starting from the premise that federal copyright is a purely statutory creation, the Supreme Court argued that ‘when the legislature are about to vest an exclusive right in an author . . . , they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law’.<sup>494</sup> In view of that, the Court found that the completion of all statutory formalities of the 1790 Copyright Act was critical to establishing a copyright in works after publication. Even though the right accrued from the time of registration of a copy of the title of the work, attaching the notice, making a newspaper advertisement and depositing a copy of the work were deemed part of the title and essential to render the federal copyright perfect.<sup>495</sup>

Accordingly, while copyright in unpublished works was subject to state common law and therefore required no compliance with formalities,<sup>496</sup> copyright in published works was strictly limited to US federal copyright law and all its requirements.

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<sup>489</sup> See *Ewer v. Coxe*, 8 F.Cas. 917 (Circuit Court, E.D. Pennsylvania, 1824). See also *King v. Force*, 14 F.Cas. 521 (Circuit Court, District of Columbia, 1820), ruling that an omission of the date of entry from the notice of registration was fatal to the plaintiff’s title to copyright (although the court seems to suggest that the omission could be cured by a republication of the work with a correct notice).

<sup>490</sup> See Patterson 1968, at 198 et seq.

<sup>491</sup> *Wheaton v. Peters*, 33 US 591, 8 Pet. 591 (US Supreme Court, 1834).

<sup>492</sup> *Ibid.*, at 658.

<sup>493</sup> *Ibid.*, at 660-661.

<sup>494</sup> *Ibid.*, at 663-664.

<sup>495</sup> *Ibid.*, at 664 et seq.

<sup>496</sup> See Ginsburg 2006, at 666.

## 3.2.3 EXPLAINING THE DIFFERENCES IN ATTITUDE TOWARDS FORMALITIES

As the previous overview has illustrated, the nature and legal effects of formalities differed considerably between the UK, the continental European countries and the US. This difference in attitude towards formalities may perhaps seem a bit odd, but there are various circumstances which might explain the divergences.

## 3.2.3.1 THE INFLUENCE OF 'OLD' BOOK FORMALITIES

A first important reason for why formalities in early continental Europe had a rather rigid nature was that they were remnants of the old system of book privileges. As observed, the grant of a privilege was typically subject to the obligation to deposit a certain number of copies of the book, to insert a copy of the privilege and licence to print in the book, to mark the book with the publisher's name and place of printing and sometimes to register the privilege or title of the book. Although the old feudal order was destructed during the French Revolution,<sup>497</sup> lawmakers on the European mainland most likely took the principles that were in force at the end of the *Ancien Régime* as a reference point. Because the protection of literary works thus far fully depended on compliance with formalities, this influence of the old feudal principles may well explain why formalities in the early copyright laws in continental Europe were considered to be constitutive rather than declarative of authors' rights.<sup>498</sup>

Admittedly, the early British copyright formalities were remnants left over from old times as well. However, privileges played no role in their conception.<sup>499</sup> Instead, it was the stationers' copyright that provided the elements on which the British copyright system was built.<sup>500</sup> Unlike book privileges, which were purely government grants, the stationers' copyright had a public-private character (see para. 3.1.3 above). This is important, for it might explain the fairly moderate stance towards formalities that was taken in the UK. At least, it seems likely that, given the public-private roots of the registration requirements in the stationers' copyright, the framers of the Statute of Anne had little inclination to lay down very strict state-imposed formalities.

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<sup>497</sup> Markoff 1996. Following the liberal ideals of the French Revolution, the Netherlands abolished the book privilege system at the end of the eighteenth century. Germany maintained the privilege system for a much longer time. In 1856, the privileges of authors like Schiller, Goethe, Wieland and Herder were extended for the last time. They finally expired in 1867. See Schriks 2004, at 253.

<sup>498</sup> See, with in respect to the early French copyright law, Lacan & Paulmier 1853, II, at 202 (no. 653): '*C'est dans cet esprit, d'ailleurs, que nous paraît avoir été conçue la disposition de l'art. 6 de la loi de 1793. Cette loi ... s'est inspirée des principes qui étaient en vigueur auparavant, et qui subordonnaient l'existence même du droit des auteurs à la condition préalable d'un dépôt*'.

<sup>499</sup> In England, by the end of the seventeenth century, book privileges lost their significance, when their granting for all practical purposes had come to an end. See Patterson 1968, at 78 et seq.

<sup>500</sup> See Bracha 2005, at 176 et seq.

## 3.2.3.2 THE POSITION OF THE AUTHOR

Another, perhaps more important, reason that may explain the different attitude that the various countries took towards formalities was the position of the author. While, in the UK, the notion of copyright as an author's right had been firmly established at the end of eighteenth century,<sup>501</sup> in many continental European countries, it took until the mid-nineteenth century, or longer, before copyright became a full-fledged author's right. Although several national laws seemingly conferred a property right on the author, it was essentially the publisher who received protection. This was the case, e.g., in the Netherlands and various German states, where copyright protected the printed work rather than the product of the mind and the bookseller or publisher rather than the author.<sup>502</sup> As it had not yet been fully recognized that property rights vested in the author, the view that the right should attach upon the author's creative act was not accepted. Instead, it was believed that intellectual property rights could be acquired only if the statutory formalities and conditions were fulfilled.<sup>503</sup>

Even in France, which later would become the cradle of the author's right (*droit d'auteur*), copyright in the first half of the nineteenth century was not consistently perceived as a right inherent to the author.<sup>504</sup> The idea that, because of their personal bond with their creations, authors 'naturally' owned a right of intellectual property, had not entirely infiltrated the French legal order. It seems that, at the time, this idea was overshadowed by the belief that copyright was based on a 'social contract'.<sup>505</sup> This was inspired by the idea that, upon publication, an author dispossessed himself of his work and the right to exploit the work passed to the public. In return, authors had a private claim against society, allowing them to demand remuneration for the exploitation. The supporters of this theory believed that this claim took the form of

<sup>501</sup> *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (Court of King's Bench, 1769) firmly established the idea of the author as the creator and ultimate source of literary (and artistic) property rights. See Patterson 1968, at 14-15 and 151-79. See Rose 1993, for a comprehensive account on the formation of the conception of authorship in eighteenth century Britain. See also para. 6.2.2.1 below.

<sup>502</sup> Schriks 2004, at 424. The Dutch Copyright Act of 25 January 1817 and most German state copyright laws granted a *kopijrecht* or *Verlagsrecht*, as these countries thus far were accustomed to (see para. 3.1). An exception is the Prussian Act of 11 June 1837, which assumed protection of authors' rights.

<sup>503</sup> See e.g. the plea held by Mr. D. Donker Curtius at the hearing of the Dutch Supreme Court on 2 June 1840 in the case *Johannes Noman en Zn. v. Staat der Nederlanden*: 'dat als men een eigendom wil scheppen, men er ook kenmerken aan moet geven, welke zijn als de voorwaarden, waaronder het alleen kan worden geeërbiedigd. ... De wet .... wil voortaan geene privilegiën meer en erkent geen kopy-regt, dan aan hem, die aan de voorwaarden, welke zij stelt, heeft voldaan'. This statement was later upheld by the Dutch Supreme Court in its decision of 8 September 1840. See *Het letterkundig eigendomsregt in Nederland 1865-1867*, II (1867), 109-125 (at 117) and 132-134. In the UK, in the case *Newton v. Cowie* (1827), 130 Eng. Rep. 759 (at 760), 4 Bing. 234 (at 236), Serjeant-at-law Wilde used a similar argument to substantiate the strict construction of the notice requirement in the 1735 Engravers' Copyright Act: 'The statutes having given a monopoly, it is essential to the title of the party who claims the monopoly, that he comply with all the conditions attached to it'.

<sup>504</sup> See Ginsburg 1994, at 157.

<sup>505</sup> See Pfister 2005. See also para. 6.2.2.1 below.

a privilege granted by the legislator on behalf of the public.<sup>506</sup> This is evident from a 1841 report, drawn up for the French government, which states unambiguously: ‘*La jouissance garantie aux auteurs n’est point un droit naturel, mais un privilege resultant d’un octroi b n vole de la loi*’.<sup>507</sup> This illustrates that, at the time, authors were not deemed beneficiaries of the right because they had a natural right in their intellectual creations. Rather copyright was regarded as a statutory grant. Therefore, a greater importance may have been attached to copyright formalities.

Interestingly, in the US, the idea of copyright as an author’s right prevailed in the early state copyright laws.<sup>508</sup> The preambles of several of these laws show instances of natural rights rhetoric and references to principles of natural equity and justice.<sup>509</sup> But also under US federal copyright law, copyright was essentially rationalized by the argument that authors should be entitled to the fruits of their labour. However, the Supreme Court in the *Wheaton v. Peters* case emphasized that, in order to enjoy their rights, authors should comply with the statutory conditions. It stated:

‘That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.’<sup>510</sup>

Despite acknowledging that authors are entitled to reap the fruits of their labour, the Supreme Court thus established the rule that federal copyright protection cannot be enjoyed unless the statutory formalities are fulfilled. While for some people this may sound somewhat contradictory, it will be seen in Chapter 6 that a ruling of this kind is consistent with the Lockean labour theory of property and the place it has in Locke’s broader theory of civil society and representative government.

### 3.2.3.3 THE FOCUS ON PUBLIC WELFARE AND SOCIAL UTILITY

A final reason for why formalities may have played an important role in many early copyright laws was that these laws were not principally concerned with protecting authors, but often supported a broader social interest. The Statute of Anne of 1710, for example, was first and foremost aimed at ‘the encouragement of learned men to

<sup>506</sup> Pfister 2005, at 136-137, 144-145 and 148-149. Klippel 1993, at 133, indicates that also in Germany, there was a tendency to revert back to the idea of privileges to explain the protection of copyright.

<sup>507</sup> Romberg 1859, I, at 68.

<sup>508</sup> See Patterson 1968, at 188.

<sup>509</sup> See e.g. the preambles to the Massachusetts Act of 17 March 1783, the New Hampshire Act of 7 November 1783 and the Rhode Island Act of December 1783 which refer to literary property as ‘one of the natural rights of all men, there being no property more peculiarly a man’s own than that which is produced by the labour of his mind’. See also the preambles to the Connecticut Act of January 1783, the New Jersey Act of 27 May 1783, the Georgia Act of 3 February 1786 and the New York Act of 29 April 1786, which refer to ‘principles of natural equity and justice’.

<sup>510</sup> *Wheaton v. Peters*, 33 US 591, 8 Pet. 591 (US Supreme Court, 1834), at 658.

compose and write useful books'.<sup>511</sup> Similarly, US federal copyright law was meant 'to promote the progress of science and the useful arts'.<sup>512</sup> Therefore, the premise of these copyright laws was primarily utilitarian, aimed at the increased production of works and the encouragement of knowledge, not at securing the rights of individual authors. In view of this public-benefit rationale, it may well be that the legislator, in reply for protection, deemed it fitting to require compliance with formalities.<sup>513</sup>

Also on the European mainland, copyright law was inspired by considerations of public welfare and social utility. The French decree of 1793, for example, was not just motivated by authors' personal claims of rights in their intellectual works.<sup>514</sup> In general, it was thought that the rights and interests of authors were to be established in accordance with those of the public domain. Gastambide, for example, believed that the primary objective of deposit was neither to create prima facie proof of the ownership of a work, nor to enrich national libraries. He found that its purpose was essentially to enable authors to inform the public about their intention as to whether they would want to enjoy and exercise their rights. He argued that, when abstaining from deposit, authors proved that they had voluntarily abandoned their property rights to the public domain.<sup>515</sup> He believed that as soon as a work was published, it should be deposited. If the deposit could be performed at a later stage, this would oppose the presumed intention of authors abandoning their property rights.<sup>516</sup>

Other observers followed an opposite line of reasoning. Renouard, for example, did not find the absence of deposit to constitute evidence of the author's consent to his work entering the public domain. He asserted: '*Dire que l'auteur est censé ... avoir personnellement contracté avec le domaine public, et avoir stipulé l'abandon de ses droits, c'est une exagération inadmissible*'.<sup>517</sup> He argued that, if deposit was interpreted as involving the absolute loss of rights in case of disobedience, this was a transgression of the law. The law did not declare the author's right void in case of absence of deposit; it only extinguished the possibility of litigation.<sup>518</sup> Accordingly, Renouard considered the deposit formality to be declarative rather than constitutive

<sup>511</sup> See the preamble of the Statute of Anne (1710).

<sup>512</sup> Art. 1, sec. 8, of the US Constitution of 17 September 1787 (in: Copyright Enactments 1963, at 21).

<sup>513</sup> See Ginsburg 1994, at 133: 'If copyright is essentially a governmental incentive-programme, many formal prerequisites may accompany the grant.'

<sup>514</sup> Ginsburg 1994, at 143 et seq.

<sup>515</sup> See Gastambide 1837, at 151 (no. 124), arguing that by dedicating the work to the public domain, the author would satisfy himself with the advantages of a 'honourable publicity'. Thoughts of this kind were very common at the time. See Pfister 2005, at 128-129.

<sup>516</sup> Gastambide 1837, at 152 (no. 125). Lacan & Paulmier 1853, II, at 201-202 (no. 653) argue that if the simultaneity of deposit and publication were given up, the existence of authors' rights could only be established arbitrarily and retroactively, thus causing legal uncertainty for third parties relying on the supposition that works not deposited are dedicated to the public domain. In their view, this would be '*un piège que la loi ne peut comporter, et qu'une sage jurisprudence ne peut admettre*'.

<sup>517</sup> See Renouard 1838-1839, II, at 374 (no. 218), underlining that the negligence consisting in omitting the deposit was often ascribable to the publisher rather than the author.

<sup>518</sup> *Ibid.*, II, at 374-375 (no. 218).

of copyright. In his opinion, neither the text nor the spirit of the law would justify another interpretation.<sup>519</sup> This reasoning would foreshadow the developments in the second half of the nineteenth century, although the constitutive nature of formalities would, at that time, be rejected on other, more philosophical, grounds.

### 3.3 Formalities in Modern Copyright Law

In the mid-nineteenth century, early modern copyright law transformed into modern copyright law. This transformation resulted from some important developments that changed the contours of copyright. This section examines how copyright formalities developed against the background of this transition. It will be seen that, while in the US formalities were retained, in Europe, they were gradually softened and limited and in the end abolished altogether (para. 3.3.1). This section explains the change of perspective vis-à-vis formalities in Europe on the basis of a number of ideological, functional and conceptual innovations in copyright law (para. 3.3.2). Also, it gives reasons for the continuation of copyright formalities in the US (para. 3.3.3).

#### 3.3.1 THE DEVELOPMENT OF FORMALITIES IN NATIONAL COPYRIGHT LAW

In the second half of the nineteenth century, copyright formalities were maintained in most countries around the globe. In Europe, whereas the UK and the Netherlands retained formalities at the exact same level as before, a tendency to limit their use or soften their consequences can be witnessed in Germany and France. Eventually, in the early twentieth century, copyright formalities were eliminated in most European countries. In the US, on the other hand, copyright formalities were fully maintained and, although with different legal effects, can still be found in US copyright law.

##### 3.3.1.1 UNITED KINGDOM

In the UK, the formalities of the earlier British copyright laws were maintained and their nature and legal effects remained unaffected. The 1842 Literary Copyright Act subjected the authors of literary works to a registration and a deposit requirement.<sup>520</sup> The deposit requirement was left entirely unchanged. Like before, failure to deposit involved a fine, but did not result in forfeiture of the copyright. Registration, on the

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<sup>519</sup> It is consistent with the positivist character of the social contract theory, that supporters of this theory (such as Renouard) based themselves primarily on the text of the law. See Pfister 2005, at 150-151. Other commentators (such as Nion 1846, at 128-129 and Blanc 1855, at 140-141) also relied strongly on the text of the law, although these commentators rejected the constitutive nature of legal deposit because they believed that authors' rights were born with the creation of the work (*infra* text).

<sup>520</sup> Secs 6 to 10 of the Literary Copyright Act (1842), 5 and 6 Vict. c. 45.

other hand, became a condition to *any* suit for infringement at law or in equity, thus avoiding the previous distinction between statutory and common law remedies.

The 1842 Literary Copyright Act maintained the rule ‘that the omission to make such entry shall not affect the copyright in any book’.<sup>521</sup> Failure to register affected the right to sue in respect of a copyright infringement only. Nevertheless, the courts consistently held that, once registration was effectuated, authors could proceed even in respect of infringements made before the registration date.<sup>522</sup> Consequently, there was no need to register a work until a violation occurred. Provided that authors had registered before issuing the writ, their cases were admissible before a court.

Apart from the registration of copyrights, the 1842 Literary Copyright Act also opened the possibility for registering assignments and licensing agreements.<sup>523</sup> This was an absolute novelty as compared with the earlier British copyright laws.

Different types of formalities applied to other types of works. The protection of paintings, drawings and photographs, for example, was subject to registration. The 1862 Fine Arts Copyright Act provided that, until registration, the authors of these works were not entitled to claim the benefits laid down by this law. Furthermore, no action was sustainable and no penalty recoverable with respect to ‘anything done before registration’.<sup>524</sup> Accordingly, in contrast with literary works, registration was constitutive of the copyright in paintings, drawings and photographs. Still, one court held that, after registration, damages could be obtained for the unauthorized sale of copies of a drawing, even if the copies were made prior to registration.<sup>525</sup>

A new situation specific formality was introduced by the Musical Compositions Act of 1882. While establishing a public performance right in musical compositions and dramatic musical works, this law required authors to mark all copies of these works with an explicit notice of reservation.<sup>526</sup> A copyright owner could not legally assert his public performance rights, if such notice was omitted from the copies.<sup>527</sup>

For engravings, prints and lithographs and for sculptures, models and casts, the rule remained that copyright attached only to works marked with a notice, pursuant to the 1735 Engravers’ Copyright Act and the 1814 Sculpture Copyright Act.

Consequently, British copyright law in the second half of the nineteenth century consisted of a patchwork of statutory regimes for different types of works including

<sup>521</sup> *Ibid.*, sec. 24. While small errors could be fatal to the registration, they could be repaired by a later entrance. See *Low v. Routledge*, (1865-66) LR 1 Ch. App. 42 (Court of Appeal in Chancery, 1865).

<sup>522</sup> See e.g. *Goubard v. Wallace*, 36 *L.T.* (n.s.) 704, *W.N.* 130 (1877) and *Warne v. Lawrence*, 54 *L.T.* 371, 34 *W.R.* 452 (1886). The latter decision displayed a case of an extremely late registration: the entrance in the registers was made earlier in the day on which the plaintiff had issued the writ.

<sup>523</sup> Sec. 11 of the Literary Copyright Act (1842).

<sup>524</sup> Sec. 4 of the Fine Arts Copyright Act (1862), 25 & 26 *Vict.*, c. 68. It followed from sec. 1 of the Fine Arts Copyright Act (1862) that the first sale or disposition of a painting, drawing or photograph had to be accompanied by a written agreement between the artist and purchaser as to whom the copyright would belong, otherwise the copyright would be lost altogether. See *Scrutton* 1903, at 192-193.

<sup>525</sup> *Tuck v. Priester*, 19 *Q.B.D.* 629 (Court of Appeal, 1887).

<sup>526</sup> Sec. 1 of the British Copyright (Musical Compositions) Act (1882), 45 and 46 *Vict.*, c. 40.

<sup>527</sup> See *Fuller v. Blackpool Winter Gardens*, [1895] 2 *Q.B.* 429 (Court of Appeal, 1895).

different formalities. This would last until 1911, when the British copyright system was unified in a single law, the 1911 Copyright Act.<sup>528</sup> This law did not contain any formalities. The British lawmaker eliminated them following the introduction of the prohibition on formalities in the Berne Convention in 1908. The only formality that reappeared was legal deposit, but it was no prerequisite for copyright.<sup>529</sup> Today, the deposit requirement is laid down in the Legal Deposit Libraries Act of 2003.<sup>530</sup>

### 3.3.1.2 CONTINENTAL EUROPE

In several continental European countries, the attitude towards formalities changed radically in the second half of the nineteenth century. Overall, their nature and legal effects softened. The belief grew that the existence of literary and artistic property should not depend on compliance with formalities. In France, for example, although the system of legal deposit of the 1793 decree was retained until 1925, from the mid-nineteenth century onwards, the courts increasingly ruled that legal deposit was not a condition for the coming into being of the copyright.<sup>531</sup> In contrast with earlier decisions, they held legal deposit to merely serve as a law enforcement measure or a tax established in the interest of literature and the arts. An omission to deposit was no longer regarded as an abandonment of the copyright in the interest of the public domain.<sup>532</sup> Furthermore, the courts ruled that authors could deposit at any time they deemed appropriate for taking advantage of their rights. Claims were admissible in court as long as the copies were delivered before legal action against a counterfeiter was started.<sup>533</sup> The courts regarded legal deposit as being merely declaratory of the copyright. This opinion also became prevalent in French legal doctrine.<sup>534</sup>

The notion that copyright should exist independently of formalities was pursued even further by the legislator in Germany. Two Federal Copyright Acts of 1870 and 1876,<sup>535</sup> which were adopted after the unification of Germany,<sup>536</sup> were based on the

<sup>528</sup> UK Copyright Act (1911), 1 and 2 Geo. V, c. 46.

<sup>529</sup> *Ibid.*, sec. 15. It appears that, at an earlier stage, the British government had proposed a voluntary registration scheme with *prima facie* evidentiary effects. See Kaplan 1958, at 334, indicating that this proposal never made it to the final act, as voluntary registration was assumed to be ineffective.

<sup>530</sup> Legal Deposit Libraries Act (2003), c. 28.

<sup>531</sup> See Pouillet 1908, at 473-474 (no. 433).

<sup>532</sup> Civil Tribunal of the Seine, 21 November 1866, *Franck, Pataille* 1866, 394.

<sup>533</sup> Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger*, in Blanc 1855, at 35-36; Civil Tribunal of the Seine, 21 November 1866, *Franck, Pataille* 1866, 394; Court of Paris, 28 March 1883, *Roussin et Duvoir v. Arpé, Pataille* 1884, 84; Civil Tribunal of the Seine, 14 December 1887, *Enoch et autres v. Bruant et autres, Pataille* 1890, 59; Court of Pau, 31 May 1878 and 6 December 1878, *Latour v. Cazaux, Dalloz* 1880, 2, 80; Court of Paris, 12 June 1885, *Decauville, Pataille* 1886, 129; Court of Paris, 25 March 1903, *Bernier v. Desvignes, Pataille* 1904, 93.

<sup>534</sup> See e.g. Delalande 1880, at 123, Garraud 1888-1894, V, at 554-555 (no. 530), Poinard 1894, at 491, Huard 1903, I, at 94-95 and Pouillet 1908, at 471-473 (no. 432).

<sup>535</sup> See the German Federal Copyright Act of 11 June 1870 (concerning works of literature, illustrations, musical compositions and dramatic works) and the German Federal Copyright Act of 9 January 1876

assumption that formalities were to be avoided as much as possible and could only be justified to the extent that a true public need existed.<sup>537</sup> Only for photographs, the protection depended on an indication of the name and residence of the photographer or publisher and the date of first publication on each copy of the work.<sup>538</sup> For the remainder, no formalities were required for the coming into being of copyright. The German legislator only required a registration of certain facts for which it believed adequate public knowledge should exist, so as to enable users to ascertain whether a particular work was still subject to protection or could yet be freely used.<sup>539</sup>

In other states, the nature and effects of formalities did not change much. In the Netherlands, the legal deposit, which was continued by the 1881 Copyright Act,<sup>540</sup> remained constitutive by nature. Although the Dutch legislator had underscored that copyright arose with the act of creation and not with the act of deposit,<sup>541</sup> failure to deposit within one month after publication would forfeit the right.<sup>542</sup> This caused a somewhat remarkable situation. While, in theory, legal deposit was not constitutive of copyright, in practice, the right perished and the work fell into the public domain if the copies were not delivered in a timely manner. This implied that the copyright could not be exercised and, in all probability, had never actually come into existence.<sup>543</sup>

Several continental European countries also introduced situation specific formalities. In order to retain a translation right in literary works,<sup>544</sup> a public performance right in musical compositions or dramatic musical works<sup>545</sup> or a

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(concerning works of the fine arts). On 10 January 1876, the German legislator also adopted a statute concerning the protection of photographs against unauthorized reproduction and a statute concerning copyright in designs and models. These statutes, however, were based on different rationales.

<sup>536</sup> The government was instructed to draft national copyright legislation by art. 4(6) of the Constitution of the North German Confederation of 26 July 1867. This resulted in the Federal Copyright Act of 1870, which in 1871 was also made applicable to the southern German states which had united with the North German Confederation. Later, the Federal Copyright Acts of 1876 were established.

<sup>537</sup> See Fischer 1870, at 33-34; Dambach 1871, at 205-207.

<sup>538</sup> See art. 5 of the German Copyright Act of 10 January 1876, stating that inaccurate or incomplete notifications caused the loss of protection of photographs against unauthorized reproduction.

<sup>539</sup> See Fischer 1870, at 33, Dambach 1871, at 207 and Wächter 1875, at 136. The registration applied to (a) the reservation of the translation right for literary or dramatic works (the reservation was subject to statutory maximum terms); (b) the names of authors of anonymous or pseudonymous works which were disclosed before the term of protection for these works ended (this would cause these works to be protected longer); and (c) the titles of works that were still protected by a book privilege issued before the German Copyright Acts of 1870 and 1876 took effect. See arts 6, 11, 52 and 60 of the German Copyright Act of 1870; arts 9 and 19 of the German Copyright Act of 9 January 1876.

<sup>540</sup> Art. 10 of the Dutch Copyright Act of 1881.

<sup>541</sup> See the Explanatory Memorandum and Memorandum in Reply, in *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 94 and 95-96.

<sup>542</sup> This rule was based on the assumption that the author did not want to avail himself of his copyright if he failed to deliver the copies. See e.g. Veegens 1895, at 119 and Van de Kastele 1885, at 159.

<sup>543</sup> See Veegens 1895, at 119-120 and Van de Kastele 1885, at 160.

<sup>544</sup> See art. 6(c) of the German Copyright Act of 1870 and art. 5(b) of the Dutch Copyright Act of 1881.

<sup>545</sup> See art. 50 of the German Copyright Act of 1870 and art. 12 of the Dutch Copyright Act of 1881.

reproduction right in (short) articles in newspapers or periodicals,<sup>546</sup> the laws in these countries required authors to affix an explicit notice of reservation to all the copies of these works.

In the early twentieth century, most countries in continental Europe abrogated all copyright formalities. The German lawmaker eliminated them in 1901 for literary works and music and in 1907 for artistic works and photographs.<sup>547</sup> Other countries removed copyright formalities following the implementation of the prohibition on formalities in the Berne Convention of 1908. In the Netherlands, for example, they were eliminated in 1912.<sup>548</sup> In France, on the other hand, the legal deposit remained a condition to sue for copyright infringement until it was finally disconnected from the French copyright system in 1925.<sup>549</sup>

Since then, copyright in Europe has been protected without formalities. The only formalities that have been continued are certain situation specific formalities.<sup>550</sup> Moreover, many countries maintain a legal deposit system outside the copyright framework.<sup>551</sup> Also, in Germany, authors of anonymous or pseudonymous works can still register their names, in order to extend the copyright term from seventy years following the year of first publication to seventy years following the year of their death.<sup>552</sup>

### 3.3.1.3 UNITED STATES OF AMERICA

In contrast to Europe, US federal copyright law in the second half of the nineteenth century shows an unbroken pattern when it comes to copyright formalities. Nothing materially changed in the types of formalities that were imposed or their nature and legal effects. To secure protection in a published work, US copyright law required pre-publication registration and an accompanying deposit.<sup>553</sup> Failure to comply with these formalities would cast the work in the public domain.<sup>554</sup> In addition, all copies

<sup>546</sup> See art. 7(b) of the German Copyright Act of 1870 and art. 7 of the Dutch Copyright Act of 1881.

<sup>547</sup> German Copyright Acts of 19 June 1901, *RGBl.* 1901, 227 (concerning literary and musical works) and 9 January 1907, *RGBl.* 1907, 7 (concerning artistic works and photographs).

<sup>548</sup> Dutch Copyright Act of 23 September 1912, *Stb.* 1912, 308.

<sup>549</sup> French Act of 19 May 1925, in *Journal Officiel* of 27 May 1925. See Lepaulle 1927, at 210 et seq.

<sup>550</sup> See para. 2.2.4 above.

<sup>551</sup> See e.g. Book I, Title III of the French Code of Heritage (*Code du Patrimoine*) which regulates legal deposit in France.

<sup>552</sup> See art. 31 in conjunction with art. 56 et seq. of the German Copyright Acts of 19 June 1901 and art. 66(2) in conjunction with art. 138 of the German Copyright and Neighbouring Rights Act 1965.

<sup>553</sup> See sec. 90 et seq. of the Copyright Act of 8 July 1870, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., c. 230 (in: Copyright Enactments 1963, at 36-41) and sec. 4956 et seq. of the Revised Statutes, Title 60, of 1 December 1873, 43<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (in: Copyright Enactments 1963, at 43-47), as revised by sec. 3 of the Act of 3 March 1891, 51<sup>st</sup> Cong., 2<sup>nd</sup> Sess., c. 565 (in: Copyright Enactments 1963, at 49-54).

<sup>554</sup> Sec. 90 of the Copyright Act 1870 and sec. 4956 of the Revised Statutes 1873 stated that 'no person shall be entitled to a copyright unless' copies were deposited for registration. In addition to a deposit

of the work needed to be marked with a prescribed copyright notice.<sup>555</sup> Even though it appeared from the text of the law that the consequence of omitting the notice was the unenforceability of copyright in an infringement suit,<sup>556</sup> in practice, some courts held the notice to be a prerequisite for protection.<sup>557</sup> Furthermore, the law continued the obligation that assignments of copyright had to be recorded to take legal effect against subsequent purchasers or mortgagees.<sup>558</sup> Finally, to qualify for renewal after the initial term of copyright, the work was to be registered and marked with a notice and the record of renewal needed to be advertised in a US newspaper.<sup>559</sup>

Novelties in US copyright law in the second half of the nineteenth century were the centralization of registration and deposit in the Library of Congress in 1870,<sup>560</sup> the creation of the position of the Register of Copyrights and the institution of the Copyright Office as a separate department of the Library of Congress in 1897.<sup>561</sup>

US copyright law was revised by the adoption of the Copyright Act of 1909. As observed in Chapter 2, under this act, publication with copyright notice was the sole condition for securing copyright.<sup>562</sup> Registration and deposit were also required, but they were no longer conditions for the vesting of copyright. Still, a valid copyright would be forfeited in case of failure to deposit after a demand of the Register. Also, registration and deposit were prerequisites to suit for copyright infringement.<sup>563</sup> The various renewal formalities were also continued, although the obligation to publicly

accompanying registration, sec. 10 of the Act of 10 August 1846, 29th Cong., 1st Sess., c. 178 (in: Copyright Enactments 1963, at 32) required a free library deposit. The latter was not required for the purpose of securing copyright. See *Jollie v. Jacques*, 13 F.Cas. 910 (Circuit Court, S.D. New York, 1850), at 911-912. However, pursuant to sec. 3 of the Act of 3 March 1865, 38<sup>th</sup> Cong., 2<sup>nd</sup> Sess., c. 126 (in: Copyright Enactments 1963, at 34-35), failure to deliver free library copies after a demand of the Librarian of Congress could cause a forfeiture of the exclusive publication right. Also, it could result in a penalty of twenty-five dollars. See sec. 1 of the Act of 18 February 1867, 39<sup>th</sup> Cong., 2<sup>nd</sup> Sess., c. 43 (in: Copyright Enactments 1963, at 35-36). In 1870, the library deposit and the deposit accompanying registration merged. See sec. 90 in conjunction with secs 93 and 94 of the Copyright Act 1870 and sec. 4956 in conjunction with secs 4959 and 4960 of the Revised Statutes 1873.

<sup>555</sup> See sec. 97 of the Copyright Act 1870, sec. 4962 of the Revised Statutes 1873, sec. 1 of the Act of 18 June 1874, 43<sup>rd</sup> Cong., 1<sup>st</sup> Sess., c. 301 (in: Copyright Enactments 1963, at 47-48) and the Act of 1 August 1882, 47<sup>th</sup> Cong., 1<sup>st</sup> Sess., c. 366 (in: Copyright Enactments 1963, at 49).

<sup>556</sup> *Ibid.*, stating that 'no person shall maintain an action for the infringement of his copyright unless' the copies of the work were marked with the prescribed copyright notice.

<sup>557</sup> See *Jackson v. Walkie*, 29 Fed. 15 (Circuit Court, N.D. Illinois, 1886). In *Higgins v. Keuffel*, 140 US 428, 11 S.Ct. 731 (U.S. Supreme Court, 1891), at 434, the copyright notice was perceived as one of 'the essential facts respecting any copyright'. In *Pierce & Bushnell Manuf'g Co. v. Werckmeister*, 72 Fed. 54 (First Circuit, 1896), the notice was construed as a strict condition to enforce the copyright.

<sup>558</sup> Sec. 89 of the Copyright Act 1870 and sec. 4955 of the Revised Statutes 1873.

<sup>559</sup> See secs 87 and 88 of the Copyright Act 1870, secs 4953 and 4954 of the Revised Statutes 1873 and sec. 2 of the Act of 3 March 1891.

<sup>560</sup> Secs 85, 109 and 110 of the Copyright Act 1870 and secs 4948 to 4951 of the Revised Statutes 1873.

<sup>561</sup> Act of 19 February 1897, 54<sup>th</sup> Cong., 2<sup>nd</sup> Sess., c. 265 (in: Copyright Enactments 1963, at 57-58).

<sup>562</sup> Secs 9 and 18 to 20 of the US Copyright Act 1909; 17 USC §§ 10 and 19 to 21 (1947). Unpublished works could obtain statutory protection by deposit (sec. 11 of the US Copyright Act 1909; 17 USC § 12 (1947)) and otherwise were protected by the common law without compliance with formalities.

<sup>563</sup> Secs 10 to 14 of the US Copyright Act 1909; 17 USC §§ 11 to 15 (1947).

announce the renewal by advertisement in US newspapers was abolished.<sup>564</sup> Lastly, the 1909 US Copyright Act ordered that unrecorded assignments of copyright were void as against subsequent assignments that were recorded in good faith.<sup>565</sup>

Thus, in contrast with European countries, which around the same time abolished copyright formalities, the US lawmaker persisted in maintaining them. Although, in 1925, a bill was introduced which aimed at permitting US adherence to the Berne Convention and therefore proposed a formality-free copyright,<sup>566</sup> it was not passed, because the idea of an ‘automatic’ copyright raised considerable opposition.<sup>567</sup>

Another revision of US copyright law took place in 1976. This revision brought US copyright law a few steps closer to the requirements of the Berne Convention. Among other things, copyright renewal was abolished for works yet to be created<sup>568</sup> and several copyright formalities were moderated. Although copyright could still be lost by publication without notice, an omission of notice could always be cured by registration within a five-year grace period.<sup>569</sup> Furthermore, while the law continued the formalities of deposit and registration, copyright did not depend on them.<sup>570</sup> Yet, no infringement action could be started until application for registration was made and no statutory damages or attorney’s fees were awarded in infringement suits if a work was not registered within three months after first publication.<sup>571</sup> Also, the law attached the same legal consequences as before to the recordation of assignment. In addition, recordation became a condition to sue for copyright infringement for any person claiming to be the right owner by virtue of an assignment of rights.<sup>572</sup>

When the US joined the Berne Convention in 1989, the US copyright formalities had to be adapted, at least in so far as they affected the protection of foreign works. However, the US lawmaker chose to employ a minimalist approach.<sup>573</sup> It abolished copyright notices as prerequisites for protection, but instead it awarded evidentiary weight to their use to preclude innocent intent defenses in mitigation of damages.<sup>574</sup> Moreover, it limited the requirement of registration as a prerequisite to infringement

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<sup>564</sup> Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

<sup>565</sup> Secs 44 and 45 of the US Copyright Act 1909; 17 USC §§ 30 and 31 (1947).

<sup>566</sup> Perkins Bill, H.R. 11258, 68<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1925), sec. 1: ‘Such copyright shall vest in the author of any such work immediately upon the making of the work and shall not depend upon the accomplishment of any conditions or formalities whatever’. See the Annual Report of the Register of Copyrights of 1925, <<http://www.copyright.gov/reports/annual/archive/ar-1925.pdf>>, at 198-223.

<sup>567</sup> See Ginsburg 2010a, at 332-333 and Ginsburg 2010b, at 447-448.

<sup>568</sup> 17 USC § 302 (1976). See also para. 2.1.2 above.

<sup>569</sup> 17 USC § 405(a)(2) (1976). See also para. 2.1.5 above.

<sup>570</sup> 17 USC §§ 407 and 408 (1976). Non-compliance with the deposit after a demand of the Register did not render the copyright void, as it did before, but failure to complete the deposit made the copyright owner liable to a fine and the reasonable cost of acquiring the copies. See also para. 2.1.4 above.

<sup>571</sup> 17 USC §§ 411 and 412 (1976). See also para. 2.1.1 above.

<sup>572</sup> 17 USC § 205 (1976). See also para. 2.1.3 above.

<sup>573</sup> See Rep. No. 609, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 6.

<sup>574</sup> Sec 7 of the Berne Convention Implementation Act 1988.

suits to works of US origin<sup>575</sup> and eliminated the requirement to record assignments before instituting a copyright infringement action.<sup>576</sup> The remainder of formalities, it left basically unaltered.<sup>577</sup> Because US copyright formalities have not been changed since this 1989 revision, current US copyright law still draws heavily on voluntary copyright notices and deposit, registration and recordation formalities.<sup>578</sup>

### 3.3.2 THE CHANGE OF PERSPECTIVE VIS-A-VIS FORMALITIES IN EUROPE

The preceding section has shown that, in Europe, toward the end of the nineteenth century, the relationship between formalities and copyright gradually weakened. At the same time, the second half of the century also witnessed the introduction of new formalities. This raises a few questions. What caused this change of perspective vis-à-vis copyright formalities in Europe? Why were formalities nevertheless continued until the beginning of the twentieth century? And for what reason were new sets of formalities introduced? These questions are related to some ideological, functional and conceptual innovations in nineteenth-century copyright law. These innovations, upon which this section will touch, concern the increased focus on the person of the author and the resultant idea that the author's creation is the ultimate source from which copyright arises (para. 3.3.2.1), the growing idea that, for a good functioning of the copyright system, formalities are not necessary per se (para. 3.3.2.2) and the awkwardness of formalities in the context of the concept of abstract authored works (para. 3.3.2.3). Subsequently, this section explains why these developments, at least initially, exerted little influence in the Netherlands and the UK (para. 3.3.2.4).

#### 3.3.2.1 THE INCREASED PERSON-ORIENTED NATURE OF COPYRIGHT

The position of authors on the European mainland had gradually become stronger in the course of the nineteenth century. This was attributable to an increased belief that the person of the creator was the very foundation of the property in the work.<sup>579</sup> In France, the idea that the creation of a work was a service which the author rendered to society, in return for which society assured the author of certain exclusive rights, faded. Instead, the justification for protecting authors' rights was increasingly found to exist in their identification as property. Expanding on the theory of 'intellectual

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<sup>575</sup> Ibid., sec. 9.

<sup>576</sup> Ibid., sec. 5.

<sup>577</sup> Nevertheless, a technical amendment was made to ensure that all works protected by copyright and published in the US were subject to mandatory deposit. Ibid., sec. 8. See note 108 above.

<sup>578</sup> 17 USC §§ 205 and 401 to 412. See para. 2.1 above.

<sup>579</sup> See Pfister 2005, at 126-127 and 152-153, speaking of a process of 'personalising literary and artistic property', which was particularly fruitful for the development of the French *droit d'auteur*.

property' developed in the eighteenth century under the influence of natural law,<sup>580</sup> and in particular on John Locke's labour theory holding that man has a natural right to property which exists in his own person and which he acquires by appropriating the commons through his labour,<sup>581</sup> the advocates of the intellectual property theory emphasized the inextricable bond between the work and its creator (see para. 6.2). By regarding the creator as 'the natural law basis of literary and artistic property',<sup>582</sup> they believed that authors' rights emanate directly from the quality of the authors' own intellectual creations.<sup>583</sup> The law was seen as merely recognizing the existence and regulating the exercise of authors' rights.<sup>584</sup> This idea also became widespread among German intellectuals. As in France, copyright was progressively regarded as a right of intellectual property,<sup>585</sup> the foundation of which was seen to reside in the very nature of things.<sup>586</sup> Thus, it was not the laws that created authors' rights. These rights were believed to have always existed in the legal conscience of men.<sup>587</sup>

In Germany, a parallel theory evolved which gave even more prominence to the person of the author as creator of the work. This was the personality theory, which was based principally on the philosophies of Kant, Fichte and – perhaps to a lesser degree – Hegel. While their philosophies are dealt with extensively below (see para. 6.3.1), as a general rule, they put the author's personality as reflected in the work at the heart of their justification for copyright protection. Fichte, for example, made a strong case that the author's inalienable and exclusive property existed in the form in which he had expressed his thoughts or ideas, as opposed to the thoughts or ideas themselves, which cannot be exclusively owned but are the common property of all, and the book as a tangible object, to which the normal property rules apply.<sup>588</sup> This differentiation between freely usable content and the protected form of the author's thoughts and ideas provided a very strong justification for copyright to be vested in the author. Since it assured protection against any taking of the personal and unique form in which the author expressed his thoughts or ideas, this new abstract concept

<sup>580</sup> On the evolution of the theory of intellectual property ('*geistigen Eigentum*') in eighteenth-century Germany, see Gieseke 1995, at 115-135. See also para. 6.2.2 below.

<sup>581</sup> See Locke 1690 (1988), II, sec. 27 (at 287-288). Locke's labour theory of property appears to have been popular among nineteenth-century liberal thinkers in France. See e.g. Nion 1846, at 127-128.

<sup>582</sup> Pfister 2005, at 124-125, 156-157 and 158-159. See French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado*, *Dalloz* 1858, 1, 161 (at 164): '*Attendu que si la propriété des œuvres littéraires, musicales et artistiques dérive du droit naturel, ...*'. See also Blanc 1855, at 139.

<sup>583</sup> See Blanc 1855, at 138: '*La propriété, c'est-à-dire la qualité d'auteur, ...*'.

<sup>584</sup> See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc 1855, at 38-39.

<sup>585</sup> See Klippel 1993, at 126 et seq., explaining that in Germany the idea of intellectual property became accepted, because it constituted '*durch Arbeit mit der Persönlichkeit verbundene geistige Eigentum*' (at 135) and German natural law and legal philosophy assumed a fairly broad concept of property.

<sup>586</sup> *Ibid.*, at 125: '*Der Mensch hat ... ein aus seinem "Urrecht" entspringendes "ursprüngliche(s) Recht auf die Erzeugnisse seiner Geistes- und Körperkräfte"*'.

<sup>587</sup> See Kase 1967, at 8, who concludes that under the theory of authors' rights as intellectual property rights, '[copyright] is thus a natural right growing out of natural law'.

<sup>588</sup> Fichte 1793, at 447 et seq.

linked everything done to the work back to the personality of the author.<sup>589</sup> This laid the groundwork for German scholars to develop the theory of copyright as a right of personality (see para. 6.3.2.1). By accentuating the personal element in the author's creation, they claimed that copyright arises directly from the authorship of a work. Accordingly, they considered copyright to come into being through the very act of creation (*'die geistige Schöpfungstat'*) and through the act of creation alone.

This affected the way in which copyright formalities were perceived. The belief that copyright was born with the creation of a work did not correspond with the idea of formalities being constitutive of this right. Because the legitimation of protection was seen in the nature of the author's creation or personality, it was also considered unfair if authors could lose protection due to a failure in the process of completing a formality. This was especially so if the failure was ascribable to another person than the author (e.g. if the law also allowed the publisher to complete the formality), to complicated procedure and costs involved (e.g. if the facilities where the formality had to be fulfilled were located too far away) or to mere technicalities (e.g. innocent mistakes or late submissions of applications).<sup>590</sup> In the nineteenth century, it was not uncommon for authors to lose protection as a result of any of these reasons.

Thus, there was a growing consensus that the *existence* of copyright should not be subject to formalities and that failure to comply with formalities should never be the occasion of a loss of copyright. In France, it was argued in jurisprudence and legal doctrine that the deposit was neither constitutive of nor formed the legal basis for copyright.<sup>591</sup> Decisions appeared in which it was ruled that copyright emerged with the creation of a work and that legal deposit was a formality necessary for the exercise of rights only.<sup>592</sup> Courts also held that even if a counterfeiter deposited a work before the author did, the copyright would remain unharmed, since this right found its origin in the creation of the work and not in the deposit.<sup>593</sup> Thus, copyright was believed to appear directly, automatically and exclusively with the creation of a work.<sup>594</sup> This also became the general opinion in Germany and other continental European states.<sup>595</sup> Moreover, as we shall see below, the idea that copyright comes into existence independently of formalities figured prominently at both the 1858 International Conference on Literary and Artistic Property in Brussels and the 1878 International Conference on Artistic Property in Paris (see para. 4.2).

At the same time, it was acknowledged that the protection of literary and artistic works was not unconditional, but should always be established in accordance with the public interest and societal order. In 1857, the French Court of Cassation ruled

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<sup>589</sup> Kawohl & Kretschmer 2009, at 210-216.

<sup>590</sup> See e.g. De Beaufort 1909, at 263.

<sup>591</sup> See Blanc 1855, at 137: '*Le dépôt ne constitue pas la propriété, et n'en est pas le point de départ*'.

<sup>592</sup> See e.g. Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger* in Blanc 1855, at 35-36.

<sup>593</sup> See e.g. Court of Paris, 12 June 1863, *Mayer et Pierson, Pataille* 1863, 225.

<sup>594</sup> See Blanc 1855, at 138-139. See also Nion 1846, at 129.

<sup>595</sup> See e.g. Klostermann 1876, at 185 et seq.: '*die Erwerbung des Urheberrechts [erfolgt] durch die Hervorbringung des Geisteswerkes und [ist] nicht an die Erfüllung von Förmlichkeiten gebunden*'.

that the *exercise* of copyright could always be restricted if the public interest would so require.<sup>596</sup> This was equally the case for other property rights.<sup>597</sup> Because of the cultural and social significance of literature and the arts, it was deemed completely normal that there be a fair balance between the private interests of copyright holders and the public interest.<sup>598</sup> This manifested itself in the distinction between protected and unprotected domains (the idea-expression dichotomy), the limited duration of copyright, limitations and exceptions and, arguably, also formalities.<sup>599</sup> In Germany and other continental European countries, the law was based on a similar ‘balancing act’ between the protection of right holders and the interest of the public.<sup>600</sup>

### 3.3.2.2 THE FUNCTIONS OF COPYRIGHT FORMALITIES

In the nineteenth century, copyright formalities were deemed valuable for a variety of reasons. They were believed to play an important role, both inside the copyright system (internal functions) and outside the copyright system (external functions). In general, this approbation of formalities fits the general mindset of this period. At the time, it seems that formalities – and registration in particular – were seen as a panacea that could cure nearly all problems, at least those concerning title and assurances of property.<sup>601</sup> In addition, because of technological and administrative innovations in the earlier nineteenth century, such as the improvement of the postal services and transport infrastructures, registration had become much easier.<sup>602</sup> In the UK and elsewhere, this prompted a great interest in registries, those for land, deeds and mortgages,<sup>603</sup> and patents, designs and trademarks,<sup>604</sup> probably being the most

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<sup>596</sup> French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado*, *Dalloz* 1858, 1, 161 (at 164): ‘*Que des considérations d’ordre et d’intérêt public ont dû déterminer le législateur à en régler et modifier l’exercice*’.

<sup>597</sup> Art. XVII of the Declaration of the Rights of Man and of the Citizen, as approved on 26 August 1789 by the National Assembly of France, refers to property as ‘an inviolable and sacred right, that no one shall be deprived of except where the public interest, legally defined, shall evidently require it ...’.

<sup>598</sup> See Pfister 2005, at 166-167 and 176-179.

<sup>599</sup> As the next section shows, in France, formalities were believed to fulfil some important functions for the exercise of copyright. This may explain why France continued formalities until 1925, despite the emergence of the idea that copyright arises with the creation of a work in the mid-nineteenth century.

<sup>600</sup> Bluntschli 1853-1854, I (1853), at 193, Gierke 1895-1917, I (1895), at 755 and Klippel 1993, at 135.

<sup>601</sup> See e.g. De Villiers 1901, at 11, who mentions that, in 1830, the UK Real Property Commissioners found compulsory registration of real property ‘[the] great and sovereign remedy ... to cure all evils; to render titles secure, fraud impossible, and loss of deeds harmless; ...’.

<sup>602</sup> See Bently 1997, at 35.

<sup>603</sup> See Simpson 1986, at 280-283.

<sup>604</sup> In the UK, systems of registration were introduced by the Designs Registration Act (1839), 2 Vict., c. 17, the Patent Law Amendment Act (1852), 15 and 16 Vict., c. 83 and the Trade Marks Act (1875), 38 and 39 Vict., c. 91.

noteworthy examples. Registration was thus assumed to be beneficial.<sup>605</sup> This may well explain the continuation of formalities in nineteenth-century copyright law.

### *Internal Functions*

Inside the copyright system, formalities performed various key functions. First, they fulfilled an important evidentiary function. In France, receipts of deposit constituted prima facie proof of the property right on the work deposited.<sup>606</sup> Although always subject to rebuttal by other evidence,<sup>607</sup> legal deposit was an important means of proving the anteriority of authorship and the priority of a property claim.<sup>608</sup> Because of the deposit, the authenticity of a work could also be resolved easily. An identical function was attached to legal deposit in several German states.<sup>609</sup> Equally, in the UK, the facts stated in an entry of registration gave a legal presumption in favour of the registered person.<sup>610</sup> In general, the registers could serve as prima facie evidence of the ownership, assignment or licensing of the right.<sup>611</sup> Therefore, formalities were capable of assisting in providing low-cost and quick resolution of disputes.<sup>612</sup>

Second, formalities fulfilled important publicity functions. The various copyright registers in the UK, for example, served ‘as notice and warning to the public’ not to ignorantly infringe another man’s literary or artistic property.<sup>613</sup> This was intended to create legal certainty and facilitate the regular exercise of rights.<sup>614</sup> By enabling anyone to inspect the registers,<sup>615</sup> third parties could get information about the title of a work, the date of first publication and the names and places of residence of the

<sup>605</sup> See Bently 1997, at 34 and 35 (note 38).

<sup>606</sup> See art. 9 of the French Ordinance of 24 October 1814.

<sup>607</sup> See French Court of Cassation, 19 March 1858, *Hache et Pepin-Lehauilleur v. Goupil*, *Dalloz* 1858, 1, 190 and Court of Paris, 29 November 1869, *Placet v. Yvon*, *Dalloz* 1871, 2, 59.

<sup>608</sup> See Blanc 1855, at 137-138, who speaks of a ‘presumption of paternity’ in favour of the depositor.

<sup>609</sup> See art. II of the Mandate of the Chancellery of 30 November 1833 for the Duchy of Holstein, art. V of the Bavarian Act of 15 April 1840 and art. 7 of the Regulation of Lübeck of 31 July 1841.

<sup>610</sup> See Sherman & Bently 1999, at 184.

<sup>611</sup> In case of an unsettled dispute on the ownership of a work, however, courts could order that an entry was worthless as evidence at trial. See e.g. *Chappell v. Purday*, 152 *Eng. Rep.* 1214, 12 *M. and W.* 303 (1843); *Ex parte Davidson*, 118 *Eng. Rep.* 884, 2 *El. and Bl.* 577 (1853).

<sup>612</sup> See Bently 1997, at 33, who indicates that this was the main reason for the 1836 Select Committee on Arts and their Connection with Manufactures to propose a design registration system.

<sup>613</sup> See Lord Kenyon in *Beckford v. Hood* (1798), 101 *Eng. Rep.* 1164 (at 1167), 7 *T.R.* 620, at 627. See also sec. II of the Statute of Anne (1710), which states explicitly that registration at Stationers’ Hall should prevent that people ‘through ignorance offend against this act’.

<sup>614</sup> See Seville 1999, at 237, note 38.

<sup>615</sup> See e.g. sec. II of the Statute of Anne (1710), which ordered that the registers at Stationers’ Hall be open for public inspection ‘at all seasonable and convenient times’.

publisher and the copyright owner (or his assignee).<sup>616</sup> Similar functions were attached to the various notice requirements. This is illustrated by the British case *Newton v. Cowie*, where it was held that ‘for the protection of the public, it is most material that the day of publication of the print [and the name of the copyright owner] should appear, otherwise it is impossible for a rival publisher to know whether [and against whom] he offends’.<sup>617</sup> Other formalities served as indicators for the public to know whether the author had reserved a certain right (e.g. the translation right in respect of literary works), or simply, whether a particular formality had been fulfilled and, thus, if this formality was constitutive of the right, whether copyright attached to a work.<sup>618</sup>

Third, formalities were considered important instruments for establishing the duration of copyright in those cases where the law laid down a fixed term.<sup>619</sup> In the UK, fixed terms, to be calculated from the date of first publication, were prescribed in respect of literary and artistic works.<sup>620</sup> Without some visible evidence of the date of first publication, either on the work itself or in a public register, it was almost impossible to ascertain when the term of protection commenced and, thus, when the copyright expired.<sup>621</sup> This was also the case in some German states where the term of protection was calculated from the date of first publication and where the receipt of deposit, besides a presumption of ownership, provided proof of the date of publication of a work.<sup>622</sup> In 1881, the Dutch legislator also established a relation between formalities and the duration of copyright when, instead of a term of

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<sup>616</sup> Sherman & Bentley 1999, at 185. The information function of the registers was improved by sec. 13, plus appendix, of the Literary Copyright Act (1842), which formalized the layout of the registration scheme and opened the possibility for registering assignments and licensing agreements.

<sup>617</sup> *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (at 760), 4 *Bing.* 234 (at 236-237).

<sup>618</sup> See Veegens 1895, at 125 and De Beaufort 1909, at 265 et seq. Art. 11 of the Dutch Copyright Act of 1881 required a public registration and monthly publication in the *Staatscourant* (the Government Gazette) of all deposited works. This public advertisement in the *Staatscourant* was also required by earlier laws (art. 14 of the Sovereign Enactment of 1814 and art. 6(c) of the Copyright Act of 1817). Likewise, in France, an advertisement of deposit was typically inserted in the *Journal de la librairie*. In Lübeck, art. 7 of the Regulation of 31 July 1841 required each copy of a work to be marked with a notice that the deposit was completed, together with the date of delivery of the copies.

<sup>619</sup> See De Beaufort 1909, at 257-258 and Snijder van Wissenkerke 1913, at 59.

<sup>620</sup> The 1735 Engravers’ Copyright Act laid down a copyright term of fourteen years from publication, which was extended to twenty-eight years by the Engravers’ Copyright Act (1766), 7 *Geo. III*, c. 38. The 1798 Models and Busts Act laid down a term of fourteen years from publication. The same plus an additional fourteen years if the author was still living after the initial term was fixed by the 1814 Sculpture Copyright Act. The 1862 Fine Arts Copyright Act contained a term of the author’s life plus seven years. For literary works, the 1710 Statute of Anne fixed the copyright term at fourteen years plus an extra fourteen years if the author survived the initial term. The copyright term was increased by the 1814 Copyright Act to twenty-eight years or the author’s life and by the 1842 Copyright Act to forty-two years or the author’s life plus seven years if that proved to be the longer.

<sup>621</sup> *Report of the Royal Commission on Copyright* 1878, at xxiii (para. 134).

<sup>622</sup> See e.g. art. II of the Mandate of the Chancellery of 30 November 1833 for the Duchy of Holstein and art. 7 of the Regulation of Lübeck of 31 July 1841.

protection *post mortem auctoris*, it laid down a fixed term of fifty years from publication.<sup>623</sup>

The importance of formalities for the internal operation of the copyright system weakened by the end of the nineteenth century. First, formalities were increasingly replaced with legal presumptions of authorship, stating that without proof to the contrary, the person named as the author on the work was deemed to be the actual author.<sup>624</sup> Because legal presumptions could achieve the same outcome, while being less onerous for authors, they started to prevail over formalities.<sup>625</sup> This was clearly manifested in the Berne Convention, which contained presumptions of authorship from its early inception.<sup>626</sup> Formalities also lost their significance for the calculation of copyright terms, which were increasingly linked to the author's lifespan.<sup>627</sup> While in France, the term was measured from the author's death already since the decrees of 1791 and 1793,<sup>628</sup> the German legislator adopted a *post mortem auctoris* term in 1870.<sup>629</sup> In the early twentieth century, a 'life plus fifty years' term was introduced in the Berne Convention<sup>630</sup> and, later, also in the UK and the Netherlands.<sup>631</sup>

Nonetheless, several legal commentators and practitioners argued that formalities remained important for the functioning of the copyright system. Especially French lawyers seemed to be convinced of the necessity of formalities for facilitating the regular exercise of copyright.<sup>632</sup> In 1878, when in Germany the laws contained legal presumptions already for a number of years, Pataille, *avocat* at the Court of Appeals in Paris, argued that there were good reasons to subject the exercise of authors'

<sup>623</sup> Art. 13 of the Dutch Copyright Act of 1881. If the author outlived the fixed term of fifty years from publication (or better, from deposit, given that the term was calculated from the officially recorded date indicated on the receipt of deposit), the term would extend to the remainder of his life. Earlier, art. 3 of the Dutch Copyright Act of 1817 laid down a term of twenty years after the author's death.

<sup>624</sup> See e.g. art. 28 of the German Copyright Act of 1870.

<sup>625</sup> See Fischer 1870, at 33-34 and Dambach 1871, at 205-209, arguing that, because the facts recorded by formalities usually were not verified *ex ante*, formalities often only proved that a certain fact was recorded at a certain time. Because the correctness of the recorded facts could always be contested, they believed that legal certainty could equally be established by a set of legal presumptions.

<sup>626</sup> See art. 11 Berne Convention (1886). Nowadays, presumptions of authorship are contained in art. 15 Berne Convention (1971).

<sup>627</sup> See the discussion in *Congrès International de la Propriété Artistique 1878*, at 52-53.

<sup>628</sup> In France, the copyright term was fixed at the author's life plus five years (1791) or ten years (1793). In 1810, it was extended, for the author's widow, to her lifetime and, for his children, to twenty years after the author's death. Finally, in 1866, a copyright term of 'life plus fifty years' was adopted.

<sup>629</sup> Art. 8 of the German Copyright Act of 1870 set the copyright term at thirty years after the author's death. The same term was adopted in the German Copyright Act of 9 January 1876.

<sup>630</sup> Art. 7 Berne Convention (1908) laid down a term of the life of the author plus fifty years, but it allowed contracting states with shorter terms to retain these terms. Ultimately, in 1948, the term of the life of the author plus fifty years became mandatory for all contracting states. See also art. 7(1) Berne Convention (1971).

<sup>631</sup> See the UK Copyright Act (1911) and the Dutch Copyright Act of 1912.

<sup>632</sup> The importance of formalities for the exercise of copyright was emphasized at the 1858 International Conference on Literary and Artistic Property in Brussels and the 1878 International Conference on Artistic Property in Paris. For a discussion of these debates, see para. 4.2 below.

rights to formalities. In general, he maintained that they were valuable for proving priority of authorship, enhancing publicity and creating legal certainty.<sup>633</sup> Hence, formalities were considered to play a key role in upholding the balance between the protection of authors' rights and the public interest. This may well explain why, in France, the legislator persisted until 1925 in requiring legal deposit as a condition to sue.

### *External Functions*

Except for internal functions, formalities also performed a few key roles outside the copyright system. Deposit, for example, was also designed to enrich the collections of national libraries. As part of a broad social-cultural programme aimed at creating national cultural depositories, it fulfilled an essential goal of general utility.<sup>634</sup> Also, formalities may have played a role in commercial dealings. Copyright registers, for instance, may well have operated as trade registers and, thus, as instruments for the economic ordering of the market for books or other protected works.<sup>635</sup> Formalities were occasionally also used as instruments of press control. In France, for example, Napoleon reinstated in 1810 the legal deposit as a measure of state censorship.<sup>636</sup> He demanded that every publisher deposit five copies of each printed work,<sup>637</sup> one of which was meant for censorship control.<sup>638</sup> This lasted until 1829, when Martignac, the French Minister of the Interior, abandoned the idea of deposit as a measure of administrative monitoring.<sup>639</sup> Equally, in the second half of the century, the British applied formalities as an instrument of imperial surveillance of colonial literature. Following the 1857 uprising in India, they issued the 1867 Press and Registration of Books Act, which required publishers to submit three copies of every book to the local government, along with information regarding the book and the payment of a

<sup>633</sup> *Congrès International de la Propriété Artistique 1878*, at 53 et seq.

<sup>634</sup> Lemaitre 1910, at xxxvii-xxxviii.

<sup>635</sup> This function may have been attached to the registration in Saxony, where, as Kawohl 2002, at 24-25 observes, the early copyright laws were still primarily aimed at protecting the Leipzig book trade.

<sup>636</sup> Art. 48 of the Imperial Decree of 5 February 1810 containing regulations for the printing and the book trade.

<sup>637</sup> While art. 6 of the French decree of 1793 placed the duty to deposit on the author, the decree of 1810 made the publisher responsible for depositing. Yet, this must be understood correctly. Although, in theory, the publisher's obligation was separate from the author's and both were equally responsible for performing their respective obligations, in practice, a deposit made by the publisher exempted the author from his obligation. See Pouillet 1908, at 465-66 (no. 425). Thus the deposit performed by the publisher was sufficient to ensure the preservation of the author's rights. See the rulings of the Court of Cassation of 1 March 1834, *Thiéry v. Marchant*, *Dalloz* 1834, 1, 113 ; *Sirey* (2me Sér.) 1834, 1, 65; 20 August 1852, *Bourret et Morel v. Escriche de Ortéga*, *Dalloz* 1852, 1, 335; and 6 November 1872, *Garnier v. Lévy*, *Dalloz* 1874, 1, 493. Earlier, the Court of Cassation had ruled in the opposite direction. See Court of Cassation, 30 June 1832, *Noël et Chapsal v. Simon*, *Dalloz* 1832, 1, 289.

<sup>638</sup> Art. 4 of the Ordinance of 24 October 1814. See Lemaitre 1910, at xxxvi-xxxvii.

<sup>639</sup> Art. 1 of the Ordinance of 9 January 1828.

small fee.<sup>640</sup> Failure to comply with these formalities could lead to severe fines and imprisonment. In addition, non-compliance could result in the inability to acquire copyright protection under the domestic Indian Copyright Act of 1847.<sup>641</sup>

In essence, the different purposes for which formalities in the above cases were applied, concerned clear external matters. While linked to the copyright system, the belief grew that they could as well be regulated separately from one another. This was the case, first of all, with censorship rules. Except for the few occasions where the two were tied up together, press control and copyright protection developed in two distinct directions in the nineteenth century. The instances where the two were connected became ever more sporadic.<sup>642</sup> Likewise, if states wished to enrich their national libraries, there was no need to have a deposit requirement inside copyright law. They could as well create a system of legal deposit that is not tied to copyright protection.<sup>643</sup> Finally, to the degree that copyright registers functioned as trade registers, more and more alternative sources from which data about the economic ordering of the market could be deduced began to appear, including general book trade indexes and bibliographic information systems.<sup>644</sup> In general, these sources proved much more accurate than copyright registers, which often were incomplete, especially if the existence of copyright did not rely on the act of registration.

### 3.3.2.3 *SOME IMPORTANT CONCEPTUAL INNOVATIONS AND TRANSFORMATIONS*

The second half of the nineteenth century also saw a few conceptual innovations in copyright that affected the notion of formalities. Throughout the century, the scope of protection was significantly extended. New categories of works found protection under copyright, including sculptures, paintings, drawings and photographs. Also, protection was severed from the physical object in which literary or artistic works were embodied. Instead, copyright protected works *qua abstractum*, by focusing the protection on the personal and unique form of expression of the author's thoughts

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<sup>640</sup> Act no. XXV of 22 March 1867, An Act for the Regulation of Printing-Presses and Newspapers, for the Preservation of Copies of Books Printed in British India, and for the Registration of Such Books. The aim was to register relevant information that could be harmful for the political situation in India and to create annual statistical reports on the state of colonial literature. See Darnton 2002.

<sup>641</sup> Act no. XX of 1847, An Act for the Encouragement of Learning in the Territories Subject to the Government of the East India Company. See Bently 2007, at 1183-1185 (notes 8 and 11).

<sup>642</sup> In many European countries, the link between censorship and copyright loosened after the French Revolution and disappeared entirely during the nineteenth century. See e.g. Gieseke 1993, who marks the year 1835 as the date on which the two finally separated in Germany.

<sup>643</sup> See Röthlisberger 1907, at 1689, in response to the continuation of the legal deposit as a condition to suit in France: '*An dieser Einrichtung der Pflichtexemplare, die ganz gut als presspolizeiliche oder bibliothekarische massregel neben dem Schutz des Autorrechts bestehen kann, aber auf diesen absolut keinen Einfluss ausüben sollte, wird beständig herumgedoktert, ohne nennenswerten Erfolg*'.

<sup>644</sup> An example is the 'Universal Bibliographic Repertory' set up in 1895. See para. 4.3.2 below.

or ideas.<sup>645</sup> This gave even more prominence to the intangible character of copyright and eventually led to the recognition of protection for the multiple ways in which a work could be exploited. Rather than protection against reprinting, which authors previously enjoyed, they were granted rights of reproduction, public performance and, occasionally, translation and adaptation.<sup>646</sup> These transformations seem to have had a great impact on the way in which copyright formalities evolved.

On the one hand, in respect of the increased focus on the intangible, formalities may have been thought valuable to provide some sense of legal certainty. From the moment when the idea of incorporeal property had been firmly established,<sup>647</sup> it had raised many concerns. Most prominently, it was believed to be difficult to manage and shape the limits of intangible property.<sup>648</sup> Formalities may have contributed in alleviating this concern. As Bently concludes: ‘A registration system operated as a functional equivalent of possession of title deeds – fixing ownership in and marking boundaries of a particular asset. Registration thus made the whole idea of intangible property much less threatening’.<sup>649</sup> Hence, by making more explicit the intangible assets which formed the subject matter of protection, formalities may have played a key role in rationalizing this strange concept of intangible property.<sup>650</sup>

On the other hand, the abstraction implicit in the new concept of authors’ rights contradicted copyright formalities to some extent. As Kawohl and Kretschmer make clear, formalities undermine the presumption that works merit protection *qua abstractum*: ‘If the emerging rationale of copyright derives from the character of abstract, identical authored works (as opposed to the earlier incentive in the creation or dissemination of useful products), protection should coincide with the moment of creation’.<sup>651</sup> Also, abstract work identities are not easily captured in formalities, especially if they are not fixed in a tangible medium. It is difficult to imagine the registration of a performed musical work or the deposit of an oral lecture, speech or sermon (not to think of marking these works with a notice of some kind).<sup>652</sup> Hence, there was some tension between abstraction and existing formalities.

<sup>645</sup> Kawohl & Kretschmer 2003, at 214 et seq.

<sup>646</sup> The Prussian Act of 11 June 1837, for example, protected not only against the reprinting, publication and distribution of writings (arts 2 and 9), but also against the transcription of lectures and sermons (art. 3), the translation of writings, if this right was reserved by a notice (art. 4), the adaptation or rearrangement of musical compositions (art. 20), the creation of derivative works of drawings, paintings or sculptures (art. 23) and the public performance of dramatic and musical works (art. 32).

<sup>647</sup> See Feather 1987, at 25, who states, with respect to the 1774 ruling in *Donaldson v. Beckett*: ‘Despite all the distrust of the idea of incorporeal property, such property was now deemed to exist’.

<sup>648</sup> See Sherman & Bently 1999, at 19-42, for a comprehensive account of the various concerns raised.

<sup>649</sup> Bently 1997, at 35-36. See also Sherman & Bently 1999, at 182-183.

<sup>650</sup> See *Report of the Royal Commission on Copyright* 1878, at xxiii (para. 136): ‘copyright is a species of incorporeal property, of which some visible evidence is desirable’.

<sup>651</sup> Kawohl & Kretschmer 2003, at 221.

<sup>652</sup> Heemskerk 1869 (2000), at 81-82. Also, there was the practical difficulty of when a formality would need to be completed for securing copyright in performed or publicly recited works. This problem is illustrated by sec. 5 of the Lecturers’ Copyright Act (1835), 5 and 6 Will. IV, c. 65, which denies

Moreover, even if an abstract authored work was fixed in a tangible medium of expression, formalities could still be hard to apply, as it often proved difficult, if not impossible, ‘to reduce the subject matter of copyright law beyond the material form in which it existed’.<sup>653</sup> Unlike for patents, designs and trademarks, a representative description or sample of the intangible property was hard to provide for literary and artistic works. To be able to identify the subject matter of protection, they needed to be reproduced in their full physical manifestation, so as to capture all characteristic (i.e. subjective and original) elements that made them eligible for protection.<sup>654</sup>

However, not all types of works lend themselves easily to reproduction. Artistic works and special or limited editions of literary works, at the time, were particularly difficult to duplicate and, even if this were technically possible, it would be inapt to demand a deposit of replicas or copies of these works, as the cost of reproduction were often prohibitively high. Therefore, representatives of artists campaigned strongly against formalities,<sup>655</sup> arguing that the situation regarding works that were not reproducible *ad infinitum* (paintings, drawings and sculptures) was different from that of works that were intended to be reproduced (prints, engravings and photographs).<sup>656</sup> Even so, also for these latter types of works, complaints were raised that the registration and accompanying deposit often appeared too costly and impracticable.<sup>657</sup>

Because the identification of the subject matter of copyright continued to rely on the specific object in which the work existed and not – as with patent, design and trademark rights – on a registered representation of the object,<sup>658</sup> formalities seemed less indispensable for copyright protection. Rather than defining *ex ante* the essence and boundaries of the intangible property via formalities, it was left to the courts to demarcate the nature and limits of literary and artistic works *ex post*.<sup>659</sup> This was considered satisfactory, inter alia, because, in copyright law, there was less need of avoiding difficulties of proof regarding independent creation (*Doppelschöpfung*). If compared with designs and patents law, for example, the chances that this would occur were limited, due to the very personal nature of literary and artistic property.<sup>660</sup>

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copyright protection for oral lectures, unless a two days’ previous notice in writing was given to two justices living within five miles of the place where the lecture would be held.

<sup>653</sup> Sherman & Bently 1999, at 183.

<sup>654</sup> *Ibid.*, at 183-184.

<sup>655</sup> See *Congrès International de la Propriété Artistique 1878*, at 52-59 and, in the UK, *Minutes of the Evidence taken before the Royal Commission on Copyright 1878*, questions 3957-4035 (at 212-218).

<sup>656</sup> See Pataille in *Congrès International de la Propriété Artistique 1878*, at 53 and, for the situation in the UK, *Report of the Royal Commission on Copyright 1878*, at xxvi (para. 157).

<sup>657</sup> Especially for copyright owners holding large catalogues of works with low individual value (such as musical scores), registration and deposit often appeared too costly and impracticable. See e.g. Lord Thring, quoted by Lord Monkswell (24 April 1899) in Sherman & Bently 1999, at 183 (note 38).

<sup>658</sup> Sherman & Bently 1999, at 191-193.

<sup>659</sup> *Ibid.*, at 192.

<sup>660</sup> See Wijnstroom & Peremans 1930, at 16-17 and Bently 1997, at 38 and 41. See also *Minutes of the Evidence taken before the Royal Commission on Copyright 1878*, question 2923 (at 151-152).

Thus, as copyright law ‘moved from the concrete to the abstract’,<sup>661</sup> many of the old formalities started to lose their significance. At the same time, however, new formalities were introduced in response to the extended protection for the various modes of exploitation of abstract authored works, including the rights of making translations and adaptations, public performance and recitation. Because there were great concerns about the economic implications of these previously unprotected acts being brought under the scope of copyright,<sup>662</sup> national lawmakers often began to impose threshold requirements in the form of situation specific formalities. Before authors received protection for these new forms of exploitation, they were required to mark their works with an explicit notice of reservation (as discussed above). This was intended to uphold the balance between the limited exclusivity granted to authors and the interest in the public domain.<sup>663</sup> As the general attitude towards formalities changed and the Berne Convention adopted the principle of no formalities, many situation specific formalities were abolished. Nevertheless, some continued to exist and, even today, can still be found in the copyright law of a number of countries.<sup>664</sup>

### 3.3.2.4 THE NEGLIGIBLE EFFECTS ON DUTCH AND UK COPYRIGHT LAW

The question remains why formalities were retained on a more consistent and ongoing basis in the Netherlands and the UK and, thus, why the above innovations exerted little influence in these countries. In the Netherlands, the second part of the nineteenth century was characterized by pragmatic rather than ideological thinking on copyright. It was believed that there was no higher legal principle that forced the state to secure the rights of authors to the fruits of their labour.<sup>665</sup> Copyright law was considered necessary for reasons of public interest: it should ensure that authors continued creating works.<sup>666</sup> Dutch copyright law thus appears to be one of opportunity rather than of deliberate, principled choices.<sup>667</sup> This fits the spirit of the time, which showed a general resistance against another intellectual property right: the patent right. For small countries with open economies, the net benefit of a property in inventions was thought to be small. Consequently, it was believed that

<sup>661</sup> See Sherman & Bently 1999, at 55 et seq., explaining how ‘the law ... moved from the concrete to the abstract’ due to the ‘shift from the surface of the text to the essence of the creation’.

<sup>662</sup> Kawohl & Kretschmer 2003, at 214 et seq.

<sup>663</sup> See Kawohl & Kretschmer 2003, at 221, arguing that the early copyright registration in Prussia and the UK must already be considered as ‘an indicator of political and economic uneasiness about the [extended] locus of protection, regarding both subject matter and exclusive rights provided’.

<sup>664</sup> See para. 2.2.4 above.

<sup>665</sup> See the preliminary report of Mr. J. Freseman Viëtor in *Handelingen NJV* 1877, I, 34-49, at 44: ‘er is geen rechtsbeginsel dat den Staat kan nopen schrijvers en kunstenaars de rechten van hun arbeid te verzekeren. Zij kunnen daarop geen rechten doen gelden’.

<sup>666</sup> *Handelingen NJV* 1877, II, 69-71, at 71. See also para. 6.2.2.2 below.

<sup>667</sup> See Cohen Jehoram 1993.

free trade in inventions should prevail.<sup>668</sup> This ‘patent controversy’ led to the abolition of the Dutch patent system for over forty years (1869-1910).<sup>669</sup> This may explain why, in the Netherlands, the time was not yet ripe for a major liberal reform of the copyright system.<sup>670</sup>

Equally, no reform of domestic copyright law took place in the UK in the second half of the century. Although the need for reform and consolidation of legislation was widely recognized, it took until 1911 before copyright law was modernized and codified in a single law.<sup>671</sup> This delay in reorganizing the British domestic copyright system seems to have been caused chiefly by imperial and colonial matters, making it difficult to maintain uniformity of copyright law throughout the British Empire.<sup>672</sup> During a general review of British copyright law between 1875 and 1878, a Royal Commission on Copyright made various recommendations for reform, including the idea of making registration compulsory for most types of works (with the exception of paintings and drawings).<sup>673</sup> While a number of recommendations found way into bills,<sup>674</sup> these attempts to revise British copyright law proved unsuccessful.<sup>675</sup>

Despite the initial inactivity on the part of the Dutch and British lawmakers, the principle of no formalities was accepted without resistance when the two countries changed their domestic copyright law following the 1908 revision of the Berne Convention. While the Convention only prohibited imposing formalities on foreign works, the Netherlands and the UK chose to abolish formalities even as to domestic works.<sup>676</sup> In the UK, the existing formalities were typified as ‘anomalous, uncertain, and productive of great disadvantage and annoyance to authors with little or no advantage to the public’.<sup>677</sup> Also, it appears that formalities were poorly fulfilled. In the Netherlands, few books were actually deposited,<sup>678</sup> and in the UK, entries were

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<sup>668</sup> Schiff 1971.

<sup>669</sup> Machlup & Penrose 1950.

<sup>670</sup> On the contrary, with reference to the abolition of the Dutch patent system, voices were raised to do away with Dutch copyright law altogether. See e.g. Mr S. Katz, quoted in De Beaufort 1909, at 75.

<sup>671</sup> Bently 1997, at 3.

<sup>672</sup> See Sherman & Bently 1999, at 136-137.

<sup>673</sup> *Report of the Royal Commission on Copyright* 1878, at xxii-xxvi (paras 128-159). See the Dissent from the Report of the Commissioners as to Paragraphs 153 and 154, respecting the Registration of Books, by Mr. Anthony Trollope (*ibid.*, at lix-lx) and the Note appended to the signature of Mr. Frederick Richard Daldy (*ibid.*, at lx) for dissenting opinions regarding compulsory registration. See also Alexander 2010, at 140-142, for an account of the discussions on registration and deposit.

<sup>674</sup> See Sherman & Bently 1999, at 136 (note 32).

<sup>675</sup> See Kaplan 1958, at 333.

<sup>676</sup> See para. 5.1.1 below, for some obvious reasons for why they decided to do so.

<sup>677</sup> *Report of the Committee on the Law of Copyright* 1909, at 12. For a dissenting opinion, see the Note appended to the Signature of Mr. E. Trevor Ll. Williams (*ibid.*, at 32-35).

<sup>678</sup> See § 2 of the Parliamentary Report of the Dutch Lower Chamber (Memorandum in Reply) of 1912, in *Auteurswet 1881: Parlementaire geschiedenis van de Auteurswet 1912* (1989), III, 6-10, at 9. See also Snijder van Wissenkerke 1913, at 58.

often not made until the copyright was infringed.<sup>679</sup> This was not uncommon in the late nineteenth and early twentieth centuries, as other examples show.<sup>680</sup> As a result, it seems that in the Netherlands and the UK, at the time of their removal, formalities were not really embraced as essential and critical features of copyright law.<sup>681</sup>

### 3.3.3 THE CONTINUATION OF FORMALITIES IN THE US

In contrast with Europe, the US legislator attached great importance to the maintenance of copyright formalities. An important reason seems to be that US copyright policy was not primarily oriented toward the person of the author as the origin of copyright (para. 3.3.2.1), but was rather aimed at furthering public policy objectives. This can be concluded from a 1909 report in which US Congress explicitly stated:

‘The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted ... Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.’<sup>682</sup>

Because Congress believed that the purpose of copyright exists in utilitarian rationales, US copyright law was not principally tailored to the private interests of authors, but to the specific needs of society.<sup>683</sup> While seeking to establish a balance between the interests of authors and those of the public,<sup>684</sup> US copyright law

<sup>679</sup> See *Minutes of the Evidence taken before the Royal Commission on Copyright 1878*, questions 340 (at 21), 1958-1959 (at 97) and 5501-5502 (at 301) and *Report of the Royal Commission on Copyright 1878*, at xxiii (para. 133). See also *Cate v. Devon & Exeter Constitutional Newspaper Co.*, (1889) LR 40 Ch. D. 500 (Chancery Division, 1889), at 506: ‘It is well known that registration is only necessary as a condition precedent to suing; and the almost universal practice on the part of large publishers notoriously is that they do not register until just on the eve of taking some proceeding ...’.

<sup>680</sup> In Italy, it was calculated that, between 1887 and 1891, only 5.5 per cent of all published books had actually been deposited. See ‘La question des formalités en Italie’, *Le Droit d’Auteur*, 10 (1897), 63-66 (at 65). In France, while the number of deposited copies was fairly high (ranging from 17,000 books in 1884 to 21,700 books in 1908), there were constant complaints that often these copies were incomplete or in bad condition or that no copies were deposited at all. See Lemaitre 1910, at l-liv.

<sup>681</sup> Nonetheless, in the UK, the abolition of formalities raised opposition, inter alia, by representatives of newspaper and library associations, who emphasized the importance of formalities in relation to the exercise of copyright and the calculation of the copyright term. See Alexander 2010, at 272.

<sup>682</sup> See H.R. Rep. No. 2222, S.Rep. 1108, 60th Cong., 2d Sess. (1909), at 7.

<sup>683</sup> *Ibid.*, at 7: ‘In enacting a copyright law Congress must consider ... two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.’

<sup>684</sup> See e.g. *Twentieth Century Music Corp. v. Aiken*, 422 US 151 (US Supreme Court, 1975), at 156; *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693 (US Court of Appeals, Second Circuit, 1992), at 696; and *Fogerty v. Fantasy, Inc.*, 510 US 517 (US Supreme Court, 1994), at 526-527.

ultimately pursued the premise that ‘[where] they conflict, ‘the public interest must prevail’.<sup>685</sup>

Copyright formalities were considered to play an important role in preserving the delicate balance between copyright protection and the public interest. The overview of the role and functions of formalities in Chapter 2 has revealed that US copyright formalities had – and still have – real values for both authors and the public at large. Among other things, formalities helped to place a great number of published works in the public domain, showed whether a work was protected by copyright, identified copyright ownership and revealed relevant rights management information.<sup>686</sup> These functions of copyright formalities were repeatedly articulated in both US case law and congressional reports during the nineteenth and twentieth centuries.<sup>687</sup>

This is not to say that US copyright formalities encountered no criticism. Often, US copyright law was criticized of consisting of ‘a snarled web of overly technical formalities’.<sup>688</sup> In particular, the pre-1909 copyright system with its many formalities caused great disapproval. The then-Register of Copyrights argued: ‘[copyright has] come to depend upon exact compliance with the statutory formalities which have no relation to the equitable rights involved, and the question may very well be raised whether this condition should be continued’.<sup>689</sup> It was said to be unjust if authors are deprived of copyright due to a failure to fulfil a mere technical formality, especially if the authors’ failure was the result of inadvertence or innocent mistake.<sup>690</sup>

The US lawmaker agreed that formalities should somehow be mitigated to avoid unintentional loss of copyright and therefore changed the existing provisions during the various revisions of US copyright law.<sup>691</sup> However, it never intended to do away with copyright formalities altogether. It simply deemed them of great value for the functioning of copyright.<sup>692</sup> Although failure to fulfil formalities could cause a loss of protection, this was considered to be part of the balance which US copyright law intended to strike between the interests of authors and those of the public.<sup>693</sup>

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<sup>685</sup> Report of the Register of Copyrights 1961, at 1206.

<sup>686</sup> *Ibid.*, at 1262-1263, discussing the value of the copyright notice.

<sup>687</sup> See para. 2.3 for various twentieth-century examples. A nineteenth-century example is *Burrow-Giles Lithographic Co. v. Sarony*, 111 US 53 (US Supreme Court, 1884), at 55.

<sup>688</sup> Katz 1953, at 87.

<sup>689</sup> Solberg 1904, at 25.

<sup>690</sup> See Report of the Register of Copyrights 1961, at 1263.

<sup>691</sup> In 1976, US Congress abolished renewal, because it was the ‘cause of inadvertent and unjust loss of copyright’, and mitigated the consequences of omissions or errors in the copyright notice by allowing these to be cured. See H.R. Report No. 94-1476, 94th Cong., 2nd Sess. (1976), at 134 and 143.

<sup>692</sup> *Ibid.*, at 143. See also the overview of the functions of formalities in para. 2.3 above.

<sup>693</sup> See Kaplan 1958, at 366: ‘The present scheme of formalities ... is a compromise attaining various public and private advantages at some price both to the public and to private parties. It is hard to do exact justice to each element in the aggregate of “pleasures and pains”.’

### 3.4 Conclusion

The history of formalities in national copyright law shows a gradual decline. Dating back to the pre-history of copyright law, formalities started as stern prerequisites for the protection of books. They formed an intrinsic part of the systems of book privileges and stationers' copyright that existed in Europe at that time. To obtain protection in a book, applicants were required to acquire a licence to print from the censor, affix a notice on the copies of the book, deposit copies of the book and register the book privilege or the stationers' copyright. Formalities in this period had a dual character. They were instruments of trade regulation and censorship at the same time.

Most formalities of the 'old' systems of book privileges and stationers' copyright found their way into early modern copyright law, not as instruments of censorship, but as genuine copyright formalities. However, their nature and legal consequences were as rigid as before. In many countries, copyright came into existence only if the statutory formalities were fulfilled. This was the case in most continental European countries and in US federal copyright law. An exception was the UK, where failure to fulfil copyright formalities did not necessarily lead to a loss of protection.

Things changed in the second half of the nineteenth century. In various European countries, copyright formalities gradually disappeared. Especially in Germany and France, there was a clear tendency to limit their use and soften their nature and legal effects. The idea emerged that the existence of copyright should not be conditional on formalities and that non-compliance with formalities should not result in the loss of protection. Therefore, constitutive formalities were either abolished altogether or held to be merely declaratory of copyright. The latter, above all, occurred in France. One reason is that, in France, formalities were deemed important for facilitating the regular exercise of copyright. In the early twentieth century, the European countries examined in this chapter eventually eliminated all formalities from copyright law.

So how can these developments be explained? As this chapter has identified, one primary reason for the growing insignificance of copyright formalities in the course of the nineteenth century was the upcoming belief that the foundation of copyright exists solely in the quality of the author's personal creation. Under the influence of natural rights theory, copyright was thought to arise automatically with the author's creation. As Ginsburg asserts: 'If copyright is born with the work, then no further action should be necessary to confer the right'.<sup>694</sup> This proved fatal for constitutive formalities. In Chapter 6, this argument is scrutinized in detail. It will be concluded there that, from a principled viewpoint, formalities do not entirely conflict with the natural property and personality rights theories underlying copyright law.

Other than this ideological reason, there were a few pragmatic reasons that added to the gradually weakening connection between copyright law and formalities. First, formalities did not fit well with the concept of abstract authored works. They were

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<sup>694</sup> Ginsburg 1994, at 133-134.

incapable of capturing the essence of the author's expression in order to define the nature and limits of protection. Moreover, they could not be fulfilled unless a work was fixed in a tangible medium. This clashed with the idea that copyright exists in a work irrespective of the mode or form of expression. For certain newly protected categories of works, completing formalities also proved difficult or overly costly. In addition, formalities were rendered redundant by the availability of alternative legal means for establishing authorship and calculating the term of protection.

Given these ideological and pragmatic objections against copyright formalities, it is fairly understandable why most European countries had little inclination to retain them in the early twentieth century. Still this is not to say that these objections were absolute hindrances for preserving copyright formalities. For one thing, they did not influence copyright policy in every country. In the US, for example, compliance with formalities remained a prerequisite to copyright in published works for nearly two centuries. Admittedly, this was caused by the non-existence of 'natural rights' thinking on the part of the US legislator at that time. But, apart from this ideological difference, the US reliance on copyright formalities shows that most of the practical objections were not as powerful as to make formalities in copyright law completely impracticable. In fact, the history of US copyright law reveals that copyright can be subject to formalities without causing significant legal problems in practice.

Another lesson that can be learned from US copyright history is that formalities may play a central role in maintaining the balance between the protection of authors and the public interest. Interestingly, this was also recognized in nineteenth-century Europe. Although the mindset in Europe shifted in favour of automatic copyright protection, there was no absolute resistance against formalities. They were believed to fulfil some important functions in relation to the exercise of copyright. Moreover, situation specific formalities were increasingly imposed as threshold requirements in reply to an extended protection for new forms of exploitation. This is consistent with the, at that time, widely accepted and prevalent idea that, while copyright should well be secured, this must always be done with due regard for the public interest.

These conclusions are relevant to the current discourse. History shows that since the inception of copyright, there was a constant will to establish a fair balance between copyright protection and the public interest. This is precisely what the present calls for a reintroduction of formalities aim to achieve. Today, the balance has tipped too far in favour of protecting the author. The historical overview in this chapter reveals that formalities may play an important role in restoring the imbalance in copyright protection. From its historical roots, copyright certainly has never been an absolute or unconditional right. The exercise of copyright can always be restricted or made subject to formalities if the societal order or the public interest so require.

## Chapter 4

# The Prohibition on Formalities in International Copyright Law

The previous chapter has demonstrated that, in several countries, the attitude toward formalities changed around the turn from the nineteenth to the twentieth century. In this period, the idea emerged that the existence of copyright should not be subject to formalities. At the same time, formalities were not completely opposed. They were thought to fulfil important functions in relation to the exercise of copyright.

Despite the acknowledged functionality of copyright formalities, some countries eliminated them in the early twentieth century. The key cause was the introduction of the prohibition on formalities in the Berne Convention in 1908, which forbade contracting states from subjecting copyright in foreign works to formalities. This induced many states to also abolish formalities for all domestic works. The remark made on this point by the Gorell Committee in the UK in 1909 is illustrative:

‘The Committee fail to see what advantage to the public can be expected from systems of registration, which ... if abolished for [foreign authors] ... should equally be abolished for authors of our own country.’<sup>695</sup>

Hence, the abolition of formalities in national copyright law was also caused by the prohibition on formalities at the international level. To understand the reason for the absence of formalities in current copyright law, therefore, the rationales behind the prohibition on formalities in international copyright law must be unravelled.

For this purpose, this chapter examines the development of copyright formalities at the international level. First, it investigates the international situation prior to the adoption of the Berne Convention in 1886, by providing an overview of formalities in the pre-Berne bilateral agreements (para. 4.1) and exploring the discussions in the proceedings of the most important pre-Berne conferences on international copyright (para. 4.2). Subsequently, it studies the legislative history of the Berne Convention, as reflected in the early commentaries and the records of the diplomatic conferences adopting and revising the Berne Convention (para. 4.3). This chapter then looks at rules on formalities in other treaties, including the Universal Copyright Convention

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<sup>695</sup> *Report of the Committee on the Law of Copyright 1909*, at 12.

(para. 4.4), as well as the Film Register Treaty, the TRIPS Agreement and the WIPO Copyright Treaty (para. 4.5). In the conclusion of the chapter, the main reasons for the introduction of the prohibition on formalities in the framework of international copyright law are identified and discussed (para. 4.6).

## 4.1 International Copyright Prior to the Berne Convention

In the years preceding the adoption of the Berne Convention, international copyright was secured by a patchwork of bilateral agreements. To acquire copyright in foreign countries, these agreements often imposed on authors a variety of formalities. This section explains how countries began to recognize copyright in foreign works on the basis of reciprocity and compliance with formalities (para. 4.1.1). Moreover, it gives an overview of formalities in some of the pre-1886 bilateral copyright treaties (para. 4.1.2). It concludes with illustrating the resistance against the multitude of copyright formalities that must be fulfilled to secure international protection (para. 4.1.3).

### 4.1.1 THE RECOGNITION OF COPYRIGHT IN FOREIGN WORKS

At the international level, the unauthorized reproduction of works was rampant in the eighteenth and nineteenth centuries.<sup>696</sup> An effective protection of foreign works did not yet exist. National copyright law was limited to works first published within the national territory or confined to the subjects of the protecting state.<sup>697</sup> Moreover, some laws granted protection only to works printed by a domestic printer.<sup>698</sup> Hence, without international agreements to that effect, the protection afforded by national copyright laws did not extend to foreign works.<sup>699</sup> From a legal viewpoint, therefore, foreign works were '*publici iuris*'. They could be reprinted and turned to the profit of any person without the author's consent.<sup>700</sup> This also encountered little resistance from an ethical viewpoint. The unauthorized reproduction of foreign works allowed domestic printers and publishers to procure these works at modest expense and, for

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<sup>696</sup> See Briggs 1906, at 44-56, with respect to English, French and German books.

<sup>697</sup> See, in the US, secs 1 and 5 of the US Federal Copyright Act 1790, secs 1 and 8 of the Copyright Act 1831, sec. 86 of the Copyright Act 1870 and, in the UK, sec. 1 of the Literary Copyright Act (1842). Initially, it was uncertain whether foreign authors could secure British copyright by first publication in the UK. See Seville 2006, at 174 et seq. However, in *Routledge v. Low*, L.R. 3 H.L. 100 (House of Lords, 1868), it was held that foreigners who first published in the UK could obtain British copyright, provided that they temporarily resided in one of the British Dominions. Later, first publication in the UK became the sole condition for acquiring British copyright. See Dubin 1954, at 93-94.

<sup>698</sup> See art. 6 of the Dutch Copyright Act of 1817, art. 27 of the Dutch Copyright Act of 1881, art. 61 of the German Copyright Act of 1870 and art. 20 of the German Copyright Act of 9 January 1876. US copyright law also knew a domestic manufacturing clause (sec. 3 of the Act of 3 March 1891).

<sup>699</sup> See Kohler 1896, at 248 and Briggs 1906, at 34-35.

<sup>700</sup> See Curtis 1847, at 21 et seq. and Burke 1852, at 58.

that reason, was considered to be a perfectly honourable business that contributed to the spread of knowledge and the enlightenment of the domestic population.<sup>701</sup>

In the mid-nineteenth century, countries like France and the UK strongly called for international copyright protection. The main reason for this was the protection of the domestic book trade, which lost significant income as a result of the large-scale reprinting of French and English works in foreign countries.<sup>702</sup> To induce protection of French and English works abroad, these countries decided to grant protection to alien works in return for reciprocal protection of domestic literary and artistic output in foreign countries. In the UK, the International Copyright Act of 1844 empowered the Crown to extend British copyright on a reciprocal basis to works first published abroad.<sup>703</sup> As absolute requisites for protection, alien works had to be registered and a copy of the work deposited at Stationers' Hall.<sup>704</sup> Thus, the existence of copyright in foreign works was fully conditional on compliance with formalities.<sup>705</sup>

In France, the Civil Code contained a general rule granting to foreigners the same '*droits civils*' as granted to French citizens, subject to reciprocity.<sup>706</sup> Although some commentators argued that '*droits civils*' encompassed all civil rights, thus requiring reciprocity in all cases where foreigners claimed protection in France,<sup>707</sup> other legal commentators believed that foreigners should enjoy certain civil rights regardless of reciprocity. These were so-called '*droits des gens*', i.e., civil rights such as marriage and property, which originate from natural law and are recognized by the majority of countries.<sup>708</sup> Copyright was thought to be such a '*droit des gens*'.<sup>709</sup> This may explain the adoption of the 1852 French decree granting copyright to foreign works without reference to reciprocity. In accordance with the French decree of 1793, the

<sup>701</sup> See Ricketson 1987, at 18 and Ricketson & Ginsburg 2006, I, at 19. See also Darras 1887, at 214, Briggs 1906, at 36-38 and Ladas 1938, I, at 25.

<sup>702</sup> See Ricketson 1987, at 20-21 and Ricketson & Ginsburg 2006, I, at 22-23. There was an enormous foreign market for French and English literature, because many countries shared a common tongue and the French and English languages were immensely popular in those days.

<sup>703</sup> International Copyright Act (1844), 7 & 8 Vict., c. 12, as amended by the International Copyright Act (1852), 15 & 16 Vict., c. 12, the Fine Arts Copyright Act (1862) and the International Copyright Act (1875), 38 & 39 Vict., c. 12. It remained in effect until the adoption of the International copyright Act (1886), 49 & 50 Vict., c. 33, which opened the way for the UK to join the Berne Convention.

<sup>704</sup> Sec. 6 et seq. of the International Copyright Act (1844). See also sec. 8 of the International Copyright Act (1852) for specific formalities with respect to translations. See Burke 1852, at 62 and 68-70.

<sup>705</sup> Accordingly, as compared with domestic works (see para. 3.3.1.1 above), copyright formalities in the UK had a more rigorous nature and more far-reaching consequences in relation to foreign works.

<sup>706</sup> See art. 11 of the French Civil Code, introduced by Law No. 1803-03-08 adopted on 18 March 1803: '*L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra.*'

<sup>707</sup> See Demolombe 1845-1879, I (1845), §§ 240-246bis, at 285-301.

<sup>708</sup> See Aubry & Rau 1869-1883, I (1869), § 78, at 288 et seq. See also Demangeat 1844, § 56, at 248-260 and Valette 1859, at 16-18 and 407-416.

<sup>709</sup> See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc 1855, at 38-39: '*Considérant que la création d'une œuvre littéraire ou artistique constitue au profit de son auteur une propriété dont le fondement se trouve dans le droit naturel et des gens ...*'. See also Blanc 1855, at 139 ('*la propriété littéraire était une création ... du droit naturel et des gens*') and Darras 1887, at 240.

deposit of two copies of the foreign work with the National Library in Paris as a condition to sue for copyright infringement was required.<sup>710</sup> Because, in practice, the 1852 decree was restrictively interpreted,<sup>711</sup> the protection of foreign works in France continued relying on the conclusion of reciprocal agreements with foreign countries.

National regulations such as those adopted in the UK and France opened the way for states to secure international copyright protection by concluding bilateral treaties with other countries. From the mid-nineteenth century onward, various countries in Europe, including the UK, France, the Netherlands and some German states, entered into bilateral copyright agreements with each other and with other states in Europe, Latin America and Russia to secure reciprocal protection of their authors.<sup>712</sup>

The US remained an important outsider in this trend. US federal copyright law recognized copyright in foreign works in 1891.<sup>713</sup> Only foreign citizens of countries that received presidential proclamation were eligible for protection in the US.<sup>714</sup> The protection of foreign works was conditional on compliance with the formalities laid down in US copyright law, including registration, deposit, notice and manufacturing in the US.<sup>715</sup> In 1905, however, an ‘ad interim’ copyright was introduced for books first published abroad. This was intended to facilitate compliance with US formalities,<sup>716</sup> thus alleviating the burden for foreign authors seeking protection in the US.<sup>717</sup> Except for presidential proclamations, the US joined two inter-American

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<sup>710</sup> Art. 4 of the French decree of 28-30 March 1852.

<sup>711</sup> The 1852 French decree was believed not to grant national treatment, but only to permit foreign right holders to enjoy, in the territory of France, the rights granted by his home country. See Darras 1887, at 221 et seq., Briggs 1906, at 135-136, *Recueil* 1904, at 262-263, Ladas 1938, I, at 27-29, Ricketson 1987, at 22 and Ricketson & Ginsburg 2006, I, at 23-24. See e.g. the decision of the French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado, Dalloz* 1858, I, 161, in which the Court refused to recognize a public performance right in foreign works (the operas of Verdi).

<sup>712</sup> For an overview of the various bilateral agreements prior to the Berne Convention, see Ladas 1938, I, at 44 et seq., Ricketson 1987, at 25 et seq. and Ricketson & Ginsburg 2006, I, at 27 et seq.

<sup>713</sup> Sec. 13 of the Act of 3 March 1891. Note that unpublished works of foreign origin were sometimes protected at state common law. See Ginsburg 2006, at 667-668.

<sup>714</sup> A country could become a ‘proclaimed’ country, if it granted to US citizens the benefit of copyright on substantially the same basis as to its own citizens or if it adhered to an international agreement that provided for reciprocity in the granting of copyright and that was open for ratification by the US.

<sup>715</sup> Bogsch 1959, at 741. Domestic manufacturing was required by sec. 3 of the Act of 3 March 1891.

<sup>716</sup> Act of 3 March 1905, 58<sup>th</sup> Cong., 3<sup>rd</sup> Sess., c. 1432 (in: Copyright Enactments 1963, at 62-63). For books in foreign languages first published abroad, US copyright could be obtained if one copy was deposited with the Library of Congress within thirty days of first publication. This copy should carry a notice of reservation and the correct date of publication. Within one year after first publication, the book should be registered and two copies deposited to obtain protection for the full copyright term. In addition, the book should be manufactured in the US and carry a copyright notice. A similar rule reappeared in secs. 21 and 22 of the US Copyright Act 1909; 17 USC § 22 and 23 (1947). The ‘ad interim’ provisions were finally eliminated by the 1976 US Copyright Act.

<sup>717</sup> See McCannon 1963, at 1131.

multilateral treaties<sup>718</sup> and concluded a few bilateral agreements in the early twentieth century.<sup>719</sup>

#### 4.1.2 THE PLETHORA OF FORMALITIES IN EARLY BILATERAL AGREEMENTS

Although most bilateral agreements subjected the mutual protection of copyright to formalities, the requirements in the various conventions differed to a great extent.<sup>720</sup> The treaty concluded in 1851 between the UK and France, for instance, stood out because of its many strict formalities.<sup>721</sup> Under the terms of this treaty, French works acquired British copyright only if they were registered at Stationers' Hall in London and one copy of the work was deposited with the British Museum. Vice versa, British works obtained copyright protection in France only if they were registered with the *Bureau de la Librairie* of the Ministry of the Interior in Paris and one copy of the work was deposited with the National Library. The formalities had to be fulfilled within three months after first publication in the other country.<sup>722</sup> The treaty also prescribed that the laws and regulations of the respective countries were to be duly obeyed.<sup>723</sup> This implied, for example, that French books could be refused registration in the UK if the translation right had not been expressly reserved on the title page.<sup>724</sup> The treaties that the UK afterwards concluded with Belgium, Spain and Sardinia were modeled after the Franco-British treaty and contained identical formalities.<sup>725</sup>

Registration and deposit formalities were also included in other bilateral treaties. The Franco-Spanish Convention of 1853 and the Franco-Belgian Conventions of 1852 and 1861 required both registration and deposit of copies of the work.<sup>726</sup> On

<sup>718</sup> These are the Mexico City Convention of 1902 and the Buenos Aires Convention of 1910.

<sup>719</sup> See Bogsch 1959, at 741.

<sup>720</sup> For a general overview of the formalities in bilateral copyright agreements prior to 1886, see Ladas 1938, I, at 55-57, Ricketson 1987, at 35 and Ricketson & Ginsburg 2006, I, at 37-38.

<sup>721</sup> See arts 8 and 9 of the Convention between the UK and France of 3 November 1851 (in: Burke 1852, at 82; Delalain 1866, at 27).

<sup>722</sup> Ibid. The modes of registration with respect to specific types of works, as prescribed by the copyright law of one of the countries (e.g. the registration requirements in the British Fine Arts Copyright Act (1862)), equally applied to the same types of works first published in the other country.

<sup>723</sup> Ibid., art. 8.

<sup>724</sup> As required by sec. 8 of the International Copyright Act (1852). See Darras 1887, at 651, note 2.

<sup>725</sup> Arts 8 and 9 of the Convention between the UK and Belgium of 12 August 1854 (in: 44 British and foreign state papers 30); arts 8 and 9 of the Convention between the UK and Spain of 7 July 1857 (in: Levi 1858, at 181); arts 8 and 9 of the Convention between the UK and Sardinia (Italy) of 30 November 1860 (in: 54 British and foreign state papers 1025). See also the formalities in art. II of the earlier Convention between the UK and Prussia of 13 May 1846 (in: Volkmann 1877, no. X, at 64), to which several other German states later also acceded. See Ladas 1938, I, at 45.

<sup>726</sup> Art. 2 of the Convention between France and Belgium of 22 August 1852, art. 7 of the Convention between France and Spain of 15 November 1853 and art. 3 of the Convention between France and Belgium of 1 May 1861 (in: Delalain 1866, at 42, 99 and 188).

the other hand, the treaties that France concluded with Prussia (1862), Switzerland (1864), Saxony (1865), Austria-Hungary (1866) and Portugal (1866), prescribed a registration of works, but no deposit of copies.<sup>727</sup> As a rule, authors were compelled to complete the registration with the Ministry for the Interior or the local Embassy of the state where protection was sought.<sup>728</sup> The convention concluded between the Netherlands and Spain in 1862 secured reciprocal copyright protection on condition that one copy of the foreign work was delivered to the National Library in Madrid or the Royal Library in The Hague within three months after first publication.<sup>729</sup>

Other treaties exempted authors from fulfilling the formalities in the foreign state where copyright was claimed. The conventions that the Netherlands concluded with France (1855) and Belgium (1858) secured reciprocal protection if the formalities in the home country had been fulfilled.<sup>730</sup> Certificates issued in the country of origin constituted evidence that the formalities were duly completed.<sup>731</sup>

Several bilateral treaties also included situation specific formalities. Treaties concluded by France and the UK often provided for a short-term (e.g., a five-year) translation right in foreign works, on condition that authors reserved the translation right by a notice in the beginning of the work and that an authorized translation was published, in part, within one year and, in its entirety, within three years. Additionally, both the original work and the translation had to be registered and deposited.<sup>732</sup> Other treaties required articles in newspapers or periodicals to be marked with an explicit notice of reservation in order to retain a reproduction right in these works.<sup>733</sup>

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<sup>727</sup> See art. 3 of the Convention between France and Prussia of 2 August 1862, art. 3 of the Convention between France and Switzerland of 30 June 1864 and art. 3 of the Convention between France and Saxony of 26 May 1865 (in: Delalain 1866, at 206, 215 and 301); art. 2 of the Convention between France and Austria-Hungary of 11 December 1866 and art. 2 of the Convention between France and Portugal of 11 July 1866 (in: *Recueil* 1904, at 90, 575, 301 and 790).

<sup>728</sup> See Delalain 1866, at xxvii and Darras 1887, at 652.

<sup>729</sup> Art. 5 of the Convention between the Netherlands and Spain of 31 December 1862 (Stb. 1863, 115). See Van de Kasteele 1885, at 164 and De Vries 1990, at 110.

<sup>730</sup> Art. 2 of the Convention between France and the Netherlands of 29 March 1855 (in: Delalain 1866, at 130 and 178; *Recueil* 1904, at 295 and 765) and art. 2 of the Convention between Belgium and the Netherlands of 30 August 1858 (in: *Recueil* 1904, at 125 and 759).

<sup>731</sup> See Van de Kasteele 1885, at 163-164.

<sup>732</sup> Art. 3 of the Convention between the UK and France of 3 November 1851, art. 3 of the Convention between the UK and Belgium of 12 August 1854, art. 3 of the Convention between the UK and Spain of 7 July 1857, art. 3 of the Convention between the UK and Sardinia (Italy) of 30 November 1860 and art. 6 of the Convention between France and Prussia of 2 August 1862. See also Delalain 1866, at xxvii-xxviii, for similar formalities in the early bilateral copyright treaties concluded by France.

<sup>733</sup> Art. 5 of the Convention between the UK and France of 3 November 1851, art. 4 of the Convention between France and the Netherlands of 29 March 1855, art. 4 of the Convention between Belgium and the Netherlands of 30 August 1858, art. 5 of the Convention between the UK and Belgium of 12 August 1854, art. 5 of the Convention between the UK and Spain of 7 July 1857 and art. 5 of the Convention between the UK and Sardinia (Italy) of 30 November 1860.

#### 4.1.3 THE GROWING RESISTANCE AGAINST THE EXCESS OF FORMALITIES

The many formalities imposed on authors by the various bilateral copyright treaties constituted considerable obstacles for securing international copyright.<sup>734</sup> To receive international copyright protection, authors were subject to a vast number of bilateral treaties, where these existed, and were accordingly required to fulfil their often burdensome and sometimes unreasonable formalities. This caused many disadvantages for authors.

The letter of concern addressed by French copyright experts to the organizing committee of the 1858 International Conference on Literary and Artistic Property in Brussels illustrative this well.<sup>735</sup> This letter outlined many difficulties that formalities could create. To obtain international protection, authors usually relied on their publishers, who sometimes failed to fulfil a formality within a given timeframe. In addition, not all publishers had foreign agents or other contacts and sent items could accidentally get lost in international transport or postal services. Also, it sometimes occurred that authorities where the formality had to be fulfilled handled foreign applications carelessly or even refused them arbitrarily. Lastly, the simplest procedural error or omission could be a reason for registering or depositing authorities to disregard an application.

Hence, there were numerous occasions that could lead to a defeat of international copyright. While international copyright protection was enforced by the adoption of bilateral treaties, at the same time the various formalities contained in these treaties multiplied the chances of losing copyright. In every country where protection was sought, the relevant formalities had to be completed. This raised questions about the necessity of imposing formalities in general and about the need to subject copyright to formalities in countries other than the home country of the work. These questions were discussed at the various pre-1886 conferences on international copyright.

## 4.2 The Pre-Berne Debates on International Copyright

In the second half of the nineteenth century, the question of international copyright was extensively debated. The main discussions before the diplomatic conferences in Berne took place at the International Conference on Literary and Artistic Property in Brussels (1858), the International Conference on Artistic Property in Paris (1878)

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<sup>734</sup> See e.g. Ladas 1938, I, at 55.

<sup>735</sup> See *Rapport fait en France au nom de la Commission Mixte chargée d'examiner le programme des questions qui seront soumises à Bruxelles, le 27 septembre 1858, au Congrès de la Propriété Littéraire et Artistique, et présenté au Conseil d'Administration du Cercle de la Librairie, de l'Imprimerie et de la Papeterie, et au Comité de la Commission des Auteurs et Compositeurs Dramatiques, les 14 mai et 1<sup>er</sup> juin 1858*, in: Romberg 1859, I, 217-238, at 221-223.

and the International Conference on Literary Property in Paris (1878).<sup>736</sup> These three conferences addressed questions concerning copyright, in general, and international copyright, in particular. These include the two questions, identified above, about the necessity of imposing copyright formalities (para. 4.2.1) and of subjecting copyright to formalities in countries other than the country of origin (para. 4.2.2). This section summarizes the discussion as recorded in the minutes of the three conferences. This may cast light on how copyright formalities were perceived at the international level in the second half of the nineteenth century and provide a first indication of why the prohibition on formalities was eventually introduced in the Berne Convention.

#### 4.2.1 THE NECESSITY OF FORMALITIES FOR COPYRIGHT PROTECTION

The first question addressed in relation to formalities was the question regarding the necessity of formalities for the protection of literary and artistic property, which was on the agenda of the 1858 Brussels conference (para. 4.2.1.1) and the 1878 artistic conference in Paris (para. 4.2.1.2). By assessing the significance of formalities for the protection of copyright, these conferences reflected much of the discussions that took place at the national level in Europe around the same time.<sup>737</sup>

As we shall see, the conferences confirm that there was broad consensus that the existence of copyright should not be subject to formalities and that non-compliance with formalities should never be the occasion of a loss of copyright. However, at both conferences, people stressed the utility of formalities with regard to facilitating the exercise of copyright. This corresponds with our findings in Chapter 3.

It should be noted that, while the belief that copyright should exist independent of formalities had a great impact on the elimination of formalities at the national level, it was not the cause for the introduction of the prohibition on formalities at the international level. As will be explained below, this prohibition was mostly inspired by pragmatic reasons. Nonetheless, the discussion that follows is important, because the growing belief that authors should not be subject to any formality to secure their rights added to the idea that formalities were not an essential feature of copyright. As a result, when it came to international copyright protection, the decision to free authors from completing formalities outside their home country was easily reached.

##### 4.2.1.1 *THE 1858 CONFERENCE ON LITERARY AND ARTISTIC PROPERTY*

The 1858 Brussels conference addressed the questions of whether it was necessary, for the good functioning of the law, to make the existence of copyright conditional on formalities, whether failure to comply with formalities should necessarily entail

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<sup>736</sup> The 1861 Artistic Conference in Antwerp is not discussed here because it did not address the issue of copyright formalities. See the programme of this conference in Gressin Dumoulin 1862, at 5-6.

<sup>737</sup> See para. 3.3.2 above.

the loss of protection<sup>738</sup> and whether formalities were needed for protecting the property of artistic works that were not produced by print or other mechanical means.<sup>739</sup>

Remarkably, neither in the conference report nor during the plenary debates were these questions discussed thoroughly.<sup>740</sup> The only person who openly questioned the necessity of copyright formalities was Mr Houtekiet, a lawyer in Brussels, who encouraged the abolition of formalities as conditions for the coming into being or the enforcement of copyright.<sup>741</sup> This was immediately contested by Mr Blanc, *avocat* at the Imperial Court in Paris,<sup>742</sup> who emphasized the importance of formalities for the exercise of rights. While asserting that copyright ought to exist independently from formalities, he argued that formalities were important for guaranteeing the anteriority of works and the authenticity of authorship and for informing the public about the date of first publication and the reservation of the exclusive property by the author.<sup>743</sup>

Without further elaboration, the assembly accepted this latter view. It agreed that the existence of copyright should not depend on formalities and that failure to fulfil formalities should not result in a loss of protection. However, the assembly did not condemn copyright formalities altogether. There was common agreement that they could be important for facilitating the exercise of rights. This was expressed in two resolutions, which were unanimously adopted at the end of the conference:

‘It is not necessary for the existence of their right to subject authors of literary and artistic works to formalities. Although particular formalities can be useful as administrative or order measures or as means for signalling and proving the property, it should be assured that non-compliance with formalities cannot and will never lead to the loss of rights. It is important that formalities be as simple as possible; registration and deposit of one or more copies of a work with a public authority created for that purpose appears to be most advantageous.’<sup>744</sup>

<sup>738</sup> Romberg 1859, I, at 4-6, question no. 14.

<sup>739</sup> *Ibid.*, I, at 4-6, question no. 23.

<sup>740</sup> *Ibid.*, I, at 141, 170 and 205 (question no. 14), and 70, 172 and 210 (question no. 23).

<sup>741</sup> Houtekiet in Romberg 1859, I, at 210.

<sup>742</sup> Blanc was the delegate of the *Association des artistes peintres, sculpteurs, architectes, graveurs et destinateurs* of Paris and the *Association des inventeurs et artistes industriels* of Paris.

<sup>743</sup> Blanc in Romberg 1859, I, at 210. Blanc illustrated this by recalling that deposit performed important functions, not for the vesting of the copyright, but as a condition for instituting legal action and for preserving the collections of libraries and museums. See also the treatise of Mr Warnkönig, Professor at the University of Heidelberg, and Dr O. Wächter, from Stuttgart, in reply to the questions proposed by the organizing committee of the 1858 conference, in: Romberg 1859, I, at 268-274, at 269.

<sup>744</sup> Resolution 7 of part II, in Romberg 1859, I, at 175-178: ‘*Il n’y a pas lieu d’astreindre les auteurs d’ouvrages de littérature ou d’art à certaines formalités, à raison de leur droit. Si des formalités particulières peuvent être utiles, soit comme mesure d’administration et d’ordre, soit comme moyen de constater et de prouver le droit de propriété; s’il convient d’assurer l’accomplissement de ces formalités par une sanction quelconque, leur inobservation ne peut et ne doit jamais entraîner la déchéance du droit. Il importe de rendre ces formalités aussi simples que possible; l’enregistrement*

‘Special formalities as absolute conditions for the acquisition and maintenance of property are no more required for artistic works than they are for literary productions. However, in one case or the other, formalities can be desirable as order measures and for facilitating the regular exercise of the right. The works could be registered and the certificate of registration issued to the artist would allow him to make the authenticity of the work and, where appropriate, that of the copies recognizable as belonging to him or his assignees.’<sup>745</sup>

Before these resolutions were adopted, Mr Blanc stressed that their contents were ‘of course, without prejudice to the rights and interests of authors as established in accordance with those of the public domain’.<sup>746</sup> By so stating, he seemingly referred back to earlier debates at the conference, in which a clear appraisal was made of the interests of authors and the public domain.<sup>747</sup> During the conference, there was quite some agreement that intellectual property rights could not be unconditional. Owners of other property rights, such as landed property, were also obliged to sacrifice their rights if the public interest so required, e.g., for exploitation of (mineral) resources or (rail)road construction.<sup>748</sup> Consequently, while copyright was believed to emanate from the quality of the author and to exist independently of formalities,<sup>749</sup> there was a common understanding that, because of its social importance and public utility, the exercise of copyright could always be restricted in the public interest.

#### 4.2.1.2 THE 1878 INTERNATIONAL CONFERENCE ON ARTISTIC PROPERTY

The question of whether authors of artistic works should be subject to formalities to secure copyright protection was also raised at the 1878 International Conference on Artistic Property.<sup>750</sup> In its preliminary report, the organizing committee proposed the abolition of formalities that were useless, the simplification of formalities that

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*et le dépôt d'un ou plusieurs exemplaires de l'ouvrage, entre les mains d'une autorité publique constituée à cet effet, paraissent le mode le plus avantageux.’*

<sup>745</sup> Resolution 4 of part IV, in Romberg 1859, I, at 175-178: ‘*Des formalités particulières ne doivent pas être exigées pour les œuvres d'art, pas plus que pour les productions littéraires, comme condition absolue de l'acquisition et de la conservation de la propriété. Cependant, dans un cas comme dans l'autre, des formalités peuvent être désirables comme mesure d'ordre et pour faciliter l'exercice régulier du droit. Les ouvrages pourraient être enregistrés, et le certificat d'enregistrement qui serait délivré à l'artiste permettrait à celui-ci de faire reconnaître, entre ses mains et entre celles de ses cessionnaires, l'authenticité de l'œuvre, et, le cas échéant, celle des copies.*’

<sup>746</sup> See Blanc in Romberg 1859, I, at 172: ‘*Il est bien entendu que c'est sans préjudice des droits et des intérêts des auteurs tels qu'ils ont été établis conformément avec ceux du domaine public.*’ In the person of the president, the assembly consented with this view. *Ibid.*, I, at 172.

<sup>747</sup> See, in particular, the debate on copyright duration in Romberg 1859, I, at 69 and 95 et seq.

<sup>748</sup> *Ibid.*, I, at 69.

<sup>749</sup> *Ibid.*, I, at 70.

<sup>750</sup> *Congrès International de la Propriété Artistique 1878*, at 4-5; question no. 3.

appeared essential and the extension of the terms within which formalities should be completed.<sup>751</sup>

At the conference, the question of formalities was lively debated. Some participants in the discussion strongly advocated a formality-free copyright regime, while others expressed their support of continuing formalities, arguing that they performed a few important functions for the exercise of (literary and) artistic property rights.

A strong defender of the total abolition of formalities was Mr Dognée, president of the *Institut des Artistes Liègeois* in Belgium. He argued that the existence of artistic property, which he called a 'sacred' right, should not depend on formalities. All artists, even the humblest ones, should be able to reap the fruits of their creative labour without being required to fulfil formalities so as to establish artistic property. He believed that no artist should be denied the advantages to which he is legitimately entitled. If the artist does not want to make use of his rights, so he argued, the rights could simply be renounced.<sup>752</sup> Dognée asserted that formalities run counter to the very interests that they try to defend. He questioned: if formalities aim to protect the artist's interest by establishing proof of the creation of his work, why should this result in the loss of copyright in case of failure to complete those formalities? He maintained that there were other, equally effective but more equitable means to prove artistic property. Artists should be free to establish the paternity of works by any legal evidence.<sup>753</sup>

A counterargument was voiced by Mr Pataille, *avocat* at the Court of Appeals in Paris. He acknowledged that copyright should exist independent of formalities, but he nevertheless believed that there were good reasons to subject the exercise of copyright to a particular formality.<sup>754</sup> In infringement suits he had experienced many difficulties in proving anteriority, especially in relation to works of smaller authors.<sup>755</sup> He found that it was in the artist's own interest to fulfil some kind of formality so as to be able to provide evidence of his property in court.<sup>756</sup> Because of practical utility, he believed that legislators should be free to impose formalities as prerequisites to sue. Even so, when proposing a resolution, he advised against subjecting the enforcement of copyright to formalities, but for the establishment of a

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<sup>751</sup> See the report of the Committee of Organization, presented by Mr A. Huard, *avocat* at the Court of Appeals in Paris, in: *Congrès International de la Propriété Artistique 1878*, 21-26, at 24.

<sup>752</sup> Dognée in *Congrès International de la Propriété Artistique 1878*, at 54. Although Dognée did not explain how artists could give up their copyright, it seems evident that it required affirmative steps.

<sup>753</sup> *Ibid.*, at 54-55.

<sup>754</sup> Pataille drew a general comparison with the registers of births, marriages and deaths. He questioned: why should artists not register the birth of their works '*comme un père va déclarer son enfant et le faire inscrire sur le registre des naissances*' ('like a father will declare his child and have it registered on the register of births')? See *Congrès International de la Propriété Artistique 1878*, at 54.

<sup>755</sup> *Ibid.*, at 53: '*Dans les quatre cinquièmes des procès que j'ai eu à plaider, j'ai eu de grandes difficultés à prouver l'antériorité.*'

<sup>756</sup> *Ibid.*, at 53.

purely voluntary registration system. The proposal that Pataille put forward read as follows:

‘The artist’s property right exists independently from deposit. Nevertheless, it would be useful to establish in each country registers in which authors or their successors in title can record their works together with the names of publishers and assignees, if there are any.’<sup>757</sup>

This proposal gained approval from different sides. Mr Laroze, a Parisian lawyer, welcomed Pataille’s distinction between the existence and the exercise of rights. He argued that, while artistic property was ‘sacred’ and inviolable, the great evidentiary benefits for artists would warrant that the exercise of this right be subject to a voluntary registration of some kind. This would provide for many advantages without harming anyone.<sup>758</sup> For the same reason, Mr Pouillet, *avocat* at the Court of Appeals in Paris, also argued in favour of an optional formality. However, to emphasize the voluntary nature of the proposal and to make it more acceptable to everyone, he suggested including the sentence: ‘In all cases, this registration is optional’.<sup>759</sup> Also, the idea of requiring a recordation of assignments of copyright received broad support.<sup>760</sup>

Nonetheless, in the end, the assembly voted against Pataille’s proposal. Only the first part of the draft, regarding the absence of formalities in relation to the existence of copyright, received enough support. Thus the following resolution was adopted:

‘The author of an artistic work should not be subject to any formality to secure his right.’<sup>761</sup>

The reason why the assembly did not adopt the second part of Pataille’s proposal is unknown. Different circumstances may have contributed to this. First, it is likely that not everyone was certain of the facultative nature of the proposal. Some people seem to have been concerned that accepting voluntary registration would provide an

<sup>757</sup> Ibid., at 53: ‘*Le droit de propriété de l’artiste existe indépendamment de tout dépôt. Néanmoins, il serait utile d’établir dans chaque pays des registres sur lesquels les auteurs ou leurs ayants cause seraient admis à faire enregistrer leurs œuvres avec les noms des éditeurs et acquéreurs, s’il y en a.*’

<sup>758</sup> Laroze in *Congrès International de la Propriété Artistique 1878*, at 55-56, stressing that a certificate of deposit or registration would not only provide evidentiary benefits for artists claiming protection in their own country, but definitely also for those claiming international protection of their artistic property.

<sup>759</sup> Pouillet in *Congrès International de la Propriété Artistique 1878*, at 56-57: ‘*La déclaration, dans tous les cas, n’est que facultative.*’

<sup>760</sup> See Meissonier, president of the conference, in *Congrès International de la Propriété Artistique 1878*, at 57: ‘*Je crois que ce qui pourrait être utile ce serait un enregistrement, non pas au moment où l’œuvre vient d’être faite, mais au moment où l’auteur a cédé son droit. L’acquéreur pourrait être tenu de faire enregistrer cette cession.*’

<sup>761</sup> Resolution 7 in *Congrès International de la Propriété Artistique 1878*, at 115-117: ‘*L’auteur d’une œuvre d’art ne doit être astreint à aucune formalité pour assurer son droit.*’

opportunity for countries to continue imposing compulsory formalities.<sup>762</sup> Second, a few people referred to the impracticality of registering paintings and other works of art that are not reproducible *ad infinitum*.<sup>763</sup> Other people relativized this concern.<sup>764</sup> Third, the argument that artists could prove their rights by other legal means might have convinced participants of the redundancy of formalities as concerns the good functioning of copyright law.<sup>765</sup> Fourth, it was questioned whether the registration of a title or a description of artistic works could sufficiently identify artistic property. If no copy, photograph or sketch was deposited, evidentiary difficulties could arise if a similar title or description were registered by a third person.<sup>766</sup> Finally, Pataille's proposal might have been too specific for adoption at this conference. There appears to have been a broad understanding that the conference should not adopt concrete provisions, but create common principles for a future (international) copyright law.<sup>767</sup>

#### 4.2.2 THE NECESSITY OF SUBJECTING FOREIGN AUTHORS TO FORMALITIES

A second question on the agenda of the various pre-Berne international conferences on literary and artistic property was the question of whether international copyright should necessarily entail compliance with formalities in every state where authors seek protection. At the 1858 Brussels conference, this issue still appeared somewhat controversial. Nevertheless, a resolution was adopted to the effect that international copyright should be secured upon compliance with formalities in the home country (para. 4.2.2.1). At the 1878 conferences on literary and artistic property in Paris, the idea that international copyright should attach upon compliance with formalities in the country of origin seems to have been fully accepted (para. 4.2.2.2).

##### 4.2.2.1 THE 1858 CONFERENCE ON LITERARY AND ARTISTIC PROPERTY

At the 1858 Brussels conference the question was raised whether, for the purpose of securing international copyright, foreign authors should be subject to formalities in all countries where they claim protection or whether completing formalities in their

<sup>762</sup> See Leighton in *Congrès International de la Propriété Artistique 1878*, at 57: 'Je suis complètement contre l'enregistrement, parce que ceux qui négligent de se faire inscrire perdent leur droit ...'.

<sup>763</sup> See Meissonier, president of the conference, in *Congrès International de la Propriété Artistique 1878*, at 56.

<sup>764</sup> See Pouillet in *Congrès International de la Propriété Artistique 1878*, at 56.

<sup>765</sup> Leighton in *Congrès International de la Propriété Artistique 1878*, at 57: 'Les experts sont toujours capables de reconnaître l'auteur d'une œuvre, soit d'un écrit, soit d'un dessin, aussi bien que pour la touche, la manière d'un peintre, et cela même après la mort de l'auteur.'

<sup>766</sup> Beaume, avocat at the Paris Court, in *Congrès International de la Propriété Artistique 1878*, at 58.

<sup>767</sup> *Ibid.*, at 58: 'Je ne crois pas que ce soit le rôle d'un Congrès de préciser les formalités à prendre; il ne peut que poser les principes d'ordre général.'

home country should suffice.<sup>768</sup> The organizing committee took the standpoint that, once copyright is secured in accordance with the rules of the country of origin of the work, it should take legal effect in all countries granting international copyright protection without further requiring compliance with formalities abroad.<sup>769</sup>

This topic was discussed already during the preparation of the conference report. Some members argued that it would exceed the scope of international benevolence if foreign authors could enjoy copyright without formalities, while domestic authors were obliged to fulfil formalities and bear the associated costs.<sup>770</sup> Other members, however, pointed out the maxim *locus regit actum*,<sup>771</sup> i.e., a rule of conflict of laws recognized in civil law and international law stating that the form of a legal act should be governed by the law of the country where the act took place.<sup>772</sup> They believed that if copyright was established in the country of origin, the quality of the author and the copyright that derived from it could not be denied in the other countries.<sup>773</sup>

At the plenary session, this discussion was continued. Critical remarks on freeing authors from completing formalities outside their home countries were posed, *inter alia*, by Mr Faider, a lawyer in Brussels. He feared that creators of derivative works (such as translators, lithographers and illustrators) would run the risk of accidentally infringing copyright in foreign works that were imported in their countries without a formality of some kind indicating that these works were protected by copyright. He argued that copyright should respect the public interest by providing adequate legal certainty. Therefore, he found that authors should comply with a simple and modest formality before they become entitled to claim copyright in a foreign country.<sup>774</sup>

This view was shared by the secretary of the *Association Internationale pour les Réformes Douanières*, Mr Jottrand. He believed that authors of literary and artistic works should be able to enjoy copyright across the globe. However, for the benefit of the public at large, this right should at least be publicly announced. He stated:

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<sup>768</sup> Romberg 1859, I, at 4-6, question no. 4.

<sup>769</sup> Explanatory Circular of the Committee of Organization in Romberg 1859, I, 7-15, at 8.

<sup>770</sup> Romberg 1859, I, at 62. Interestingly, this argument was sometimes used in national court decisions involving early bilateral copyright treaties in order to decline protection for foreign works for which domestic formalities had not been completed. See e.g. *Cassell v. Stiff* (1856), 2 K. & J. 279, 69 Eng. Rep. 786: 'otherwise authors of foreign works would be placed in a better position than authors in this country, which certainly was not intended. There is a careful and jealous provision that no author of a foreign work shall be in a better position in this country than the authors of works here are.'

<sup>771</sup> The maxim *locus regit actum* and its relationship with formalities was also referred to by a few early commentators of the Berne Convention. See Soldan 1888, at 15-16 and Röhlsberger 1906, at 26-27.

<sup>772</sup> See Van Eechoud 2003, at 26, on this rule of conflict of laws.

<sup>773</sup> See Romberg 1859, I, at 62-63. Here, copyright is once more referred to as a '*droit des gens*'.

<sup>774</sup> Faider in Romberg 1859, I, at 75 and 77. During the preparation of the report for the first session, one member proposed to subject international copyright to the formality of marking all copies of a work with a special notice, but this suggestion was opposed and rejected. See Romberg 1859, I, at 199.

‘Not requiring formalities, would result in setting a legal trap which people, who in good faith believe they have the right to reproduce a work, could involuntarily fall into.’<sup>775</sup>

To substantiate his position, Jottrand drew a comparison with real property, arguing that the acquisition and transfer of land was also conditional on formalities. Because these formalities fulfilled important publicity functions, he queried why formalities could not fulfil similar publicity functions in the field of copyright law.<sup>776</sup>

Many other participants took an opposite viewpoint. Mr Romberg, the reporter of the first session, found the arguments for maintaining formalities in the international copyright context unconvincing. He called the difficulty of having no formalities at the international level entirely imaginary.<sup>777</sup> He believed that the conference should leave the old state of affairs behind and head a new direction. His aspiration was that writers and artists who receive copyright in their own countries be secured protection in all other countries. It is incompatible with this principle if they would be required to fulfil formalities in each country where they seek protection.<sup>778</sup>

Mr Celliez, representative of the *Société des gens de lettres* in Paris, asserted that if authors were liberated from fulfilling formalities in foreign countries, this would strengthen the international protection of literary and artistic property. He stated that if literary and artistic property was recognized as an absolute right, it should be put at the author’s complete disposal.<sup>779</sup> While formalities obviously provided important publicity functions, he found that creators of derivative works, whether or not acting in good faith, should not be granted a favour at the detriment of authors.<sup>780</sup>

The arguments against preserving formalities for securing international copyright found support by the large majority of participants at the conference. This resulted in the following resolution, which was almost unanimously adopted:

‘It is not necessary to impose particular formalities on foreign authors to allow them to invoke and enforce the right of property. In order for their rights to be recognized and protected, it must suffice if they have fulfilled the formalities required by the law of the country where the first publication took place.’<sup>781</sup>

<sup>775</sup> See Jottrand in Romberg 1859, I, at 77: ‘*Si vous n’exigez pas de formalité, vous tendez un piège à la bonne foi des gens qui, croyant avoir le droit de reproduire, pourraient tomber involontairement sous le coup de la loi.*’

<sup>776</sup> Ibid., I, at 77. But see Celliez in Romberg 1859, I, at 77, stating that the association with real property is misplaced, because copyright cannot be compared with concepts of physical property.

<sup>777</sup> Romberg in Romberg 1859, I, at 76: ‘*L’inconvénient ...est, je crois, complètement imaginaire ....*’

<sup>778</sup> Ibid., I, at 76.

<sup>779</sup> See Celliez in Romberg 1859, I, at 77: ‘*Nous reconnaissons à l’auteur un droit absolu; ....*’

<sup>780</sup> Ibid., I, at 77.

<sup>781</sup> Resolution 4 of part I, in Romberg 1859, I, at 175-178: ‘*Il n’y a pas lieu d’astreindre les auteurs étrangers à des formalités particulières, afin qu’ils soient admis à invoquer et à poursuivre le droit de propriété. Il doit suffire, pour que ce droit leur appartienne, qu’ils aient rempli les formalités requises par la loi du pays où la publication originale a vu le jour.*’

It was predicted that a rule of this kind would be among the principal provisions of a future International Code for the protection of literary and artistic property.<sup>782</sup> As we shall see below, the 1886 Berne Convention would indeed subject the international protection of copyright to compliance with formalities in the home country.

#### 4.2.2.2 THE 1878 CONFERENCES ON LITERARY AND ARTISTIC PROPERTY

During the two 1878 conferences on literary and artistic property in Paris, there was little discussion on the question of the necessity of subjecting authors to formalities outside their home country to secure international protection. It was believed that authors should be able to exercise their literary and artistic property rights anywhere without difficulty. To obtain protection in foreign countries, the assemblies held the view that it would be sufficient if authors could prove that they enjoyed copyright in the country of origin of the work.<sup>783</sup> The 1878 International Conference on Literary Property expressed this, by adopting the following resolution:

‘To secure protection of his rights, it will be sufficient for the author to have fulfilled the formalities in the country where the work was first published.’<sup>784</sup>

A resolution with a similar recommendation was adopted at the 1878 International Conference on Artistic Property. It reads as follows:

‘In order to be allowed to legally assert his right in all countries, the artist will only need to prove his property in the country of origin. This will be the same for the right of representation or public performance of musical works.’<sup>785</sup>

Consequently, on the eve of the establishment of the Berne Convention, there was a strong international consensus about the need to liberate authors from the multitude of formalities that they had to fulfil to secure international protection of their works. A first sign of this consensus can be found in the bilateral copyright agreements that were concluded in the early 1880s. These agreements granted reciprocal protection, provided that authors could prove that they enjoyed copyright under the law of their home country by establishing that they had fulfilled the domestic formalities.<sup>786</sup>

<sup>782</sup> See Romberg in Romberg 1859, I, at 63.

<sup>783</sup> See Pataille in *Congrès International de la Propriété Artistique 1878*, at 54 and Pouillet, *ibid.*, at 102.

<sup>784</sup> Resolution 5 in *Congrès littéraire international de Paris 1878*, at 369-370: ‘Pour que cette protection lui soit assurée, il suffira à l’auteur d’avoir accompli dans les pays où l’œuvre a été publiée pour la première fois, les formalités d’usage.’

<sup>785</sup> Resolution 16 in *Congrès International de la Propriété Artistique 1878*, at 115-117: ‘L’artiste, pour être admis à faire valoir son droit en justice dans tous les pays, n’aura qu’à justifier de sa propriété dans le pays d’origine. Il en sera de même pour le droit de représentation ou d’exécution des œuvres musicales.’

<sup>786</sup> See art. 1 of the Convention between Spain and France of 16 June 1880 (in: *Recueil 1904*, at 220 and 648) and art. 7, last paragraph, of the Convention between Germany and Italy of 20 June 1884 (in: *Recueil 1904*, at 74, 353, 563 and 707). Other treaties only required the author’s name to be duly

### 4.3 The Berne Convention and the Prohibition on Formalities

The first calls for the constitution of a ‘Union for literary and artistic property’ were expressed at the two 1878 conferences on literary and artistic property in Paris.<sup>787</sup> In the 1880s, these calls became stronger. The idea grew that the existing patchwork of bilateral treaties should be replaced with a uniform multilateral treaty establishing a Union for the protection of copyright in literary and artistic works.<sup>788</sup> This would be the 1886 Berne Convention for the Protection of Literary and Artistic Works, which until today has remained the main treaty regulating international copyright law.

The Berne Convention is famous for its prohibition on copyright formalities.<sup>789</sup> It must be emphasized, however, that this prohibition was not part of the Convention from its early inception. It was introduced only in 1908. The rule that was originally contained in the Berne Convention in 1886 subjected the enjoyment of copyright in the Berne Union to compliance with the formalities in the country of origin.

This section studies the legislative history of the Berne Convention with a view to unravelling the rationale behind the introduction of the prohibition on formalities. To that end, it analyzes the development of successive provisions on formalities in the Berne Convention, starting with the 1886 country of origin rule with respect to formalities (para. 4.3.1) and the Interpretative Declaration concerning this provision that was adopted at the 1896 Paris revision (para. 4.3.2). Next, it examines the introduction of the prohibition on formalities at the 1908 Berlin revision (para. 4.3.3). Subsequent revisions brought no substantive change (para. 4.3.4).

An explanation of the reason for the introduction of the prohibition on formalities in the Berne Convention is part of the conclusion that is provided for at the end of this chapter. Here, it can already be noted that, although it cannot be excluded that, in the background, ideological motives have played a role, it were mostly pragmatic reasons that inspired the introduction of the prohibition on formalities.

#### 4.3.1 THE 1886 BERNE CONVENTION

The adoption of the 1886 Berne Convention was preceded by a series of events. In 1883, the *Association Littéraire et Artistique Internationale* (ALAI) created a draft convention that formed the basis of a programme that could serve as a blueprint for a future multilateral treaty. The draft was based on the rule of national treatment and provided that protection should be granted on the sole condition that the formalities

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indicated on the work, without imposing any further formality. See art. 7 of the Convention between Germany and France of 19 April 1883 (in: *Recueil* 1904, at 70, 271 and 559) and art. 7 of the Convention between Germany and Belgium of 12 December 1883 (in: *Recueil* 1904, at 61 and 549).

<sup>787</sup> See the last recommendation in *Congrès littéraire international de Paris 1878*, at 370 and resolutions 20 and 21 in *Congrès International de la Propriété Artistique 1878*, at 115-117.

<sup>788</sup> See Ladas 1938, I, at 75, Ricketson 1987, at 48 and Ricketson & Ginsburg 2006, I, at 51.

<sup>789</sup> At present, this prohibition is contained in art. 5(2) of the Berne Convention (1971).

of the country of origin were completed.<sup>790</sup> It was proposed to the Swiss Federal Council, which organized three diplomatic conferences in Berne (in 1884, 1885 and 1886), in which the possibility of a universal convention was examined and discussed.

During the three diplomatic conferences in Berne, agreement was established on the text of an international copyright treaty. This treaty, the Berne Convention, was adopted in 1886. In accordance with the 1883 ALAI draft, the Convention granted protection on the basis of national treatment (para. 4.3.1.1), although it made an exception with respect to the fulfilment of formalities. Protection was granted if the formalities of the country of origin were completed (para. 4.3.1.2). The Berne Convention was supplemented with a few auxiliary provisions to compensate for the loss of legal certainty caused by the country of origin rule with respect to formalities (para. 4.3.1.3).

#### 4.3.1.1 THE CHOICE FOR A TREATY BASED ON NATIONAL TREATMENT

For the first meeting in Berne in 1884, the Swiss Federal Council proposed a work programme, which contained one provision relevant to copyright formalities:

‘The subjects or citizens of any of the Contracting States shall enjoy in all the other States of the Union, with respect to the protection of the rights of authors in their literary and artistic works, such advantages as the laws concerned do now or may hereafter grant to their own nationals. Consequently they shall have the same protection as the latter and the same legal remedies against any violation of their rights, subject to compliance with the formalities and conditions prescribed by law in the country of origin of the work.’<sup>791</sup>

This provision treated the question of formalities in direct relation with the rule of national treatment. Although some people called for the creation of a Convention containing a ‘uniform regulation ... of all provisions concerning the protection of copyright’ instead of the establishment of a Union based on the principle of national treatment,<sup>792</sup> this was considered highly impracticable and premature. The assembly feared that, given the differences in existing laws and conventions, the drafting of a universal law would delay for a long time the conclusion of a general agreement.<sup>793</sup>

<sup>790</sup> Art. 1 of the Draft Convention prepared by the ALAI during its 1883 conference in Berne, in: *Actes 1884*, at 7-8; Berne Centenary 1986, at 83-84.

<sup>791</sup> Art. 2 of the programme adopted by the Swiss Federal Council for the International Conference of 8 September 1884 in Berne, in *Actes 1884*, at 11-13; Berne Centenary 1986, at 85-86.

<sup>792</sup> See Reichardt (Germany) in *Actes 1884*, at 24; Berne Centenary 1986, at 88.

<sup>793</sup> See d’Orelli (Switzerland), Ulbach (France) and Lagerheim (Sweden) in *Actes 1884*, at 28; Berne Centenary 1986, at 90 and the circular letter of the Swiss Federal Council of 28 June 1884 in *Actes 1884*, at 10; Berne Centenary 1986, at 84-85, indicating that it was not the intention to ‘[encroach] too seriously on the domestic legislation of specific States, or on existing international conventions’.

Because the aim was to lay the foundations of an International Convention to which the greatest possible number of states could accede instantly,<sup>794</sup> the assembly opted for a Convention that was founded on the principle of national treatment.<sup>795</sup>

With respect to copyright formalities, the choice for an International Union based on national treatment had important consequences.<sup>796</sup> Because the idea of creating a uniform law was abandoned, the assembly did not have to decide on the necessity of including or excluding copyright formalities in a future treaty. Rather, the question was whether to follow a strict application of national treatment, by requiring authors to fulfil formalities in all the countries in which they seek protection, or to make an exception to national treatment, by stipulating that, under a future treaty, protection was established if the formalities in the country of origin were completed.

A system based on a strict application of national treatment was introduced a few years earlier in the 1883 Paris Convention for the Protection of Industrial Property. It granted national treatment for nationals of countries of the Paris Union 'subject to the formalities and conditions imposed by the national domestic legislation of each State'.<sup>797</sup> By offering them the same protection under the same conditions, the Paris Convention fully assimilated foreign right holders to national right holders.

As observed, the system that would make an exception to national treatment with respect to the fulfilment of formalities was proposed at the various conferences prior to the Berne Convention. It was considered too burdensome for authors to complete formalities in each and every country where they seek protection, inter alia, because of the distance, the unfamiliarity with foreign laws and the risk of losing protection due to international transport problems. Moreover, for fulfilling formalities, authors often relied on publishers, who pursued purely commercial goals and therefore were less inclined to complete formalities for unsuccessful works in foreign countries. It was deemed unfair for authors to lose protection as a result of these international obstacles or commercial considerations. Therefore, it was argued that international copyright should be secured if the formalities in the home country were fulfilled.<sup>798</sup> This was also the model that would be adopted in the Berne Convention.

<sup>794</sup> Resolution proposed by Ruchonnet (Switzerland) in *Actes 1884*, at 29; Berne Centenary 1986, at 90.

<sup>795</sup> The rule of national treatment implies that Union states should grant to foreign works that are eligible to protection under the Convention the same protection as they accord to domestic works.

<sup>796</sup> See Röthlisberger 1906, at 22-27.

<sup>797</sup> See art. 2 of the Paris Convention for the Protection of Industrial Property of 20 March 1883, in *Actes de la Conférence de la propriété industrielle 1883*, at 32-37: 'Les sujets ou citoyens de chacun des États contractants jouiront, dans tous les autres États de l'Union, en ce qui concerne les brevets d'invention, les dessins ou modèles industriels, les marques de fabrique ou de commerce et le nom commercial, des avantages que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux. En conséquence, ils auront la même protection que ceux-ci et le même recours légal contre toute atteinte portée à leurs droits, sous réserve de l'accomplissement des formalités et des conditions imposées aux nationaux par la législation intérieure de chaque État.'

<sup>798</sup> Illustrative is the opening speech of Mr Droz, in *Actes 1884*, at 21; Berne Centenary 1986, at 88: 'A second question is that of the formalities to be complied with for the recognition of rights. Writers and artists are demanding the utmost simplification in this connection. A country recently concluded 25 conventions on literary and artistic property; if its nationals have to comply 25 times with the

## 4.3.1.2 THE COUNTRY OF ORIGIN RULE WITH RESPECT TO FORMALITIES

The consensus that was established at the international level on the needlessness of subjecting authors to formalities in each country in which they sought protection was noticeable at the 1884-1886 Berne conferences. This becomes particularly clear from the opening speech of Mr Droz, the president of the 1885 conference:

‘The constitution of a General Union for the Protection of Authors’ Rights, based on the assimilation of foreigners to nationals and on the removal of the multitude of formalities now imposed, does not seem to have any detractors. Where there are differences of opinion, they relate to other, more or less important elements of the draft ...’<sup>799</sup>

This may explain why there was little discussion on this topic during the various Berne meetings and why the principle laid down in the Federal Council programme (see para. 4.3.1.1) was accepted without opposition.<sup>800</sup> Accordingly, the conference adopted the principle of national treatment, while making an exception with respect to the formalities which had to be completed to obtain international protection.<sup>801</sup> These would be governed by the law of the country of first publication or, in case of unpublished works, by the law of the country to which the author belonged.<sup>802</sup> The only things that were discussed in detail were the exact wording and scope of the regulation (see para. 5.2.1). In the end, the rule of national treatment was laid down in Article 2(1) of the Berne Convention (1886), whereas Article 2(2) stated that:

‘The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work ... .’

This country of origin rule with respect to formalities put authors of Union states that granted unconditional copyright in a better position than authors of Union states that subjected copyright to formalities.<sup>803</sup> The former would enjoy protection in the entire Berne Union without completing any formalities,<sup>804</sup> while the latter could lose copyright in the entire Berne Union if they failed to comply with the formalities laid

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formalities of registration and deposit, the whole operation becomes overly intricate and costly. And yet that is not essential from the point of view of the recognition of rights which, once duly secured in the country of origin, can without any difficulty be accepted as being valid in all the other countries.’

<sup>799</sup> *Actes 1885*, at 13; Berne Centenary 1986, at 109.

<sup>800</sup> *Actes 1884*, at 30; Berne Centenary 1986, at 90. See also the statement by Mr Bergne, on behalf of the British Delegation, in: *Actes 1885*, at 26; Berne Centenary 1986, at 113: ‘The delegates are no doubt aware that present English law imposes the conditions of deposit and registration with respect to foreign works in England, but we do realize that the only means of arriving at an understanding in the interest of an International Union is to relieve authors of those formalities.’

<sup>801</sup> See Baum 1932, at 924.

<sup>802</sup> Art. 2(3) and (4) of the Berne Convention (1886). *Actes 1884*, at 30; Berne Centenary 1986, at 90.

<sup>803</sup> See Schönherr 1981, at 296.

<sup>804</sup> See Court of Cassation of Rome, 7 June 1900, *May fils v. Istituto di arti grafiche, Le Droit d’Auteur* 1900, at 145-147. See also *Le Droit d’Auteur* 1900, at 122-123 and Allfeld 1902, at 308.

down in their home country.<sup>805</sup> Although states could always voluntarily extend the protection in their territory to authors who had failed to fulfil the formalities in their home country,<sup>806</sup> the Berne Convention did not oblige them to do so.<sup>807</sup>

#### 4.3.1.3 SUPPLEMENTARY PROVISIONS

Because the country of origin rule that the Berne Convention laid down with respect to formalities implied that works could be protected in the Berne Union without any formalities being fulfilled, it was feared that problems could arise with respect to the functioning of copyright law as a whole. As observed, formalities performed several key functions for the exercise of copyright.<sup>808</sup> To address these concerns, the Berne Convention of 1886 was supplemented with a few auxiliary provisions.

First, a legal presumption of authorship was introduced in Article 11 of the Berne Convention (1886) to compensate for the legal uncertainty that authors could face in proving the authorship of their works in the absence of formalities. It stated that, unless proven otherwise, the person whose name appeared on the work was deemed the author of the work.<sup>809</sup> In addition, since the protection of foreign works relied on compliance with the formalities in the country of origin of the work,<sup>810</sup> Article 11(3) of the Berne Convention (1886) provided that national courts could:

‘if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article 2.’

It was a matter for the civil procedural law of the Union states to decide whether this certificate would establish conclusive evidence of the existence of copyright in the work.<sup>811</sup> In most countries, it seems that the certificate constituted prima facie proof only and for that reason could always be rebutted by other facts.<sup>812</sup>

Moreover, situation specific formalities were laid down in Article 7(1) and Article 9(3) Berne Convention. They stated that, in other Union states, authors could invoke no reproduction right in newspaper articles or periodicals and no

<sup>805</sup> Obviously, authors could still be protected in another Union state pursuant to that country’s internal legislation, namely, if they, instead of in the work’s country of origin, complied with the formalities in the foreign country. See e.g. Kohler 1896, at 340, 342-343, 345 and 347.

<sup>806</sup> See Kohler 1907, at 405.

<sup>807</sup> See Civil Court of Justice of Geneva, 20 May 1905, *Bonnard v. Lithographie parisienne, Le Droit d’Auteur* 1905, at 144-145, denying protection in Switzerland to a French work for which the French deposit formality had not been fulfilled. See also Allfeld 1902, at 308 and Allfeld 1908, at 244.

<sup>808</sup> See, in general, para. 2.3 and, for the situation in the nineteenth century, para. 3.3.2.2.

<sup>809</sup> See art. 11(1) and (2) of the Berne Convention (1886).

<sup>810</sup> *Actes 1885*, at 50-51; *Berne Centenary 1986*, at 122-123.

<sup>811</sup> See Ricketson 1987, at 203 and Ricketson & Ginsburg 2006, I, at 308.

<sup>812</sup> See Röthlisberger 1906, at 110-111. An example is France, where the facts stated in the certificate of deposit were always subject to contrary proof. See para. 3.3.2.2 above.

performance right in published musical works, unless they had explicitly reserved these rights on all copies of these works. The justification was found in public interest considerations, which dictated that certain borrowings from authors should be allowed.<sup>813</sup>

#### 4.3.2 THE 1896 PARIS REVISION

The first conference aiming to revise the Berne Convention to perfect the system of the Berne Union was held in Paris in 1896. This conference also dealt with Article 2(2) of the Berne Convention (1886), which, in practice, had raised some problems of interpretation.<sup>814</sup> Although most Union states followed the common interpretation that this provision liberated authors from compliance with formalities outside their home country,<sup>815</sup> some Union states maintained that the Berne Convention pursued strict national treatment and that it allowed foreign works to be exposed to the same formalities that were imposed on domestic works. They argued that Article 2(2) had only dispensed with the additional formalities that countries previously imposed on foreign works (e.g. pursuant to domestic international copyright law).<sup>816</sup>

In the UK, in particular, courts required foreign works for which protection was claimed under the Berne Convention to comply with the domestic formalities.<sup>817</sup> In the 1891 case of *Fishburn v. Hollingshead*, it was ruled that no infringement action could be maintained in respect of the copyright in a German painting, unless it was registered in accordance with the UK Fine Arts Copyright Act of 1862.<sup>818</sup> In return, the Germans maintained an earlier requirement, according to which English works should be registered in Leipzig to obtain protection. However, this requirement was declared to be ‘insignificant’ in 1892 and abandoned completely in 1898.<sup>819</sup>

<sup>813</sup> See *Actes 1884*, at 50-52 and 68; *Berne Centenary 1986*, at 98-99 and 105: ‘The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.’

<sup>814</sup> Schönherr 1981, at 296.

<sup>815</sup> Reichardt of the German delegation (in *Actes 1896*, at 111) believed this to be ‘the starting point and principal goal of the Berne Convention’ (*‘le point de départ et le but principal de la Convention de Berne’*). See also *Actes 1896*, at 161; *Berne Centenary 1986*, at 137. See also Darras 1887, at 651 and 654, Soldan 1888, at 15 and *Le Droit d’Auteur* 1889, at 25-27, 35-38 and 47-51.

<sup>816</sup> See *Actes 1896*, at 161; *Berne Centenary 1986*, at 137. See also Röthlisberger 1906, at 102 and 105-106, Briggs 1906, at 311-313, Ricketson 1987, at 201-202 and Ricketson & Ginsburg 2006, I, at 306.

<sup>817</sup> See, in general, ‘Application en Grande-Bretagne de l’Article 2 de la Convention de Berne’, *Le Droit d’Auteur* 1893, at 82-83. See also Huard 1897, at 13.

<sup>818</sup> *Fishburn v. Hollingshead*, [1891] 2 Ch. 371 (Chancery Division, 14 March 1891). See also *Moul v. Groenings*, [1891] 2 Q.B. 443 (Court of Appeal, 3 July 1891), where a similar question was raised but not answered, and *Moul v. Devonshire Park Co.* (District Court of Brighton, 7 August 1891), *Le Droit d’Auteur* 1892, at 52-55, in which the *Fishburn* ruling was not followed.

<sup>819</sup> See the declarations of the Council of Leipzig of 9 May 1892, in: *Le Droit d’Auteur* 1896, at 33-34, and of 31 January 1898, in: *Le Droit d’Auteur* 1898, at 30. See also Röthlisberger 1906, at 105.

To remove these interpretation obstacles and to secure optimal legal certainty for authors of foreign works claiming protection in the Berne Union, the authorities of France proposed to amend Article 2(2) of the Berne Convention as follows:

‘The enjoyment of these rights is assured to authors without any other conditions or formalities than those prescribed by the legislation of the country of origin of the work.’<sup>820</sup>

This proposal was supported by the German, Belgian and Swiss delegations,<sup>821</sup> but not by the British delegation. Even though the British Crown did not oppose the proposal on substance, as the most recent interpretations by the courts had verified the conformity of British law with the French reading of Article 2(2),<sup>822</sup> it could not accept the amendment for reasons connected with British colonial affairs.<sup>823</sup>

Because the UK was considered to be ‘of paramount importance to the success of the Union’,<sup>824</sup> the French proposal was finally abandoned. Instead of changing the wording of Article 2(2), it was suggested to clarify the meaning of the provision in a separate Declaration representing an ‘authentic interpretation of the Convention.’<sup>825</sup> Paragraph 1 of the Interpretative Declaration of 1896 was formulated as follows:

‘In accordance with the provisions of Article 2, paragraph 2, of the Convention, the protection granted ... shall depend solely on the accomplishment of the conditions and formalities in the country of origin of the work which may be required by the legislation of that country.’

This declaration clarified that, once the conditions and formalities in the country of origin were fulfilled, the work should be protected in the entire Berne Union.

<sup>820</sup> *Actes 1896*, at 36-37. This was in full conformity with the standpoint of the International Bureau. See in particular *Le Droit d’Auteur* 1889, at 25-27, 35-38 and 47-51.

<sup>821</sup> See *Actes 1896*, at 111-112 and 121.

<sup>822</sup> The *Fishburn* ruling was overruled in *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1 (Queen’s Bench Division, 1893) and *Hanfstaengl v. The American Tobacco Company*, [1895] 1 Q.B. 347 (Court of Appeal, 1894). See Copinger 1904, at 479. These rulings were followed in Canada. See Superior Court of Montréal, 23 March 1906, *Mary v. Hubert, Le Droit d’Auteur* 1906, at 57-59 and Court of King’s Bench of Montréal, 28 June 1906, *Hubert v. Mary, Le Droit d’Auteur* 1907, at 8-9. A few years later, however, another British court ruled that French musical works should carry a notice required under British law in order to be able to exercise copyright in the UK. See *Sarpy v. Holland and Savage*, [1908] 1 Ch. 443 (Chancery Division, 18-21 December 1907). Later, this ruling was reversed by *Sarpy v. Holland and Savage*, [1908] 2 Ch. 198 (Court of Appeal, 5-7 May 1908).

<sup>823</sup> The changes in copyright law that British colonies had been forced to implement because of the UK’s adherence to the Berne Convention had already provoked the resentment of some colonies. Canada in particular, had long endeavoured to subject all non-Canadian works to rigorous formalities, including registration and domestic manufacturing. See Briggs 1906, at 313 (note 2). Therefore, it was very much opposed to any further change. Since Canada began to use the copyright debate to fight self-governance and to liberate itself from the British Empire, it is no surprise that the British Crown was extremely cautious in adopting the French proposal. See Seville 2006, at 69 et seq. and 112-118.

<sup>824</sup> See *Actes 1886*, at 13; Berne Centenary 1986, at 131: ‘[it] brought us not only the accession of Great Britain but also that of its colonies, representing a total population of more than 300 million souls’.

<sup>825</sup> *Actes 1896*, at 161; Berne Centenary 1986, at 137. The UK abstained from signing this Declaration.

Authors of Union countries that granted unconditional copyright were sometimes confronted with another difficulty when claiming protection in another Union state. They were unable to submit a certificate indicating that the formalities in the home country were fulfilled if a court of another Union state were to request so on the basis of Article 11(3) of the Berne Convention (1886).<sup>826</sup> It was questioned whether this problem should be fixed bilaterally, through a general declaration by which the one state would announce to the other that it granted protection without formalities,<sup>827</sup> or by the International Bureau of the Berne Union that could issue certificates for this purpose. The latter option was considered impracticable, because it would place too much of an administrative burden on the Bureau.<sup>828</sup> The Bureau could at most give information about the formalities imposed by the various Union states.<sup>829</sup> Hence, the question was not resolved, but referred to examination at a next conference.

For the same reason of administrative burden, the Bureau countered a proposal to create an international copyright register in Berne that should render ‘great services’ by providing adequate information about the copyright status of works to authors, scholars, libraries, etc. Although initially suggested by the French authorities,<sup>830</sup> the Norwegian delegation adopted the idea and proposed the following resolution:

‘It is desirable that the various States of the Union take measures to facilitate communication to the Berne Bureau of the acts of registration or deposit of literary and artistic works, where such formalities exist. It shall be for the Berne Bureau to coordinate the information which it is thus furnished, by adding all the documents that it is able to procure in relation to publication of literary and artistic works, in all its forms, in the various Union States.’<sup>831</sup>

The Bureau deemed itself unfit to embark on this task. It recalled that a few years earlier, in 1895, the International Bibliography Institute in Brussels was founded,<sup>832</sup> which had created an enormous database of information about literary works called the ‘Universal Bibliographical Repertory’.<sup>833</sup> According to the Bureau, this database

<sup>826</sup> See the statement of Mr Descamps, delegate of Belgium, in: *Actes 1896*, at 129-130.

<sup>827</sup> *Ibid.*, at 130. See also the declaration of Mr Renault, delegate of France, in: *Actes 1896*, at 131.

<sup>828</sup> *Actes 1896*, at 130-131. At the 1885 conference, an identical proposal made by the Italian delegation was refused for the same reason. See *Actes 1885*, at 37; Berne Centenary 1986, at 117.

<sup>829</sup> See the response of Mr Morel, director of the International Bureau, in: *Actes 1896*, at 130-131. See also *Le Droit d’Auteur 1897*, at 37-40, about the information supplied by the Bureau.

<sup>830</sup> See the second recommendation of the French authorities, drawn up in cooperation with the International Bureau, in: *Actes 1896*, at 49-50.

<sup>831</sup> *Actes 1896*, at 118. See also the amended proposal by Mr Descamps, member of the Royal Academy of Belgium, and the report of Louis Renault presented on behalf of the Committee by the French delegation, in: *Actes 1896*, at 177; Berne Centenary 1986, at 142.

<sup>832</sup> See Keenan 2003, at 198. After its foundation, the *Institut International de Bibliographie* (IIB) was renamed in 1932 to *Fédération Internationale de Documentation* (FID) and in 1986 to *Fédération Internationale d’Information et de Documentation*. In 2002, it effectively ceased to exist.

<sup>833</sup> See La Fontaine & Otlet 1895-1896.

rendered an invaluable service with which it could not possibly compete.<sup>834</sup> However, the Bureau accredited the Universal Bibliographical Repertory with a broader utility than it had in practice. It was a library documentation and information system, not a database of copyright information.<sup>835</sup> Therefore, it would never receive the position of an international copyright register. Nonetheless, the Norwegian delegation agreed with the view of the Bureau and withdrew its proposal. Hence, the idea of creating a 'Universal Directory' of copyright information was never discussed by the plenary, although at the time this idea was put forward at various conferences.<sup>836</sup>

### 4.3.3 THE 1908 BERLIN REVISION

Despite the fact that the 1886 Berne Convention had released authors of the obligation to comply with formalities in other Union states where protection was sought, the country of origin rule relating to formalities continued to raise obstacles.<sup>837</sup> This was a prelude to the introduction of the prohibition on formalities in the Berne Convention at the 1908 Berlin revision conference. This section describes the different problems with formalities at the eve of the Berlin conference (para. 4.3.3.1) and examines how this eventually led to the adoption of the prohibition on formalities (para. 4.3.3.2).

#### 4.3.3.1 THE CONTINUING PROBLEMS CAUSED BY FORMALITIES

Although the country of origin rule with respect to formalities was seemingly easy to apply, it often caused difficulties. It was uncertain, for example, the formalities of which country should be complied with, if a work was published simultaneously in multiple Union states. Some legal scholars followed the rule of Article 2(3) of the Berne Convention (1886) which stated that, in case of simultaneous publication, the country with the shortest term of protection should be regarded as the country of origin. Hence, the formalities of this country should be completed.<sup>838</sup> Other scholars believed that Article 2(3) only aimed to ensure that a work would fall into the public domain in all Union states simultaneously, not to designate the country whose

<sup>834</sup> *Actes 1896*, at 178; *Berne Centenary 1986*, at 142. See also the statement by Mr Morel, director of the International Bureau: 'There is no question whatsoever of creating a *Universal Directory* or a structure which could be compared to such a considerable undertaking.'

<sup>835</sup> Boyd Rayward 1975, at 186.

<sup>836</sup> A 'Universal Directory of Literary and Artistic Works' was called for, e.g., at the ALAI conferences in Neuchâtel (1891), Milan (1892), Barcelona (1893) and Antwerp (1894) and at the Conference of German authors in Vienna (1893). See the resolutions quoted in the second recommendation of the French authorities, drawn up in cooperation with the International Bureau, in: *Actes 1896*, at 49-50.

<sup>837</sup> See Röhrlisberger 1906, at 100-113 (at 105-111, in particular).

<sup>838</sup> See Allfeld 1902, at 310 and Allfeld 1908, at 245. See also Röhrlisberger 1906, at 110.

formalities must be fulfilled. They argued that authors could choose to comply with the formalities of any of the Union states in which they had published their work.<sup>839</sup>

Another problem was that several courts experienced difficulties interpreting the national law of the various Union states in order to ascertain whether the formalities in the country of origin were fulfilled.<sup>840</sup> Estimates showed that, until 1910, of some 100 court cases involving the Berne Convention, almost one out of seven concerned disputes regarding formalities.<sup>841</sup> Even if the author presented a certificate attesting that the formalities in the home country were fulfilled, some courts were reluctant to accept this as conclusive evidence that copyright existed in the work. Instead, they checked whether the formalities in the country of origin were applied correctly.<sup>842</sup> In practice it occurred that, on this basis, foreign works were denied protection in other Union states,<sup>843</sup> even though they received protection in their home country.

This ran counter to the object and spirit of the Berne Convention. What the Berne Convention had aimed to achieve was that once a work was protected in the country of origin it was protected in the entire Union.<sup>844</sup> Therefore, a literary or artistic work would ideally be protected in all Union states or it would not be protected at all.<sup>845</sup> It greatly interfered with this objective if protection was denied in one Union state as a result of a different interpretation about the correctness of the application of domestic provisions on formalities in the country of origin of the work.

For these reasons, there was a growing resistance against copyright formalities at the international level. This was manifested in two ways. First, various conferences adopted resolutions directed at national legislators, urging them to abolish domestic copyright formalities.<sup>846</sup> As observed, most countries in Europe answered these calls and eliminated formalities in the early twentieth century. Second, it was argued that, if all domestic formalities were to gradually disappear, then Article 2(2) of the Berne Convention (1886) could be withdrawn and replaced by a provision that guaranteed protection under the Berne Convention without compliance with

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<sup>839</sup> See Kohler 1896, at 340 and 345-347 and Kohler 1907, at 406.

<sup>840</sup> See Ladas 1938, I, at 269-270, Ricketson 1987, at 203 and Ricketson & Ginsburg 2006, I, at 308.

<sup>841</sup> Estimate provided for by the International Bureau, in: *Le Droit d'Auteur*, 1910, at 5. For an overview of case law involving the Berne Convention, see Röthlisberger 1906, at 60 et seq.

<sup>842</sup> See Röthlisberger 1906, at 110-111.

<sup>843</sup> See German Supreme Court, 26 September 1902, *Juven v. Schönau*, [1902] 35 *Entscheidungen des Reichsgericht in Strafsachen* 360, *Le Droit d'Auteur* 1903, at 5, denying protection in Germany to a French photograph, because only two copies had been deposited, whereas the French law – as it was interpreted by the German Supreme Court – required a deposit of three copies.

<sup>844</sup> See Soldan 1888, at 15-16 and Kohler 1896, at 339.

<sup>845</sup> Kohler 1896, at 340.

<sup>846</sup> Art. 2 of the *Projet de Loi-Type*, adopted by the ALAI conference in Paris in 1900 (in: *Actes 1908*, at 102-104; De Beaufort 1909, at 481-484) induced national lawmakers to provide that the enjoyment of copyright should not be subject to the fulfilment of formalities. See also the overview of resolutions on domestic formalities expressed at various international conferences, in: *Actes 1908*, at 104-105.

formalities.<sup>847</sup> This idea was put on the agenda of the 1908 revision conference in Berlin.

#### 4.3.3.2 THE PROHIBITION ON FORMALITIES

The programme drawn up by the German government for the 1908 Berlin revision conference included the proposal of substituting the country of origin rule relating to formalities with a general rule of independence of protection. This rule stated that the enjoyment and the exercise of copyright should be independent of the existence of protection in the country of origin of the work and should not be subject to any formality or condition.<sup>848</sup> The idea behind this change was to grant to Union authors a more effective protection of international copyright. If they did not have to prove that the work enjoyed copyright in the country of origin, the problems they faced in producing the required evidence would be circumvented.<sup>849</sup> The independence of protection and prohibition on formalities would thus remove one of the most salient problems that had been encountered in the working of the Berne Convention.<sup>850</sup>

The proposed rule of independence of protection was said to be easier to apply than the rule according to which the protection of the country of origin extended into other Union states.<sup>851</sup> It implied that Union states no longer had to apply foreign law to ascertain whether a work for which protection was sought under the Berne Convention was protected in the country of origin and thus should be granted national treatment.

The prohibition on formalities was both a particularization of and a complement to the general rule of independence of protection. As compared with the 1886 Berne Convention, it ensured that authors no longer had to show that copyright existed in the country of origin of the work by proving that the formalities in this country had been fulfilled.<sup>852</sup> It was thought that this would be a great simplification in the process through which authors secured protection in other Union states.<sup>853</sup> At the

<sup>847</sup> See Röthlisberger 1906, at 111-112. See also the resolutions of the 1896 ALAI conference in Berne (in: *Le Droit d'Auteur* 1896, at 126) and of other international conferences (in: *Actes 1908*, at 82-83). Briggs, however, argued that a complete abolition of formalities in the Berne Convention would, for the time being, be a too drastic measure of reform. As long as most national laws continued imposing formalities, he found such proposal impracticable and useless. See Briggs 1906, at 462-463.

<sup>848</sup> Propositions of the German authorities, drawn up in cooperation with the International Bureau, in: *Actes 1908*, at 35-52 (at 37-39 and 40, in particular).

<sup>849</sup> See the speech given by Dr Osterrieth, member of the German delegation, in: *Actes 1908*, at 169.

<sup>850</sup> See e.g. 'Report of the British Delegates to the International Copyright Conference at Berlin to Sir Edward Grey', in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 2, 4-21, at 5 and 7.

<sup>851</sup> *Actes 1908*, at 237-240; Berne Centenary 1986, at 148-149.

<sup>852</sup> This did not mean that authors could not be asked to produce a certificate in court in order to provide evidence of a particular fact. See *Actes 1908*, at 237; Berne Centenary 1986, at 148.

<sup>853</sup> See Wauwermans 1910, at 69-70 and Baum 1932, at 927.

same time, it made clear that the rule that authors were liberated from compliance with formalities outside their home country was not abandoned with the Berlin revision of the Berne Convention.

During the conference meetings in Berlin, the German proposal encountered little resistance.<sup>854</sup> The rule of independence of protection and prohibition on formalities were considered not to be a true revolution, but rather a further development of the basic principle underlying the Berne Convention, namely, that authors should enjoy in the entire Berne Union the same protection that Union states granted to national authors, with some minimum guarantees laid down by the Convention.<sup>855</sup> Except for the Swedish delegation, which suggested maintaining the rule that the enjoyment of copyright should be subject to the fulfilment of the conditions and formalities prescribed by the country of origin of the work,<sup>856</sup> none of the delegations opposed.

Hence, with reasonable unanimity,<sup>857</sup> including the express consent of the British government,<sup>858</sup> the Berlin conference adopted the following provision, which was incorporated in Article 4(2) of the Berne Convention (1908):

‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the state where protection is claimed.’

As a result of the prohibition on formalities and independence of protection, there no longer was need to authorize national courts to require a certificate from foreign authorities showing that the formalities of the country of origin had been fulfilled. Article 11(3) of the Berne Convention (1886) was therefore withdrawn.<sup>859</sup>

Another rule that did not reappear after the Berlin conference was the reservation requirement for the retention of a public performance right in published musical works. The deletion of this requirement was proposed, because performance rights were deemed ‘just as worthy of respect’ as rights of translation and representation,

<sup>854</sup> The amendments proposed by France, Italy and Monaco all followed the German proposal to prohibit formalities in the Berne Convention. See *Actes 1908*, at 284.

<sup>855</sup> See the *Mémoire* presented by the Belgian delegation, in: *Actes 1908*, 192-197, at 193. See also the explanation accompanying the German proposition, in: *Actes 1908*, at 38.

<sup>856</sup> *Actes 1908*, at 239 and 284; Berne Centenary 1986, at 149. The Swedish delegation found it odd that Union countries should be required to protect foreign works that were not protected in their country of origin due to a failure to fulfil the domestic formalities. For this reason, it proposed to maintain the country of origin rule. See *Le Droit d’Auteur* 1910, 2-7, at 4 and Potu 1914, at 48-49.

<sup>857</sup> Ricketson 1987, at 203; Ricketson & Ginsburg 2006, I, at 308.

<sup>858</sup> See, in particular, the letter of ‘Sir Edward Grey to Sir H. Bergne, Mr. Askwith, and Count de Salis’, in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 1, 1-3, at 2: ‘To the amendment in [Article 2(2) of the Berne Convention (1886)] His Majesty’s Government see no objection in principle.’

<sup>859</sup> See *Actes 1908*, at 47-48 (German proposition) and 266; Berne Centenary 1986, at 157-158.

which could be enjoyed without conditions.<sup>860</sup> Moreover, the abolition of this rule would eliminate the earlier distinction between published and unpublished musical works and avoid conflicts between authors who had an interest in affixing a notice of reservation and publishers who had an interest in removing this notice to facilitate the sale of the work.<sup>861</sup> Even though the proposal was initially opposed by the British, Swedish and Swiss delegations,<sup>862</sup> it eventually was adopted. As a result, authors enjoyed a public performance right in musical works without making an explicit reservation.<sup>863</sup>

The Berne Convention retained the notice of reservation with respect to the right of reproduction for newspaper articles or periodicals. Because of the public benefits that resulted from a free reproduction of newspaper items, it was considered fair that authors be able to exercise their reproduction right only if they had marked their articles with a notice indicating that reproduction was prohibited.<sup>864</sup> This was considered not to be a formality prohibited by Article 4(2) of the Berne Convention (1908).<sup>865</sup>

#### 4.3.4 SUBSEQUENT REVISIONS

The Berne prohibition on copyright formalities was not changed in substance during the revision conferences in Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971. However, in 1967 it was renumbered from Article 4(2) to Article 5(2) of the Berne Convention. Today, this provision still provides that: ‘The enjoyment and the exercise of these rights shall not be subject to any formality; ...’.

## 4.4 The Universal Copyright Convention

A completely different approach towards formalities can be found in the Universal Copyright Convention (UCC), which was created in 1952 to close the then existing

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<sup>860</sup> See *Actes 1908*, at 46 (German proposition) and 255-256; Berne Centenary 1986, at 154. In 1896, an identical proposal was made by France, but this met with opposition from Germany and the UK, who asserted that public opinion would not accept that, without an express reservation, the performance of musical works could be prevented. See *Actes 1896*, at 171-172; Berne Centenary 1986, at 140.

<sup>861</sup> See *Actes 1908*, at 46 (German proposition) and 255-256; Berne Centenary 1986, at 154.

<sup>862</sup> See *Actes 1908*, at 255-256; Berne Centenary 1986, at 154. See also, with respect to the UK position, ‘Report of the British Delegates to the International Copyright Conference at Berlin to Sir Edward Grey’, in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 2, 4-21, at 12-13.

<sup>863</sup> Art. 11(3) of the Berne Convention (1908). In 1967, the paragraph was deleted, as it was considered superfluous. See *Actes 1967*, II, at 1167 (English version); Berne Centenary 1986, at 204.

<sup>864</sup> *Actes 1908*, at 44-45 (German proposition) and 249-254; Berne Centenary 1986, at 152-153.

<sup>865</sup> *Actes 1908*, at 240; Berne Centenary 1986, at 149.

gap in copyright protection at the international level.<sup>866</sup> Although several countries had joined the Berne Convention, other countries refrained from doing so for internal reasons, e.g., because the standard of protection that they were obliged to grant to foreign works under the Berne Convention was higher than the protection that they then granted pursuant to their domestic copyright law. The US, for example, had not adhered to the Berne Convention, inter alia, because its minimum term of protection of fifty years after the author's death, its moral rights protection and its prohibition on formalities did not correspond with the existing US copyright system.<sup>867</sup>

One of the key obstacles in establishing the UCC was to bridge the differences of opinion between the US and states adhering to the Berne Convention with respect to the question of the formalities that needed to be completed to secure protection. Although there was mutual agreement about the need to eliminate the obstacle of having to comply with formalities in each foreign country in which protection was claimed,<sup>868</sup> the US did not have the intention to entirely abandon formalities as a condition to copyright in foreign works.<sup>869</sup> Therefore, it proposed subjecting the protection under the UCC to the condition of marking all copies of published works with a uniform notice. It argued that this condition served an important purpose and could relatively easily be fulfilled.<sup>870</sup> The notice could be attached 'on the spot' in the home country, required no knowledge of foreign law or procedure and incurred no significant cost.<sup>871</sup>

The US proposal was accepted by the other countries and laid down in Article III of the UCC.<sup>872</sup> This provision, which was believed to be 'the heart of the convention from a mechanical and operational standpoint',<sup>873</sup> exempts foreign works for which

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<sup>866</sup> Von Lewinski 2006, at 1. The UCC was adopted in Geneva on 6 September 1952 and revised at Paris on 24 July 1971. Because the Paris revision did not bring any change in relation to the UCC rule on formalities, this book makes no distinction between the 1952 and the 1971 texts of the UCC.

<sup>867</sup> US Senate report on the Universal Copyright Convention 1952, Executive Rep. no. 5 accompanying Executive M, 83<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1954), at para. 6. See also Sherman 1955, at 1146-1147.

<sup>868</sup> See Bogsch 1964, at 25, indicating that it was the purpose of the UCC to eliminate the difficulties in securing international protection as a result of the imposition of formalities at national level. At this time, many countries subjected the acquisition, maintenance and transfer of copyright to formalities. See the overview in *World Copyright: An Encyclopedia 1953-1960*, II (1954), at 672-703.

<sup>869</sup> Kaminstein 1955, at 25. See also Dinwoodie 2001, at 740 (note 25).

<sup>870</sup> *Ibid.*, at 26. The US had experience with a uniform formality in international copyright relations. Art. 3 of the Buenos Aires Convention of 1910, a multilateral treaty regulating the international protection of copyright between the US and some countries in Latin America, required all contracting states to recognize copyright acquired in another contracting state, provided that the work was marked with an 'all rights reserved' notice or a similar statement indicating the reservation of copyright.

<sup>871</sup> Bogsch 1964, at 25.

<sup>872</sup> See the Report of Sir John Blake, the Rapporteur-General of the Conference at Geneva, 6 September 1952, in *Universal Copyright Convention Analyzed 1955*, 214-248, at 224-226, for an account of the discussions between the countries about the issue of formalities. See also Kaminstein 1955, at 26-28.

<sup>873</sup> US Senate report on the Universal Copyright Convention 1952, Executive Rep. no. 5 accompanying Executive M, 83<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1954), at para. 9 under a.

protection is claimed under the UCC from compliance with the domestic formalities of a contracting state, on condition that all the copies of the work bear the symbol © accompanied by the name of the copyright owner and the year of first publication.<sup>874</sup> Unpublished works that qualify for protection under the UCC must be protected by legal means without formalities.<sup>875</sup> Article III of the UCC is thus an exception to the rule of national treatment under the UCC,<sup>876</sup> akin to the exception in the 1886 Berne Convention (para. 4.3.1). In contrast with the latter convention, however, it does not subject international protection to compliance with the formalities in the country of origin, but it makes it conditional on a uniform and standardized formality.<sup>877</sup>

The notice requirement of the UCC is seemingly unequivocal. The notice should (i) consist of the ©-sign, the name of the copyright proprietor and the year of first publication, (ii) be placed in such manner and location as to give reasonable notice of the copyright claim and (iii) appear on all the copies of the work from the time of its first publication. The copies must have been published with the authority of the author or other copyright proprietor.<sup>878</sup> However, in practice, several difficulties can arise as to the validity of the notice. This includes difficulties of interpretation with regard to the form and placement of the notice.<sup>879</sup> Also, it is uncertain whose name should appear in the notice in case the copyright after first publication is transferred, in total or in part, to a third party.<sup>880</sup> In the absence of guidance in the UCC, it seems that this must be determined according to the circumstances of each case.

The UCC copyright notice introduced a great simplification in securing copyright protection at the international level, although it did not provide complete relief. The UCC only exempts authors of foreign works from compliance with formalities that serve as 'as a condition of copyright'.<sup>881</sup> These include all constitutive formalities and situation specific formalities relating to the protection of a specific right (e.g., the right of translation).<sup>882</sup> In this respect, the UCC assumes a broad concept of 'formalities', including not only traditional formalities such as deposit, registration and notice, but also requirements such as domestic manufacture or first publication

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<sup>874</sup> Art. III paragraph 1 of the UCC.

<sup>875</sup> Art. III paragraph 4 of the UCC.

<sup>876</sup> Bogensch 1964, at 25. The rule of national treatment is laid down in art. II of the UCC.

<sup>877</sup> Accordingly, the UCC did not permit a country to apply material reciprocity with respect to copyright formalities. If a work was not protected in its home country due to a failure to complete the domestic formalities, it should still be granted protection by other contracting states of the UCC if it was duly marked with the copyright notice laid down in art. III of the UCC. See Kaminstein 1955, at 29.

<sup>878</sup> See art. III paragraph 1 of the UCC.

<sup>879</sup> See Bogensch 1964, at 26 et seq. It was held by US courts that, in order to be valid, the requirements of the UCC notice with respect to its form should be accurately followed. See e.g. *Ross Products, Inc. v. New York Merchandise Co.*, 233 F.Supp. 260 (US District Court of New York, 1964), at 262.

<sup>880</sup> See Bogensch 1964, at 26-28. See also the Report of G.H.C. Bodenhausen, the Rapporteur-General of the Conference at Paris, 1951, in *Universal Copyright Convention Analyzed* 1955, 281-300, at 288, suggesting that 'the name of the present proprietor ... should be affixed to a new publication'.

<sup>881</sup> See art. III paragraph 1 of the UCC.

<sup>882</sup> See Bogensch 1964, at 34.

in a contracting state.<sup>883</sup> The UCC obliges contracting states to waive all these formalities in respect of foreign works for which protection is sought under the UCC, provided that they are duly marked with the prescribed copyright notice. However, it does not prevent them from requiring the same formalities in respect of domestic works.<sup>884</sup>

The UCC does not exempt right owners seeking judicial relief in a UCC country from compliance with procedural requirements, including the requirement to appear through domestic counsel or to deposit a copy of the work involved in the litigation, provided that such requirements do not affect the validity of the copyright and are non-discriminatory.<sup>885</sup> Therefore, the US could preserve registration and deposit as conditions to sue for copyright infringement in respect of foreign works qualifying for protection under the UCC.<sup>886</sup> Moreover, the UCC explicitly permits contracting states granting multiple copyright terms to subject the second or subsequent term to formalities even in respect of foreign works, provided that the first term exceeds the minimum term of protection under the UCC.<sup>887</sup> This allowed the US to also retain its formalities with respect to copyright renewal for non-domestic works.<sup>888</sup>

#### 4.5 Formalities in Subsequent Treaties

In the last part of the twentieth century, other multilateral treaties were adopted. In these treaties, the question of copyright formalities played a marginal role. First, the Film Register Treaty of 1989 established an International Film Registry, but this did not touch upon copyright whatsoever. The Registry had merely evidentiary effects. The International Film Registry would never become a success (para. 4.5.1).

Treaties that dealt with international copyright in a comprehensive way were the TRIPS Agreement (para. 4.5.2) and the WIPO Copyright Treaty (para. 4.5.3). These treaties contain no specific provision on formalities, but incorporated by reference the provisions of substantive law of the Berne Convention, including the prohibition on formalities. This Berne prohibition on formalities was even applied in a *mutatis mutandis* manner to the protection granted under the WIPO Copyright Treaty.

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<sup>883</sup> See art. III paragraph 1 of the UCC, containing an illustrative and not exhaustive list of 'formalities'.

<sup>884</sup> Art. III paragraph 2 of the UCC. This paragraph was criticized for being superfluous, as the same result follows from paragraph 1 of the same provision. See Bogsch 1964, at 36.

<sup>885</sup> Art. III paragraph 3 of the UCC.

<sup>886</sup> See Kaminstein 1955, at 34 and Bogsch 1964, at 37.

<sup>887</sup> Art. III paragraph 5 of the UCC.

<sup>888</sup> See Kaminstein 1955, at 35-36 and Bogsch 1964, at 38-39.

## 4.5.1 THE FILM REGISTER TREATY

In 1989, the Treaty on the International Registration of Audiovisual Works ('Film Register Treaty') was adopted under the auspices of the WIPO. This Treaty aims to enhance the creation and circulation and combat the piracy of audiovisual works by increasing the legal certainty in transactions relating to such works.<sup>889</sup> To that end, it creates an International Film Registry, in which statements about audiovisual works and interests and rights of exploitation in such works can be registered.<sup>890</sup>

The effect of registration is that it creates a rebuttable presumption of correctness of a recorded statement. Exceptions apply to statements that are contradicted by another recorded statement or that cannot be valid under the domestic copyright law of the contracting states.<sup>891</sup> The Treaty explicitly states that it cannot be interpreted as affecting existing copyright laws and treaties.<sup>892</sup> It does not interfere for example with the presumption of authorship in Article 15 of the Berne Convention. It is not a copyright treaty and therefore does not establish obligations for contracting states in this area.<sup>893</sup> The International Film Registry that it creates has purely declaratory significance and does not affect the enjoyment or the exercise of copyright.<sup>894</sup>

The International Film Registry was established in Austria in 1991,<sup>895</sup> but it never became a success because the level of adherence to the Film Register Treaty proved not to be satisfactory.<sup>896</sup> In total, no more than 400 statements were registered.<sup>897</sup> For this reason, the Registry in Austria was closed and moved to the WIPO headquarters in Geneva in 1993. Since then, the application of the Film Register Treaty has been suspended. At present, the Registry for all practical purposes is defunct.<sup>898</sup>

## 4.5.2 THE TRIPS AGREEMENT

The TRIPS Agreement was concluded in 1994 in the framework of the World Trade Organization (WTO).<sup>899</sup> This Agreement builds directly on the groundwork of the

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<sup>889</sup> See the preamble of the Treaty on the International Registration of Audiovisual Works (Film Register Treaty), adopted in Geneva on 20 April 1989. The Treaty entered into force on 17 February 1991.

<sup>890</sup> Art. 3(1) of the Film Register Treaty.

<sup>891</sup> *Ibid.*, art. 4(1).

<sup>892</sup> *Ibid.*, art. 4(2).

<sup>893</sup> See the *Records of the Diplomatic Conference for the conclusion of a Treaty on the International Registration of Audiovisual Works 1989*, at 82.

<sup>894</sup> See Kovács 1991, at 113-114.

<sup>895</sup> Art. 3(3) of the Film Register Treaty.

<sup>896</sup> See Kovács 1991, at 110-116.

<sup>897</sup> See WIPO, 'Matters concerning the Treaty on the International Registration of Audiovisual Works', WIPO document (A/35/14), 18 August 2000, para. 4.

<sup>898</sup> *Ibid.*, paras 5 and 6.

<sup>899</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994.

Berne Convention. It was not the intention of the TRIPS negotiators ‘to reinvent the intellectual property wheel’ by redesigning international copyright law.<sup>900</sup> Instead of introducing a complete new set of rules, therefore, the provisions of substantive law of the Berne Convention were incorporated by reference into the TRIPS Agreement. This was accomplished by the ‘compliance clause’ of Article 9(1) of TRIPS, which requires all WTO members to comply with Articles 1 to 21 (with the exception of Article 6*bis* that relates to moral rights) and the Appendix of the Berne Convention (1971).<sup>901</sup> Therefore, WTO members are compelled to apply the relevant provisions of the Berne Convention, but they are not obliged to become members of it.

Among the Berne provisions that are incorporated by reference into the TRIPS Agreement is the prohibition on formalities of Article 5(2) of the Berne Convention. This did not lead to any debate during the preparation of the Agreement. Materially, the application of the Berne prohibition on formalities under the TRIPS Agreement seems to be no different than its application under the Berne Convention. Because the TRIPS Agreement contains no ‘*mutatis mutandis* application’ rule as the WIPO Copyright Treaty (see below), the prohibition on formalities seems to apply only to the rights that can be claimed pursuant to the provisions of the Berne Convention that are incorporated by reference, but not to the ‘Berne-plus’ rights that are further granted by the TRIPS Agreement. It could at most be argued that it may perhaps be applicable to the ‘Berne-plus’ rights that are directly linked to the Berne Convention or clearly lie within its object of protection. This is discussed in para. 5.1.2.

#### 4.5.3 THE WIPO COPYRIGHT TREATY

The WIPO Copyright Treaty (WCT) was established in 1996 as a special agreement to the Berne Convention aimed to respond to the new challenges of the digital era.<sup>902</sup> Because the number of contracting parties to the Berne Convention had increased greatly (from 58 in 1970, to 70 in 1980, 83 in 1990 and 147 in 2000)<sup>903</sup> and revision of the Berne Convention requires unanimity,<sup>904</sup> it was very difficult to adapt to these challenges within the framework of the Berne Convention. This led to the adoption of a separate ‘special agreement’,<sup>905</sup> the WCT, which was also open for signature by WIPO member countries that were not party to the Berne Convention.<sup>906</sup>

Similar to the TRIPS Agreement, the provisions of substantive law of the Berne Convention are incorporated by reference in the WCT by the ‘compliance clause’ of

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<sup>900</sup> Gervais 2003, para. 1.96, at 68.

<sup>901</sup> *Ibid.*, paras 2.89 to 2.97, at 124-130.

<sup>902</sup> Art. 1(1) of the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

<sup>903</sup> See the WIPO statistics about the number of contracting parties to the Berne Convention, available at: <[http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty\\_id=15&lang=en](http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en)>.

<sup>904</sup> See art. 27 of the Berne Convention (1971).

<sup>905</sup> Special agreements are explicitly permitted by art. 20 of the Berne Convention (1971).

<sup>906</sup> Ficsor 2002, para. C1.17, at 426-428.

Article 1(4) of the WCT. This requires contracting parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention (1971). These provisions are believed to ‘form the bedrock of all international norms setting authors’ rights in literary and artistic works’.<sup>907</sup> Consequently, at first glance, the WCT builds on the groundwork of the Berne Convention in the same way as the TRIPS Agreement does.

However, the WCT contains a special rule for the application of Articles 2 to 6 of the Berne Convention in the WCT context. Pursuant to Article 3 of the WCT, these provisions apply *mutatis mutandis* in respect of the protection provided for in the WCT. This implies that the prohibition on formalities of Article 5(2) of the Berne Convention applies not only to the Berne provisions as incorporated by reference in the WCT, but also to the ‘Berne-plus’ rights in the WCT.<sup>908</sup> This ‘*mutatis mutandis* application’ rule was inspired by the idea that the WCT should be built upon the same cornerstone principles that are definitely established at the international level by the Berne Convention. It was thought that this would put the rights contemplated by the WCT ‘in the proper context of a comprehensive system’.<sup>909</sup>

How Article 5(1) and (2) of the Berne Convention are to be read in the context of the WCT is further clarified in an Agreed Statement. If the original wording of these two paragraphs is re-phrased according to the instruction of the Agreed Statement concerning Article 3 of the WCT, we see how they apply in the WCT context:

‘(1) Authors shall enjoy, in respect of works for which they are protected under *the Berne Convention and the WCT*, in *Contracting Parties to the WCT* other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by *the Berne Convention and the WCT*.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; [...].’<sup>910</sup>

Para. 5.1.2 analyzes in more detail how the prohibition on formalities of Article 5(2) of the Berne Convention applies *mutatis mutandis* in the WCT context.

## 4.6 Conclusion

The previous overview of copyright formalities in the international legal framework has revealed that the introduction of the prohibition on formalities in Article 5(2) of the Berne Convention was greatly inspired by pragmatic reasons. Not long after the

<sup>907</sup> *Records of the diplomatic conference in Geneva 1996*, para. 1.05, at 170.

<sup>908</sup> *Ibid.*, para. 2.02, at 172. See also Ficsor 2002, paras C3.01 to C3.07, at 460-464.

<sup>909</sup> *Records of the diplomatic conference in Geneva 1996*, para. 2.05, at 172.

<sup>910</sup> Art. 5(1) and (2) of the Berne Convention (1971) read according to the instruction (in italics) of the Agreed Statement concerning art. 3 of the WCT. See also Ficsor 2002, para. C1.24, at 434-435.

first bilateral copyright treaties were concluded, calls were made to liberate authors from the multitude of formalities that they must comply with to secure protection in different states. These calls inspired the framers of the Berne Convention to draft a multilateral treaty that would ensure the easiest and most straightforward protection of international copyright, without the requirement for authors to fulfil formalities in each and every contracting state where they seek copyright protection.<sup>911</sup>

Therefore, the Berne Convention of 1886 adopted the principle that international copyright protection was secured if the formalities in the home country of the work were fulfilled. On this point, an exception was made to the rule of national treatment on which the Berne Convention was founded. In practice, the country of origin rule with respect to formalities raised problems. National courts did not always interpret it correctly and continued to impose domestic formalities on foreign authors seeking protection under the Berne Convention. Moreover, authors experienced difficulty in proving that they enjoyed copyright in the country of origin of the work, especially if this country did not make copyright protection dependent on formalities.

For this reason, the 1908 revision of the Berne Convention introduced the rule of independence of protection and prohibition on formalities. This ensured that authors enjoyed protection under the Berne Convention independently from the existence of protection in the work's country of origin. Therefore authors were no longer obliged to prove that their works were protected in the country of origin. This enabled them to optimally secure international copyright protection without the previous difficulty of establishing that the domestic formalities, if existent, had been fulfilled.

Consequently, at the international level, the prohibition on formalities was based principally on pragmatic rationales and not, as some believe, on principles of natural law.<sup>912</sup> The Berne Convention aimed to 'streamline' copyright protection at the international level without encroaching too seriously on the legal-theoretical basis of copyright or the domestic legislation of individual Union states.<sup>913</sup> This may explain why the question of formalities did not receive any ideological reflection during the various diplomatic conferences adopting or revising the Berne Convention. Also the early commentaries of the Berne Convention contain no references to natural law as a possible rationale behind the prohibition on formalities. The drafters of the Berne Convention only sought to reconcile the question of copyright formalities for purely international situations. Therefore, they were more concerned with the practicability and political feasibility of the treaty than with ideological considerations.<sup>914</sup>

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<sup>911</sup> See also Kohler 1896, at 341, emphasizing the enormous difficulties that authors could be confronted with if they had to comply with various types of formalities in different countries.

<sup>912</sup> See e.g. Dietz 1978, at 25 (no. 54) and Von Lewinski 2008, at 119 (no. 5.58).

<sup>913</sup> See Okediji 2004, at 143, arguing that, instead of unilaterally imposing copyright norms on states, the Berne Convention plays a 'coordinating function' to govern the relationships between states.

<sup>914</sup> See Masouyé 1978, at 10, arguing that, for doctrinal reasons or difficulties of translation, the drafters of the Berne Convention explicitly avoided the expressions *droit d'auteur*, copyright or *Urheberrecht* and, instead, used the more neutral terminology 'protection of literary and artistic works'.

However, it seems to be incorrect to completely deny the influence of ideological motivations in relation to the prohibition on copyright formalities. In comparison to owners of industrial property rights, which pursuant to the Paris Convention for the Protection of Industrial Property are required to fulfil formalities in all countries in which they seek protection, the Berne Convention liberated authors from complying with formalities in foreign countries from its early inception. This is often explained by the intricacy and cost of completing formalities in multiple countries. Still, this argument is not completely satisfactory, because the international difficulties are no different for literary and artistic property than they are for industrial property.

The special position of the author may perhaps explain this difference. At the end of the nineteenth century, there was a strong romantic undercurrent in copyright law urging for authorship to be duly protected. It was deemed unfair for authors to lose protection as a result of international obstacles associated with fulfilling formalities. It was said that all authors, even the humblest ones, should be able to reap the fruit of their creative labour. Because, in practice, authors often relied on their publishers for completing formalities in foreign countries, they risked losing protection due to failures that were not their own. This was considered to be unreasonable.

Thus, while it were mostly pragmatic reasons that initiated the introduction of the prohibition on formalities in the Berne Convention, an ideological influence seems to be manifest at least in the background. This is not really surprising, given that the drafting of the Berne Convention was carried out by different national delegations, which certainly were not ignorant of developments in national copyright law at that time. Hence, doctrinal principles, including the natural rights thinking that gained ground in Europe during the nineteenth century, may well have had an influence on the drafting of the Convention.<sup>915</sup>

The prohibition on formalities is strongly anchored in contemporary international copyright law. It is included in the Berne Convention and incorporated by reference in the TRIPS Agreement and the WCT. The only convention that does not prohibit formalities, but lays down a uniform and standardized formality – i.e., a ©-notice – is the UCC. Nonetheless, its influence is minor, as most countries nowadays adhere to the Berne Convention, the TRIPS Agreement and/or the WCT.<sup>916</sup>

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<sup>915</sup> See Grosheide 1986, at 82.

<sup>916</sup> Von Lewinski 2006.

## Chapter 5

# Contextualizing the International Prohibition on Copyright Formalities

The prohibition on formalities is one of the central features of current international copyright law. As we have observed in the previous chapter, it is incorporated in the Berne Convention and, by reference, in the TRIPS Agreement and the WCT. Since the majority of countries are members to at least one of these treaties,<sup>917</sup> virtually all countries in the world are bound by it. Hence, at first glance, there seems to be little room for reintroducing formalities in the existing framework of copyright law.

However, the degree to which countries adhering to the Berne Convention, the TRIPS Agreement and the WCT can impose copyright formalities depends on the scope of the prohibition on formalities. Under the terms of the first sentence of Article 5(2) of the Berne Convention (1971), '[the] enjoyment and the exercise of these rights shall not be subject to any formality'. To determine whether and to what extent the challenges identified in Chapter 1 – i.e., to establish legal certainty over copyright claims, improve rights clearance and enhance the free flow of information – can be addressed by reintroducing copyright formalities, we must systematically and critically analyze this provision. This is done in the following sections.

The chapter first studies the scope of application of the prohibition on formalities by exploring which 'rights' pursuant to Article 5(2) of the Berne Convention cannot be subject to formalities. It also investigates the different application of the Berne prohibition on formalities in the TRIPS Agreement and the WCT (para. 5.1). Then, it scrutinizes which types of 'formalities' are covered by the Berne prohibition on formalities (para. 5.2) and what the reference to the 'enjoyment' and the 'exercise' of rights signifies (para. 5.3). The chapter aims to identify to what extent the present international copyright framework leaves room for reintroducing formalities. This is further elaborated on in the concluding section of this chapter (para. 5.4).

On the surface, Article 5(2) of the Berne Convention seems fairly straightforward but, in practice, its scope is not entirely clear.<sup>918</sup> Some scholars go as far as arguing

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<sup>917</sup> In October 2010, there were 164 contracting parties to the Berne Convention, 153 contracting parties to the WTO Agreement (including the TRIPS Agreement) and 88 contracting parties to the WCT.

<sup>918</sup> This critique was already voiced by Potu 1914, at 54. See also Hishinuma 2010, at 463.

that the formalities prohibited by the Berne Convention include all ‘the formal and substantive prerequisites for the *genesis* of the right of the author’.<sup>919</sup> However, this definition appears too broad. Formalities are unlikely to include all the ‘substantive’ conditions for copyright. They at least do not include the substantive conditions that are inherent in the work and that equally determine the genesis of copyright, such as the standard of originality and the idea/expression dichotomy. Other scholars define formalities less broadly,<sup>920</sup> but no one appears to have a clear answer as to where the prohibition begins or ends. Unfortunately, this question remained unanswered in the 2009 US-China dispute before the WTO Dispute Settlement Body.<sup>921</sup> The panel was asked to judge on the compatibility of the Chinese Copyright Act, which subjected copyright protection to pre-publication censorship, with Article 5(2) of the Berne Convention. However, since it already held the Chinese Copyright Act to be at odds with Article 5(1) of the Berne Convention, it did not expressly rule on this question, as it ‘would not contribute further to a positive solution to this dispute’.<sup>922</sup>

This chapter attempts to clarify the scope of the Berne prohibition on formalities, by interpreting the provision in the context and in the light of the object and purpose of the Berne Convention. This is in conformity with the 1969 Vienna Convention on the Law of Treaties.<sup>923</sup> When the meaning remains ambiguous or obscure, recourse is made to supplementary means of interpretation, including the preparatory work of the Berne Convention.<sup>924</sup> Moreover, where appropriate, it will be examined how the terms of Article 5(2) of the Berne Convention have been explained in literature and court decisions. To the degree that this chapter analyzes the application of the Berne prohibition on formalities under the TRIPS Agreement and the WCT it also looks at the context, object and purpose and other relevant materials of these treaties.

## 5.1 The Scope of Application of the Prohibition on Formalities

The material scope of application of the prohibition on formalities is defined by the words ‘these rights’ in Article 5(2) of the Berne Convention. These two words refer back to Article 5(1) of the Berne Convention and demarcate the application of the prohibition on formalities in three directions. They establish the territorial reach of

<sup>919</sup> Nordemann, Vinck, Hertin & Meyer 1990, at 77.

<sup>920</sup> See Gervais 2010a, at 201, concluding that ‘the two characteristics of prohibited formalities under Article 5(2) are thus that they should be (a) imposed by law and (b) copyright-specific’. See also Gervais 2005, at 351, Gervais 2006, at 34 and Gervais 2010b, at 26.

<sup>921</sup> See WTO Panel Report, ‘China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights’, WT/DS362/R, 26 January 2009 (adopted on 20 March 2009), paras 7.145 to 7.153 and para. 7.192: ‘The Panel exercises judicial economy with respect to the claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement’.

<sup>922</sup> *Ibid.*, para. 7.153.

<sup>923</sup> Art. 31 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980 [Vienna Convention on the Law of Treaties].

<sup>924</sup> *Ibid.*, art. 32.

the prohibition on formalities (para. 5.1.1), the substantive elements of copyright to which it applies (para. 5.1.2) and, finally, its addressees (para. 5.1.3).

This section investigates the three areas in which the scope of application of the prohibition on formalities is delineated. The object of this investigation is to identify the room that the international copyright framework leaves for a reintroduction of formalities. It will be seen that the international copyright treaties do not completely ban formalities, but that they offer too little room for reintroducing formalities with the purpose of addressing the various challenges in current copyright law.

#### 5.1.1 THE TERRITORIAL SCOPE OF THE PROHIBITION ON FORMALITIES

Article 5(2) of the Berne Convention prohibits Berne Union states from imposing formalities on non-domestic works for which protection is claimed under the Berne Convention.<sup>925</sup> This follows from the words ‘these rights’, which refer to rights that contracting states must grant to copyright owners from countries of the Berne Union other than the country of origin of the work.<sup>926</sup> Except for purely national situations, it is prohibited to subject authors and copyright owners to formalities.

Because of the incorporation by reference of the Berne prohibition on formalities in the TRIPS Agreement and the WCT, the territorial application of this prohibition is similar under these treaties. WTO members and contracting states to the WCT are prohibited from subjecting non-domestic works that qualify for protection under the TRIPS Agreement or the WCT to formalities.<sup>927</sup> The prohibition on formalities does not extend to the protection of domestic works in their country of origin.<sup>928</sup>

Hence, the prohibition on formalities applies only to international situations. This leaves considerable room for reintroducing formalities. All countries adhering to the Berne Convention, the TRIPS Agreement and/or the WCT remain absolutely free to impose formalities on works of which they are the country of origin.<sup>929</sup> As observed, the US has exercised this liberty by making the institution of infringement suits for

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<sup>925</sup> Masouyé 1978, at 33.

<sup>926</sup> Pursuant to art. 5(3) of the Berne Convention, protection in the country of origin, which is established according to the criteria of art. 5(4) of the Berne Convention, is governed by domestic law.

<sup>927</sup> See the Agreed Statement concerning art. 3 WCT and Reinbothe & Von Lewinski 2002, at 59-60.

<sup>928</sup> See e.g. the ruling of the Dutch Supreme Court of 30 October 2009, *Montis (Charly & Chaplin)*, *AMI* 2010, no. 6, at 68-69, note M.M.M. van Eechoud.

<sup>929</sup> *Actes 1908*, at 237; Berne Centenary 1986, at 148. See also Wauwermans 1910, at 70-71, stating: ‘la législation du pays où l’œuvre est publiée conserve le droit de subordonner à telles conditions qu’elle estime convenir, l’existence ou l’exercice du droit à la protection dans ce pays en ce qui concerne ses nationaux. C’est affaire de droit interne’. See also the rulings of the Dutch Supreme Court of 26 May 2000, *Cassina v. Jacobs*, *NJ* 2000, 671, note D.W.F. Verkade and *AMI* 2000, at 210-214, note N. van Lingen and of the Dutch Supreme Court of 11 May 2001, *Vredestein v. Ring 65*, *NJ* 2002, 55, note J.H. Spoor and *AMI* 2001, no. 14, at 97-99, note N. van Lingen, where it was held that a particular Dutch formality, i.e. a declaration (‘*instandhoudingsverklaring*’) with the Benelux Bureau for Design Registration necessary for maintaining copyright in industrial designs after the expiration of designs protection (see para. 5.3.1.2), could not be imposed on Italian works but only on Dutch works.

works of US origin dependent on registration. However, the possibility of imposing formalities on domestic works is not limited to declaratory formalities. Works in the country of origin may be subject to all types of formalities, including constitutive and maintenance formalities. Thus, countries have sufficient opportunity to impose those formalities that most effectively address the challenges to be overcome.

At first sight, this suggests that there is enough room for reintroducing copyright formalities with a view to addressing the challenges that we identified in Chapter 1. It is feasible, for example, that countries subject the protection of domestic works to registration and that the different national registers so established are combined and integrated into an international register. This would have the advantage of creating a universal repository of information on copyright protected works that would not run counter to the international prohibition on formalities. It would also be possible that countries make the protection of domestic works conditional on a copyright notice. This would have the advantage of making valuable information about copyright readily available, even if the works are distributed beyond their national borders.

From an international viewpoint, however, a reintroduction of formalities along this line would have the effect of facilitating rights clearance, but the effects on establishing legal certainty over copyright claims and on enhancing the free flow of information would be minimal. Even if countries subject the protection of domestic works to constitutive formalities, a failure to fulfil them would not cause the works to enter the public domain in other contracting parties to the Berne Convention, the TRIPS Agreement and the WCT, as they are obliged to protect works independently from the protection in the country of origin.<sup>930</sup> This would result in the odd situation of works enjoying protection around the world, but not in their home country.<sup>931</sup>

Consequently, subjecting works to formalities in the country of origin may have the effects of creating legal certainty over copyright claims and enhancing the free flow of information, but these effects are limited to the country of origin. In other countries, the work will be protected even if it resides in the public domain in the home country due to a failure to fulfil the domestic formalities. Conversely, in the country that subjects domestic works to formalities, the same effects will apply only to domestic works, because foreign works cannot be subject to formalities.

Moreover, it is uncertain whether countries are willing to subject domestic works to formalities. There is a clear and understandable antipathy to the idea of giving foreign authors better protection than national authors. This was also the reason why most countries, when joining the Berne Convention, the TRIPS Agreement or the WCT decided not just to abolish formalities in relation to foreign works, but to grant unconditional protection to all works, irrespective of their origin.<sup>932</sup> Furthermore, national authors can fairly easily circumvent the domestic formalities

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<sup>930</sup> See De Beaufort 1909, at 353, with respect to the Berne Convention.

<sup>931</sup> See *Le Droit d'Auteur* 1910, 2-7, at 7 and Allfeld 1928, at 418.

<sup>932</sup> See Briggs 1906, at 293-294, Ricketson 1987, at 206, Reinbothe & Von Lewinski 2002, at 60 and Ricketson & Ginsburg 2006, I, at 311.

by manipulating the country of origin. They can publish their works in contracting states to the Berne Convention, the TRIPS Agreement or the WCT that impose no formalities. By so doing, national authors evade domestic formalities, while retaining protection in their own country by virtue of the Berne Convention, the TRIPS Agreement or the WCT.<sup>933</sup>

Therefore, a system that relies on a reintroduction of formalities in the country of origin would seem to require a coordinated approach and broad support, preferably from states adhering to the Berne Convention, the TRIPS Agreement and the WCT collectively. In the absence of mutual agreement between countries about subjecting domestic works to copyright formalities, it is unlikely that countries on their own accord will make the protection of domestic works conditional on formalities. This is especially so, given that the system is only as strong as its weakest link. Because it can be commercially interesting for countries to abstain from partaking in a collective approach, as this can make them attractive publishing havens for authors seeking to circumvent domestic formalities, a collective approach seems unrealistic.

### 5.1.2 THE SUBSTANTIVE SCOPE OF THE PROHIBITION ON FORMALITIES

The scope of application of the prohibition on formalities is also demarcated by the substantive elements of copyright to which it applies. To identify these elements, it must first be examined how the prohibition on formalities is to be applied under the different treaties and whether, and to what extent, it applies to rights that are subject to the rule of national treatment (para. 5.1.2.1). After this general examination, this section specifically studies how the prohibition on formalities applies to the subject matter of protection (para. 5.1.2.2), the rights to be protected (para. 5.1.2.3) and the duration of protection (para. 5.1.2.4). This investigation demonstrates that, while the substantive coverage of the prohibition on formalities is very broad, there are a few situations in which a specific type of work or a specific type of right can be subject to formalities. Accordingly, the framework of substantive law leaves some room for reintroducing formalities, but it does not permit a generic introduction of copyright formalities with a view to addressing the challenges in current copyright law.

#### 5.1.2.1 PRELIMINARY OBSERVATIONS

The substantive scope of application of the prohibition on formalities is determined entirely by the way in which the prohibition on formalities is to be applied under the Berne Convention, the TRIPS Agreement and the WCT. This includes not only its application to the rights specially granted by these treaties, but also to the protection

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<sup>933</sup> See Ladas 1938, I, at 275, note 38. Especially in the online environment, manipulating the country of origin is fairly easy. See e.g. Austin 2005, at 416-417.

to be granted pursuant to the rule of national treatment. Before the application of the prohibition on formalities to the subject matter of protection, the rights and duration of protection is analyzed, this section first examines its application in general.

*The Application of the Prohibition on Formalities under the Different Treaties*

Article 5(2) of the Berne Convention prohibits Berne Union states from subjecting the minimum corpus of rights laid down in the Berne Convention and the rights that must be granted pursuant to the rule of national treatment to formalities. Again, this follows from the words ‘these rights’, which refer to ‘the rights specially granted by this Convention’ (i.e., the Berne minima) and ‘the rights which their respective laws do now or may hereafter grant to their nationals’ (i.e., the rule of national treatment) ‘in respect of works ... protected under this Convention’, as provided for by Article 5(1) of the Berne Convention. Consequently, the prohibition on formalities applies to the whole range of rights that can be claimed under the Berne Convention.

Under the TRIPS Agreement, the prohibition on formalities seems to apply only to the rights that can be claimed pursuant to the provisions of the Berne Convention that are incorporated by reference. This includes the Berne minima and the rights to be granted under the principle of national treatment enshrined in Article 5(1) of the Berne Convention.<sup>934</sup> Because the TRIPS Agreement contains no ‘*mutatis mutandis* application’ rule, the prohibition on formalities appears not to extend to the ‘Berne-plus’ provisions in Section 1 of Part II (‘Copyright and related rights’) of the TRIPS Agreement. If it did, it would also be applicable in relation to related (neighbouring) rights of performers, phonograms producers and broadcasting organizations.<sup>935</sup> This would conflict with the protection of related rights under the Rome Convention, which is not subject to a prohibition on formalities, but to a uniform notice formality (a ‘p-in-a-circle’).<sup>936</sup> Therefore, it would be at odds with the intention of the TRIPS Agreement not to derogate from existing obligations of WTO members under the key intellectual property treaties, including the Rome Convention, if the prohibition on formalities would also be applicable to the ‘Berne-plus’ provisions.<sup>937</sup>

Nonetheless, some of the ‘Berne-plus’ provisions in TRIPS seem to be so closely linked to the Berne Convention that they may perhaps be subject to the prohibition

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<sup>934</sup> Art. 3(1) of the TRIPS Agreement also contains a rule of national treatment. For the purpose of the application of the prohibition on formalities, however, the applicable rule seems to be art. 5(1) of the Berne Convention, because in the TRIPS context, the prohibition on formalities is not applied *mutatis mutandis*. Therefore, it is governed solely by the relevant provisions of the Berne Convention.

<sup>935</sup> Art. 14 of the TRIPS Agreement.

<sup>936</sup> Art. 11 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961 [Rome Convention] provides, in relation to the international protection of published phonograms, that all domestic formalities are regarded as fulfilled if the copies of a phonogram bear a notice consisting of a ‘p-in-a-circle’ plus the year of first publication and the names of the owners of the related right in the phonogram.

<sup>937</sup> Art. 2(2) of the TRIPS Agreement.

on formalities in a roundabout way. This may arguably be the case where the TRIPS Agreement brings a provision directly within the scope of the Berne Convention or where a provision lies within the object of protection of the Berne Convention and therefore should be granted national treatment pursuant to Article 5(1) of the Berne Convention. In the next sections, the provisions in the TRIPS Agreement relating to computer programs, databases and rental rights are examined in more detail.

Under the WCT, the application of the prohibition on formalities is broader than under the Berne Convention and the TRIPS Agreement. The prohibition applies not only to the provisions of the Berne Convention that are incorporated by reference with Article 1(4) of the WCT, but also to the ‘Berne-plus’ provisions in the WCT. This follows from the ‘*mutatis mutandis* application’ rule of Article 3 of the WCT, which suggests that, ‘in respect of works ... protected under the Berne Convention and the WCT’, the contracting parties to the WCT are prohibited from subjecting ‘the rights specially granted by the Berne Convention and the WCT’ (i.e., the Berne and WCT minima) and ‘the rights which their respective laws do now or may hereafter grant to their nationals’ (i.e., the rule of national treatment) to formalities.<sup>938</sup> Hence, the prohibition on formalities applies to all rights that can be claimed under the WCT, either by virtue of the Berne provisions that are incorporated by reference or on the basis of the WCT provisions directly. However, as will be seen later, the prohibition on formalities appears to be limited to copyright protection, which implies that it is not applicable to certain provisions in the WCT that aim at protecting technological protection measures (TPMs) and rights management information (RMI).

#### *The Prohibition on Formalities and the Rule of National Treatment*

The previous section has shown that the prohibition on formalities is also applicable to the rights to be granted by virtue of the rule of national treatment, as enshrined in Article 5(1) of the Berne Convention. This provision is incorporated by reference in the TRIPS Agreement and the WCT and it applies *mutatis mutandis* in the context of the WCT. The rule of national treatment obliges contracting states to confer ‘the rights which their respective laws do now or may hereafter grant to their nationals’ on foreign works for which protection is claimed under the relevant treaty.

As a rule, national treatment extends to those matters that lie within the object of protection of the relevant treaty.<sup>939</sup> That is the Berne Convention, when protection is claimed under this Convention or the TRIPS Agreement, and the Berne Convention plus the WCT, when protection is claimed under the WCT. The object of protection of the Berne Convention and the WCT is ‘the protection of the rights of authors in

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<sup>938</sup> See the instruction of the Agreed Statement concerning art. 3 of the WCT.

<sup>939</sup> See e.g. Vaver 1986, I, at 582-584, Ricketson 1987, at 208 et seq. and Ricketson & Ginsburg 2006, I, at 312 et seq.

their literary and artistic works'.<sup>940</sup> The national treatment obligation thus extends to the subject matter, the rights and the duration of copyright protection. Anything that lies entirely outside these matters is not subject to national treatment.<sup>941</sup>

The question remains how the prohibition on formalities applies in relation to the rights that are subject to national treatment. If it is regarded purely as a rule of non-discrimination, 'promising foreign creators who come within the treaty's protection that they will enjoy in the protecting country no less favorable treatment for their creations as the protecting country gives to its own nationals',<sup>942</sup> then it can perhaps be argued that, as long as formalities are applied in a non-discriminatory manner, it would not conflict with the prohibition on formalities if a right granted beyond the minimum treaty rights is subject to formalities. Yet, if the prohibition on formalities pertains to 'the rights which their respective laws do now or may hereafter grant to their nationals', then it would apply to all rights that contracting states grant beyond the minimum treaty standards and that lie within the treaty's objectives.

Given the rules of customary international law, as codified in Section 3 of Part III of the Vienna Convention on the Law of Treaties, the latter interpretation seems to prevail. Article 31(1) of the Vienna Convention states that the terms of a treaty must be interpreted (i) in accordance with their ordinary meaning, (ii) in their context and (iii) in the light of the object and purpose of the treaty.<sup>943</sup> All three elements seem to support the interpretation that the prohibition on formalities also applies to the rights that contracting states must grant pursuant to the rule of national treatment.

First, when read in conjunction, the first and second paragraph of Article 5 of the Berne Convention clearly prohibit contracting states from making 'the rights which their respective laws do now or may hereafter grant to their nationals' dependent on formalities. The Berne Convention contains no exceptions to this rule. An objective, textual analysis of the prohibition on formalities therefore negates the interpretation that rights that fall under the rule of national treatment can be subject to formalities, provided that they are imposed in a non-discriminatory way on national and foreign works. Second, if the prohibition on formalities is seen in the light and context of its legislative history (Chapter 4), then it becomes abundantly clear that, by introducing this prohibition, contracting states aimed to create a situation in which authors would be free from complying with copyright formalities in each and every contracting state to secure international protection. Therefore, it was prohibited for contracting states to subject the protection of the Berne Convention, including the rights to be granted pursuant to the rule of national treatment, to formalities. This also corresponds with the object and purpose of the Berne Convention, which is to

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<sup>940</sup> See the preamble and art. 1 of the Berne Convention and the preamble of the WCT.

<sup>941</sup> See Ricketson 1987, at 209 and Ricketson & Ginsburg 2006, I, at 315.

<sup>942</sup> Goldstein & Hugenholtz 2010, at 99. See also Ladas 1938, I, at 365, arguing that national treatment implies a 'complete assimilation of foreigners to nationals, without condition of reciprocity'.

<sup>943</sup> See Senftleben 2004, at 99-101, who reads this rule of treaty interpretation as giving preference to the objective approach (focusing on the meaning of the text) over the subjective approach (focusing on the intention of the parties) and the teleological approach (focusing on the object and purpose).

guarantee an adequate and effective protection of literary and artistic works at the international level.

Thus it seems safe to conclude that the prohibition on formalities does not merely apply to the minimum treaty standards, but also to the protection to be granted under the rule of national treatment. All rights that are granted beyond the minimum treaty standards and that lie within the object of protection of the Berne Convention (and the WCT when protection is claimed under this treaty) are subject to the prohibition on formalities. For all other rights the prohibition does not apply, even if contracting states voluntarily extend the protection of those rights to foreign authors.<sup>944</sup>

#### 5.1.2.2 SUBJECT MATTER OF PROTECTION

Under the Berne Convention, the prohibition on formalities applies to all rights that must be granted to authors ‘in respect of works for which they are protected under this Convention’.<sup>945</sup> These are ‘literary and artistic works’, which generally include ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’.<sup>946</sup> In the Berne Convention, a number of examples of ‘literary and artistic works’ is given, but this list is non-exhaustive.<sup>947</sup>

If a Berne Union state protects subject matter that is not included in the examples listed in the Berne Convention, it should be determined through legal interpretation whether it qualifies as a Berne protected literary or artistic work.<sup>948</sup> If so, it must be granted national treatment and its protection may not be subjected to formalities. If not, contracting states are under no obligation to extend national protection of this subject matter to foreign authors<sup>949</sup> and, even if they do, the Berne Convention does not prohibit them from making this protection conditional on formalities.

<sup>944</sup> See Vaver 1986, I, at 596. Examples of rights that lie entirely outside the copyright framework are rights of authors to social security or social welfare payments, tax reductions, promotional measures, subsidies or *domaine public payant* (i.e. special royalties from public domain works that are paid into cultural and/or social funds in order to support living authors). See Vaver 1986, II, at 718.

<sup>945</sup> See art. 5(1) in conjunction with art. 5(2) of the Berne Convention.

<sup>946</sup> Article 2(1) of the Berne Convention.

<sup>947</sup> The Berne Convention names ‘books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works ...; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works ...; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science’ in art. 2(1), ‘translations, adaptations, arrangements of music and other alterations of a literary or artistic work’ in art. 2(3) and ‘collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations’ in art. 2(5).

<sup>948</sup> See Vaver 1986, I, at 597, Goldstein 2001, at 78 and Goldstein & Hugenholtz 2010, at 105.

<sup>949</sup> Vaver 1986, I, at 590 et seq.

An example of subject matter that falls outside the Berne definition of ‘literary and artistic works’ is subject matter protected by related rights, such as phonograms (sound recordings).<sup>950</sup> Although, in some jurisdictions, phonograms are protected by copyright law in a narrow sense,<sup>951</sup> under the Berne Convention, there is no requirement to extend national treatment to the protection of phonograms and, consequently, there is no prohibition on subjecting this protection to formalities.<sup>952</sup> Another example of subject matter to which the rule of national treatment does not apply is topographies of semiconductor products (chips design). Although their protection resembles the protection of copyright in the sense that originality is required before protection is afforded,<sup>953</sup> topographies of semiconductor products are not literary or artistic works in the meaning of the Berne Convention. Therefore, their protection can be subject to formalities and many countries have indeed decided to do so.<sup>954</sup>

Moreover, Article 2(7) of the Berne Convention contains one specific exception to the rule of national treatment. Contracting states are not obliged to grant national copyright protection to works of applied art and industrial designs and models that in their country of origin are solely protected by design law. The protection of such works is subject to material reciprocity, which means that contracting states are only obliged to protect them under design law. If a contracting state has no design law, however, then it must protect them as artistic works under copyright law.<sup>955</sup> Works of applied art and industrial designs and models that in their country of origin are protected by copyright law, or by design law and copyright law cumulatively, must also be protected under copyright law in other contracting states, unless these states protect such works solely with design law, in which case they must be protected under design law.<sup>956</sup> The Berne Convention prohibits contracting states from subjecting works of applied art and industrial designs and models to formalities only

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<sup>950</sup> Vaver 1986, I, at 598 et seq. In the past, some scholars considered sound recordings as adaptations of musical works and thus as Berne protected works. See Ladas 1938, I, at 424-426, repudiating this.

<sup>951</sup> This is the case for example in the US. See 17 USC § 102(a)(7).

<sup>952</sup> Other treaties, however, may include specific rules about subjecting the protection of phonograms to formalities. Examples are art. 11 of the 1961 Rome Convention, allowing contracting states to subject the protection of phonograms to a specific notice formality (a ‘p-in-a-circle’), and art. 20 of the 1996 WIPO Performances and Phonograms Treaty (WPPT), prohibiting contracting states from subjecting the enjoyment and the exercise of the rights provided for in the WPPT to formalities.

<sup>953</sup> See art. 2(2) of the EU Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, *OJL* 24/36, 27 January 1987 [EU Semiconductor Directive] and 17 USC § 902(b)(1), as introduced by the 1984 Semiconductor Chip Protection Act, Pub. L. No. 98-620, 98 Stat. 3347. In the US, the protection of chips design is embodied in copyright law.

<sup>954</sup> Art. 4(1) of the EU Semiconductor Directive permits EU Member States to subject the protection to a registration or deposit requirement. See also 17 USC § 902(a)(1)(A) in conjunction with 17 USC § 908, which lays down a registration requirement for mask works.

<sup>955</sup> See the last sentence of art. 2(7) of the Berne Convention.

<sup>956</sup> See the first sentence of art. 2(7) of the Berne Convention.

in so far as it requires such works to be protected under copyright law.<sup>957</sup> Design protection, on the other hand, can be made conditional on registration or deposit.<sup>958</sup>

For two other types of subject matter, computer programs (software) and original databases, it is uncertain whether they qualify as literary or artistic works under the Berne Convention. In so far as computer language can be made visually perceptible and readily comprehensible, software may perhaps qualify as a literary work under the Berne Convention, provided of course that it results from creative authorship.<sup>959</sup> However, it is questionable whether all elements of a computer program, the source code and object code, in particular, satisfy these criteria.<sup>960</sup> To the degree that they do not, they are not protected under the Berne Convention and therefore they may be subject to formalities. The same applies to databases, which seem to be excluded from the protection of the Berne Convention as well. The protection of collections of literary and artistic works, such as encyclopaedias and anthologies (Article 2(5) of the Berne Convention), appears not to extend to databases or other compilations of data.<sup>961</sup> Consequently, the Berne Convention does not seem to prohibit contracting states from making the protection of databases conditional on formalities.

Even so, software and original databases are protected by the TRIPS Agreement and the WCT.<sup>962</sup> Given the '*mutatis mutandis* application' of the Berne prohibition on formalities under the WCT, their protection under the WCT cannot be subject to formalities. It is uncertain however whether under the TRIPS Agreement this is also the case. This requires legal interpretation. On the one hand, the TRIPS Agreement does not provide that the prohibition on formalities applies *mutatis mutandis* to the 'Berne-plus' rights in the TRIPS Agreement. This suggests that only the provisions of the Berne Convention that are incorporated by reference are subject to the Berne

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<sup>957</sup> See the ruling of the Dutch Supreme Court of 26 May 2000, *Cassina v. Jacobs*, NJ 2000, 671, note D.W.F. Verkade and *AMI* 2000, at 210-214, note N. van Lingen, in which it was held that the former art. 21(3) of the Benelux Designs Act was at odds with the Berne prohibition on formalities, because it made the continuation of copyright after the expiry of the term of design protection (max. 15 years) conditional on the deposit of a 'maintenance notice' ('*instandhoudingsverklaring*') with the Benelux Bureau for Design Registration. In this specific case, however, the Berne Convention seems to have been applied wrongly. It involved the expiry of copyright in Italian furniture designs due to a failure to deposit the required 'maintenance notice'. Since Italy did not protect designs under copyright, the Berne Convention neither required contracting states to extend national copyright protection to Italian designs, nor prohibited them from subjecting Italian designs to formalities. See the conclusion of the Advocate-General Mr Langemeijer, at 2.11, and Nordemann, Vinck, Hertin & Meyer 1990, at 53.

<sup>958</sup> See Dreier in Dreier & Hugenholtz 2006, at 17.

<sup>959</sup> See Vaver 1986, I, at 602 et seq.

<sup>960</sup> For an exhaustive overview of the protection of software as a literary work, see Van Rooijen 2010, at 53-61. See also Vaver 1986, I, at 602 et seq. and Ricketson 1987, at 897-898.

<sup>961</sup> See Gervais 2003, at 136.

<sup>962</sup> See art. 10(1) and (2) of the TRIPS Agreement and arts 4 and 5 of the WCT. The database protection of the TRIPS Agreement and the WCT does not extend to non-original databases (as protected, *inter alia*, by the *sui generis* right granted under the EU Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ L 77/20*, 27 March 1996).

prohibition on formalities and that this prohibition does not extend to the protection of software and databases under the TRIPS Agreement. As observed, it is uncertain whether software and databases are Berne-protected works and their inclusion in the TRIPS Agreement (or the WCT) has not changed this.<sup>963</sup> On the other hand, it may perhaps be argued that, under the TRIPS Agreement, the prohibition on formalities should at least also apply to the protection of software, since the TRIPS Agreement literally provides that '[computer] programs, whether in source or object code, shall be protected as literary works under the Berne Convention'.<sup>964</sup> Similarly the TRIPS Agreement states that certain databases can be protected as intellectual creations,<sup>965</sup> which may also suggest that they are to be protected as a Berne-protected work, for the term 'intellectual creations' is directly borrowed from Article 2(5) of the Berne Convention.<sup>966</sup> However, whether it can be concluded from this that the prohibition on formalities also applies to software and databases under the TRIPS Agreement is doubtful. Nothing in the legislative history of the TRIPS Agreement supports this conclusion. Therefore, and in the absence of a clear '*mutatis mutandis* application' rule, it seems that a more restrictive legal interpretation should prevail.

### 5.1.2.3 EXCLUSIVE RIGHTS

Under the Berne Convention, the prohibition on formalities applies to the minimum set of rights laid down in the Berne Convention and the rights that must be granted pursuant to the rule of national treatment. The rights specially granted by the Berne Convention include moral rights; the rights of translation and reproduction; certain rights in dramatic and musical works; broadcasting and associated rights; certain rights in literary works; the rights of adaptation, arrangement and other alteration; and cinematographic and associated rights.<sup>967</sup> Article 5(2) of the Berne Convention prohibits contracting states from subjecting these rights to formalities.

In addition, Berne Union states are prohibited from making the rights for which they must grant national treatment conditional on formalities. As observed, these are all rights granted to nationals that are '*in pari materia*' with the rights laid down in the Berne Convention.<sup>968</sup> However, one right is explicitly exempted from the rule of

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<sup>963</sup> It is a general rule of public international law that in case of successive treaties on the same topic, the later treaty does not alter the meaning of the provisions of substantive law of the earlier treaty, unless this is explicitly stated and approved by all the parties to the earlier treaty. See arts 30(4) and (5) in conjunction with arts 39 to 41 of the Vienna Convention on the Law of Treaties. This is neither the case under the TRIPS Agreement, which was concluded in a different context (WTO) than the Berne Convention (WIPO), nor under the WCT, which is a special agreement between a number of Union states granting to authors more extensive rights than those granted by the Berne Convention.

<sup>964</sup> Art. 10(1) of the TRIPS Agreement.

<sup>965</sup> Art. 10(2) of the TRIPS Agreement.

<sup>966</sup> See Gervais 2003, at 137.

<sup>967</sup> See arts 6*bis*, 8, 9, 11, 11*bis*, 11*ter*, 12 and 14 of the Berne Convention.

<sup>968</sup> Vaver 1986, II, at 718.

national treatment. This is the resale royalty right (or *droit de suite*), i.e., the author's right to a share of the profits of the sale of his work after the first transfer of that work by the author. Berne Union states are not compelled to protect this right and, even if they do, they are not obliged to grant national treatment. The protection of the resale royalty right is subject to material reciprocity.<sup>969</sup> Accordingly, it seems not to be prohibited to subject the protection of this right to formalities.<sup>970</sup>

For other types of rights, such as public lending and commercial rental rights, it is more difficult to establish whether the Berne Convention creates an obligation for contracting states to grant national treatment. It seems that a lending or rental rights scheme may fall under the Convention's national treatment obligation if it 'takes the form of giving the author a right to receive remuneration ... each time it authorizes a person to borrow [or to rent] his/her book [or work]'.<sup>971</sup> However, if it takes the form of a social welfare scheme, it would probably not be covered by Article 5(1) of the Berne Convention.<sup>972</sup> Hence, whether national treatment must be granted seems to depend chiefly on how the lending or rental rights scheme is set up and regulated by national law.<sup>973</sup> Contracting states are prohibited from subjecting these rights to formalities only to the extent that they are to be granted national treatment.

The TRIPS Agreement, on the other hand, contains a commercial rental right in respect of computer programs and cinematographic works.<sup>974</sup> Since the prohibition on formalities does not apply *mutatis mutandis* to the 'Berne-plus' rights provided for in the TRIPS Agreement, however, WTO members do not seem to be prohibited from subjecting the protection of this right to formalities. The Berne prohibition on formalities applies only to the Berne provisions that are incorporated by reference in the TRIPS Agreement. Thus, WTO members seem to be prohibited from subjecting the protection of the commercial rental right to formalities, only if it comes within the national treatment obligation of Article 5(1) of the Berne Convention.

This is different under the WCT. Here, the prohibition on formalities applies both to the Berne provisions that are incorporated by reference in the WCT and *mutatis mutandis* to the protection provided for in the WCT.<sup>975</sup> This includes the exclusive rights of distribution, commercial rental and communication and making available

<sup>969</sup> See art. 14ter(2) Berne Convention. See also Vaver 1986, II, at 719.

<sup>970</sup> Pursuant to art. 121(5) of the German Copyright and Neighbouring Rights Act 1965, foreign authors can benefit from the *droit de suite* only if the government of the country to which they belong has officially proclaimed that it grants a corresponding right to German authors. Irrespective of whether it constitutes a 'formality' in the meaning of the Berne Convention, this requirement is compatible with the prohibition on formalities. See Nordemann, Vinck, Hertin & Meyer 1990, at 78.

<sup>971</sup> Vaver 1986, II, at 720.

<sup>972</sup> *Ibid.*, at 720. See also Goldstein 2001, at 83 and Goldstein & Hugenholtz 2010, at 108.

<sup>973</sup> See Ricketson 1987, at 210 and Ricketson & Ginsburg 2006, I, at 316-317. But see Desbois, Françon & Kerever 1976, at 152-153, Nordemann, Vinck, Hertin & Meyer 1990, at 73 and Kerever 1993, at 92, who assert that national treatment extends to every right that flows from the act of authorship.

<sup>974</sup> Art. 11 of the TRIPS Agreement.

<sup>975</sup> Art. 3 of the WCT.

to the public.<sup>976</sup> Whether the prohibition on formalities also extends to Articles 11 and 12 of the WCT, which create the obligations to protect technological protection measures (TPMs) and rights management information (RMI), is uncertain.

On the surface, Articles 11 and 12 of the WCT appear to be included among the provisions that are subject to the prohibition on formalities. Article 3 of the WCT provides that Article 5(2) of the Berne Convention applies *mutatis mutandis* to ‘the protection provided for’ in the WCT. Moreover, the legislative history of the WCT suggests that Articles 3 to 6 of the Berne Convention be applicable ‘to all new rights and aspects of protection in the present draft’.<sup>977</sup> This seems to imply that the basic provisions of Berne, including the prohibition on formalities, would also apply to the protection of TPMs and RMI under Articles 11 and 12 of the WCT.<sup>978</sup>

On the other hand, there are strong indications that the prohibition on formalities does not apply to all elements of protection in the WCT, but only to ‘the protection of the rights of authors in their literary and artistic works’.<sup>979</sup> Despite the wording of Article 3 of the WCT suggesting that the prohibition applies *mutatis mutandis* to ‘the protection provided for’ in the WCT, Article 5(2) of the Berne Convention only prohibits contracting states from subjecting ‘these rights’ to formalities. Pursuant to the Agreed Statement concerning Article 3 of the WCT, in the context of the WCT, this includes the rights that are to be granted under the rule of national treatment and ‘the rights specially granted by the Berne Convention and the WCT’ with respect to ‘works ... protected under the Berne Convention and the WCT’.<sup>980</sup>

Articles 11 and 12 of the WCT, however, constitute no ‘rights’ in the meaning of Article 5(2) of the Berne Convention read in conjunction with the Agreed Statement concerning Article 3 of the WCT. For one thing, they grant no copyright protection in literary and artistic works. TPMs and RMI are not ‘works ... protected under the Berne Convention and the WCT’.<sup>981</sup> In addition, they do not create new substantive or exclusive rights or widen the scope of existing rights.<sup>982</sup> They merely create new

<sup>976</sup> Arts 6 to 8 of the WCT.

<sup>977</sup> *Records of the diplomatic conference in Geneva 1996*, para. 2.02, at 172.

<sup>978</sup> Reinbothe & Von Lewinski 2002, at 61. See also Wand 2001, at 46, arriving at the same conclusion with respect to the protection of RMI under art. 12 of the WCT. However, he bases this conclusion not on art. 3 of the WCT, but on the Agreed Statement concerning art. 12 of the WCT (*infra* text).

<sup>979</sup> See *Records of the diplomatic conference in Geneva 1996*, para. 2.01, at 172, stating that, as a matter of reason, ‘it seems feasible and well-founded to build *new protection for literary and artistic works* upon the same principles’ as enshrined in Articles 3 to 6 of the Berne Convention (emphasis added).

<sup>980</sup> This Agreed Statement is an important source of interpretation of the text of art. 3 of the WCT. It must be regarded as an ‘agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ under art. 31(2) sub (a) of the Vienna Convention on the Law of Treaties. Therefore, it is part of the context for the purpose of the interpretation of the WCT. See Reinbothe & Von Lewinski 2002, at 19, Ficsor 2002, at 61-64 and Senftleben 2004, at 106.

<sup>981</sup> See Wand 2001, at 36 and 45, arguing that arts 11 and 12 of the WCT do not aim to protect creations of the mind (*‘bestimmter kultureller Geistesschöpfungen’*) and therefore are no substantive copyright rules but ancillary forms of protection (*‘flankierende Bestimmung[en] zur Rechtsdurchsetzung’*).

<sup>982</sup> See e.g. *Records of the diplomatic conference in Geneva 1996*, para. 13.03, at 216: ‘The obligations established in the proposed Article 13 [i.e. Article 11 WCT] are more akin to public law obligations

obligations for contracting states to provide for adequate legal safeguards in relation to the enforcement or management of copyright.<sup>983</sup> Systematically, therefore, these provisions constitute rules of enforcement rather than exclusive rights.<sup>984</sup>

Thus, the Berne prohibition on formalities appears not to apply *mutatis mutandis* to the protection of TPMs against circumvention and the protection of RMI against removal or tampering.<sup>985</sup> This gives contracting parties to the WCT the opportunity to subject this protection to particular formalities. It is feasible, for example, that the protection of TPMs is made conditional on a mandatory disclosure of the keys and specifications of TPMs that are applied to a work.<sup>986</sup> This may prevent content being unnecessarily locked up by technology.<sup>987</sup> Similarly, it would permit contracting states to subject the protection of RMI to a mandatory registration or deposit of RMI in a publicly accessible database.<sup>988</sup> This can significantly facilitate the clearance of rights and, consequently, address part of the current copyright challenges.

Nonetheless, not all challenges in current copyright law can be addressed by such measures. Contracting parties to the WCT may not rely on Articles 11 and 12 of the WCT to adopt measures that would have the effect of imposing formalities that are not permitted under the Berne Convention or the WCT.<sup>989</sup> Accordingly, they cannot subject the protection of copyright to a mandatory disclosure of the keys of TPMs or a mandatory registration or deposit of RMI or oblige right owners to apply TPMs or to attach RMI to copies of a work as a prerequisite for the enjoyment or the exercise of copyright.<sup>990</sup> Since formalities that relate to the protection of TPMs or RMI may

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directed at Contracting Parties than to provisions granting “intellectual property rights”. See also Ricketson & Ginsburg 2006, II, at 965 and Senftleben in Dreier & Hugenholtz 2006, at 111.

<sup>983</sup> In implementing these provisions, several contracting states have adopted the view that they create no exclusive ‘rights’. See e.g. sec. 375 of the Irish Copyright and Related Rights Act 2000 (on RMI), which is clearly drafted as a remedy for copyright infringement. Other contracting states, however, protect RMI and TPMs as exclusive rights. See e.g. arts 166 and 166a of the Slovenian Copyright and Related Rights Act 2004. See in more detail Guibault et al. 2007, at 79.

<sup>984</sup> See Reinbothe & Von Lewinski 2002, at 142 and 152-153 and Senftleben in Dreier & Hugenholtz 2006, at 111.

<sup>985</sup> See Burk & Cohen 2001, at 72-73 and Dusollier 2011 (forthcoming), with respect to the protection of TPMs, and Hugenholtz et al. 2006, at 179-180, Van Gompel 2007, at 682-683 and Van Eechoud et al. 2009, at 274-276, with respect to the protection of RMI. But see Denicola 2004, at 20, arguing that subjecting the protection of TPMs to formalities might well be prohibited under the WCT.

<sup>986</sup> See Burk & Cohen 2001, at 65-70 and Denicola 2004. Pursuant to art. 95d of the German Copyright and Neighbouring Rights Act 1965, works to which a TPM is applied must be clearly marked with an indication of the characteristics of the TPM and the name and address of the copyright owner, so as to ensure that beneficiaries of a copyright exception can demand the right owner to provide them with the means necessary to benefit from the exception. Failure of doing so is sanctioned by administrative fines (see art. 111a(1) under 3), but does not result in the loss of protection of the TPM.

<sup>987</sup> Dusollier 2011 (forthcoming), arguing that formalities can help preventing TPMs to lock up creative content, first, by enabling competitors to create interoperable products and, second, by enabling users to legally circumvent TPMs for the purpose of making use of a particular copyright exception.

<sup>988</sup> See e.g. Hugenholtz et al. 2006, at 179-180, Van Gompel 2007, at 682-683 and Van Eechoud et al. 2009, at 274-276.

<sup>989</sup> This is explicitly stated in the Agreed Statement concerning Article 12 of the WCT.

<sup>990</sup> See Ricketson & Ginsburg 2006, II, at 991 and Guibault 2010, at 57 (para. 12).

not affect copyright as such, the effects on enhancing the free flow of information and on creating legal certainty over copyright claims will be negligible.

#### 5.1.2.4 DURATION OF PROTECTION

Another element of copyright to which the prohibition on formalities extends is the duration of protection. Article 7 of the Berne Convention, which is incorporated by reference in the TRIPS Agreement and the WCT, lays down the minimum terms of protection of international copyright.<sup>991</sup> These terms are among ‘the rights specially granted by this Convention’ and thus cannot be subjected to formalities by countries adhering to the Berne Convention, the TRIPS Agreement or the WCT.

In general, if a contracting state grants terms of protection that exceed the Berne minimum terms,<sup>992</sup> it must also confer such terms on non-domestic works for which protection is sought under the Berne Convention, the TRIPS Agreement or the WCT. This follows from the rule of national treatment, which also applies in relation to the duration of copyright.<sup>993</sup> Since contracting states are prohibited from subjecting the rights that must be granted pursuant to the rule of national treatment to formalities, they cannot make these longer terms of protection conditional on formalities.

The Berne Convention contains one exception to the rule of national treatment. It permits contracting states to grant to non-domestic works a copyright term that does not exceed the term of protection granted by the country of origin.<sup>994</sup> This so-called ‘comparison of terms’ implies that, in relation to terms, material reciprocity applies. If a country is not obliged to grant national treatment, but nevertheless extends its national copyright terms to foreign works, the Berne Convention does not prohibit it from subjecting such voluntarily extended terms of protection to formalities.

#### 5.1.3 THE ADDRESSEES OF THE PROHIBITION ON FORMALITIES

The scope of application of the prohibition on formalities is also demarcated by the subjects to which it is addressed. If Articles 5(1) and 5(2) of the Berne Convention are read in conjunction, it follows that the prohibition on formalities applies only to rights that contracting states must grant to works of which they are not the country of origin. This implies that the prohibition on formalities is addressed to contracting parties (i.e., Berne Union states, WTO members or contracting parties to the WCT) and not, for example, to private individuals or corporate entities.<sup>995</sup>

<sup>991</sup> Art. 9 of the WCT orders contracting states not to apply art. 7(4) of the Berne Convention, stating a minimum term of protection of twenty-five years after creation, in respect of photographic works.

<sup>992</sup> Art. 7(6) of the Berne Convention.

<sup>993</sup> See Goldstein 2001, at 238-239 and Goldstein & Hugenholtz 2010, at 287.

<sup>994</sup> Art. 7(8) of the Berne Convention.

<sup>995</sup> See Gervais 2005, at 351 and Gervais 2006, at 34 and Gervais 2010b, at 26.

Because the prohibition on formalities has no horizontal application, it applies to state-imposed formalities only and does not govern the relationship between private legal subjects. Thus, it does not prohibit collective rights management organizations (CMOs) from requiring that copyright owners sign contracts for the acquisition and exploitation of their rights, provide information on their names, places of residence and the repertoire of works or perhaps deposit a copy of their works. These matters, which are contractually negotiated, may be necessary for a good administration and exploitation of rights. They might be governed by national contract and competition law,<sup>996</sup> but certainly not by the international prohibition on formalities.<sup>997</sup>

For the same reason, the Books Rights Registry, which is supposed to be created as part of the Google Books Search Settlement in the US,<sup>998</sup> cannot be regarded as a prohibited formality. This Registry is effectively a new CMO for the administration of the rights of authors whose works are covered by the settlement.<sup>999</sup> It collects the royalties, which Google under the proposed settlement must pay for the digitization and making available to the public of books, and distributes them among relevant copyright owners. The Registry is compatible with the prohibition on formalities for the sole reason that it results from a settlement between private parties.

However, things may become somewhat different if a government grants to these private arrangements a legislative stamp of approval that has the effect of extending their application to parties that were not actually involved in their conclusion. This is the case, for instance, in an extended collective licensing system.<sup>1000</sup> Likewise, the Google Books Search Settlement, which is a class action settlement, may also get an extended effect. Upon judicial approval, it will be binding for all copyright owners in the relevant class.<sup>1001</sup> Moreover, a government can create a system of mandatory collective licensing. In these cases, it can no longer be maintained that it concerns a relationship between private legal entities pure and simple.<sup>1002</sup> Therefore, a conflict with the prohibition on formalities can arise if such non-voluntary licensing systems qualify as Berne prohibited formalities that affect the enjoyment or the exercise of copyright. As we shall see in para. 5.3.2.3 below, this is not the case.

<sup>996</sup> See e.g. Guibault & Van Gompel 2006, at 125 et seq. on the regulation of CMOs in Europe.

<sup>997</sup> See Gervais 2005, at 351: 'One cannot simply assume that the prohibition on legislatively-imposed formalities such as registration or deposit extends to dealings with private entities, which most CMOs are.' See also Gervais 2006, at 34.

<sup>998</sup> See the Proposed Settlement in the case of *The Authors Guild, Inc., et al. v. Google Inc.*, Case No. 05 CV 8136 (S.D.N.Y.), filed on 28 October 2008, <<http://www.googlebooksettlement.com/>>.

<sup>999</sup> Grimmelmann 2009, at 13.

<sup>1000</sup> On the extended collective licensing system, see para. 5.3.2.3 below.

<sup>1001</sup> See Grimmelmann 2009, at 13.

<sup>1002</sup> See Kretschmer 2002, at 126-136, arguing that instead of instruments of private property law, CMOs have increasingly become regulatory instruments that are part of a broader public law policy.

## 5.2 The Formalities to Which the Prohibition Applies

Another element of Article 5(2) of the Berne Convention defining the application of the prohibition on formalities is the word ‘formalities’. Although, at first sight, this term seems to be fairly straightforward, its interpretation has created problems from the start.<sup>1003</sup> This is mainly caused by the confusion arising from the report drawn up for the 1908 Berlin conference by Mr Renault. This report attempts to shed light on how the term ‘formalities’ must be interpreted following the change of terminology in 1908. Although the 1908 and current texts of the Berne Convention merely refer to the term ‘formalities’, Mr Renault’s report contains a short statement in brackets declaring that: ‘(the Article in the draft only refers to *formalities*, but this is meant to cover the *conditions and formalities* to which the 1886 Convention refers)’.<sup>1004</sup>

Most legal commentators conclude from this statement that the term ‘formalities’ in Article 5(2) of the Berne Convention must be interpreted in the broader meaning of ‘conditions and formalities’ under the 1886 Berne Convention.<sup>1005</sup> This raises the questions of what these ‘conditions and formalities’ in the 1886 Convention exactly encompassed and whether it is correct to assume that the term ‘formalities’ in the 1908 and current text of the Berne Convention bears the same meaning as the words ‘conditions and formalities’ in Article 2(2) of the Berne Convention (1886). These questions are examined in the next sections. The object is to discover which types of conditions and formalities are covered by the prohibition on formalities.

To answer these questions, we must again revisit the drafting history of the Berne Convention. In addition, we shall examine legal commentaries of the late nineteenth and early twentieth century to establish how in those days the terms ‘conditions and formalities’ (1886) and ‘formalities’ (1908) were interpreted by legal scholars.

This section first analyzes the meaning of the words ‘conditions and formalities’ in the 1886 Berne Convention (para. 5.2.1). It reveals that the word ‘formalities’ is straightforward, but that the scope of the word ‘conditions’ varied according to the viewpoint taken. In general, it could be broadly interpreted (to exclude protection to foreign works that are not protected in the country of origin) or narrowly interpreted (to subject the protection of foreign works to certain domestic conditions). Next, the section explores the meaning of the word ‘formalities’ in the 1908 and current texts of the Berne Convention (para. 5.2.2). It will be seen that this word includes more than the word ‘formalities’ in Article 2(2) of the Berne Convention (1886), but not all ‘conditions and formalities’ under the broad interpretation of this provision. The section concludes with a short observation on how the word ‘formalities’ in Article 5(2) of the Berne Convention must be interpreted legally (para. 5.2.3).

<sup>1003</sup> See Potu 1914, at 54, referring to a letter of 7 December 1909, which the *Syndicat pour la protection de la propriété intellectuelle* in Paris addressed to the *Commission de l’enseignement et des beaux-arts* to petition for an official and authentic explanation of the word ‘formalities’.

<sup>1004</sup> *Actes 1908*, at 237; Berne Centenary 1986, at 148.

<sup>1005</sup> See, inter alia, Hilty 1986, at 212, Ricketson 1987, at 222, Peukert 2005, at 62, Gervais 2005, at 350, Gervais 2006, at 33, Ricketson & Ginsburg 2006, I, at 325 and Gervais 2010b, at 25.

## 5.2.1 THE ‘CONDITIONS AND FORMALITIES’ IN THE 1886 TEXT

Article 2(2) of the Berne Convention (1886) reads: ‘The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work.’ During the drafting procedure, different wordings were proposed as regards the ‘conditions and formalities’ to be fulfilled in the home country. The 1883 draft convention of the ALAI referred to ‘formalities’, but the German delegation proposed the words ‘*conditions formelles et matérielles*’ and the Swiss Federal Council the phrase ‘formalities and conditions’.<sup>1006</sup>

The assembly ultimately adopted the words ‘conditions and formalities’, because they seemed to include ‘all the conditions and procedures specified in the country of origin for authors’ rights to be secured’.<sup>1007</sup> However the German delegation was not entirely satisfied with this explanation and asked for a clarification. Dr Meyer, the superior counsellor at the German Department of Justice, stated the following:

‘It is merely a question of noting that the wording proposed by the German Delegation, “*conditions formelles et matérielles*”, has been replaced by the words “formalities and conditions”, and that the word “formalities”, being taken as a synonym of the term “*conditions formelles*”, included, for instance, registration, deposit, etc.; whereas the expression “conditions”, being in our view synonymous with “*conditions matérielles*”, includes, for instance, the completion of a translation within the prescribed period. Thus the words “formalities and conditions” cover all that has to be observed for the author’s rights in relation to his work to come into being (“*Voraussetzungen*” in German), whereas the effects and consequences of protection (“*Wirkungen*” in German), notably with respect to the extent of protection, have to remain subject to the principle of treatment on the same footing as nationals.’<sup>1008</sup>

Mr Droz, the president of the 1884 conference, confirmed this explanation by noting that the assembly agreed with Dr Meyer on the scope of the words ‘formalities and conditions’.<sup>1009</sup> Because none of the delegations opposed this reading, at that time, there seemed to be broad consensus that the ‘conditions and formalities’ in Article 2(2) of the Berne Convention covered ‘all that has to be observed for the author’s rights in relation to his work to come into being’ as defined by Dr Meyer.

Apart from the Meyer’s definition, however, the minutes of the 1884-1886 Berne conferences do not further explicate what the ‘conditions and formalities’ under the 1886 Convention exactly encompassed. To identify the prerequisites of protection that had to be fulfilled in the country of origin to be able to claim protection in other contracting states (i.e. the ‘*Voraussetzungen*’ in the Meyer’s definition), this section

<sup>1006</sup> See *Actes 1884*, at 7-8, 11 and 41; Berne Centenary 1986, at 83-84, 85 and 94.

<sup>1007</sup> See *Actes 1884*, at 42; Berne Centenary 1986, at 94.

<sup>1008</sup> *Actes 1884*, at 43; Berne Centenary 1986, at 95.

<sup>1009</sup> See *Actes 1884*, at 43; Berne Centenary 1986, at 95.

looks at how the words ‘formalities’ (para. 5.2.1.1) and ‘conditions’ (para. 5.2.1.2) are defined by some of the leading commentaries on the Berne Convention between 1886 and 1908. In addition, it examines which requirements are explicitly exempted from the ‘conditions and formalities’ in the 1886 Berne Convention. The minutes of the 1884-1886 Berne conferences clearly points this out (para. 5.2.1.3).

#### 5.2.1.1 FORMALITIES (‘CONDITIONS FORMELLES’)

Under the 1886 Berne Convention, the term ‘formalities’ (or ‘*conditions formelles*’) was interpreted fairly straightforwardly as being requirements that authors or their successors in title must fulfil with a state authority to obtain copyright protection or to be able to prove the existence of their rights, e.g., in legal proceedings.<sup>1010</sup> Hence, formalities were said to be requirements that were externally imposed on copyright owners,<sup>1011</sup> thus excluding all intrinsic conditions of copyright protection. Because the completion of formalities required the intervention by and assistance of a state authority, they had the character of public law instruments. Examples of formalities are the deposit of copies of works and the registration or declaration of works before state officials.<sup>1012</sup> This corresponds with the definition given by Dr Meyer.

#### 5.2.1.2 CONDITIONS (‘CONDITIONS MATÉRIELLES’)

The term ‘conditions’ (‘*conditions matérielles*’) were defined in legal commentaries as characteristics with which authors must equip their works in order to make them eligible for copyright protection.<sup>1013</sup> No state authority was involved in the process of completing the statutory conditions of protection.<sup>1014</sup> Thus, depending on whether they wished to invoke or revoke protection, authors could on their own discretion decide whether or not to fulfil them.<sup>1015</sup> Examples of conditions are the requirements to mark copies of a work with a notice of reservation to retain a certain right (e.g., a

<sup>1010</sup> See Allfeld 1902, at 309, Röhliberger 1904, introduction, at III-IV, Röhliberger 1906, at 107 and Allfeld 1908, at 245.

<sup>1011</sup> See e.g. Röhliberger 1906, at 107: ‘*die Förmlichkeiten [sind] äusserliche, dem Autor oder seinen Rechtsnachfolgern auferlegte Mittel zu Erlangung des Schutzes*’.

<sup>1012</sup> See Allfeld 1902, at 309, Röhliberger 1904, introduction, at III-IV, Röhliberger 1906, at 107 and Allfeld 1908, at 245.

<sup>1013</sup> See Röhliberger 1906, at 107: ‘*Die Bedingungen stellen also die Eigenschaften dar, mit welchen ein Werk vom Autor auszurüsten ist, um schutzfähig zu werden*’.

<sup>1014</sup> Accordingly, because no state authority was involved, in international disputes, it was impossible for national courts to require the production of certificates to the effect that the conditions in the country of origin had been fulfilled. Art. 11(3) of the Berne Convention (1886) acknowledged this, as can be concluded from the fact that it allowed courts to require the production of certificates with respect to ‘formalities’ but not with respect to ‘conditions’ that were completed in the country of origin.

<sup>1015</sup> See Allfeld 1902, at 309, Röhliberger 1904, introduction, at III-IV, Röhliberger 1906, at 107 and Allfeld 1908, at 245.

reproduction right in newspaper articles or a translation right in literary works);<sup>1016</sup> to publish or to not publish a work to enjoy a particular right (e.g., a right of public recitation in unpublished works);<sup>1017</sup> to complete a translation within a given period to enjoy an exclusive right of translation;<sup>1018</sup> to mark the copies of a work with the author's name to benefit from a longer term of protection; and so forth.<sup>1019</sup>

As a result, the term 'conditions' in Article 2(2) of the Berne Convention (1886) was interpreted fairly broadly. Even so, it is doubtful whether it covered 'all that has to be observed for the author's rights in relation to his work to come into being', as in the definition of Dr Meyer. At least it seems to exclude the substantive conditions that are inherent in the work and that equally determine the coming into existence of copyright, such as the requirement of originality and the idea/expression dichotomy. For one thing, Berne Union states were obliged to grant national treatment to works of authors of other contracting states.<sup>1020</sup> Therefore, it seems that the conditions that establish the intrinsic protectability of works were also subject to national treatment and not to the country of origin rule of Article 2(2) of the Berne Convention, which, as observed, is an exception to the rule of national treatment (see para. 4.3.1).

Hence, the 'conditions' in Article 2(2) of the Berne Convention (1886) appear to have signified only the characteristics with which a work must be equipped after its actual creation. This suggests that the substantive conditions that are inherent to the creation of works would not be covered by this provision. One indication in support of this reading can be found in the fact that foreign works, for which protection was sought under the Berne Convention, were sometimes denied copyright protection in Berne Union states because they did not satisfy the standard of originality in those countries.<sup>1021</sup> If the originality requirement was a 'condition' in the sense of Article 2(2) of the Berne Convention (1886), then declining copyright to foreign works that

<sup>1016</sup> See e.g. the British case *Sarpy v. Holland and Savage*, [1908] 2 Ch. 198 (Court of Appeal, 5-7 May 1908), in which the court acknowledged that the notice of reservation to retain a public performance right in musical works was a 'condition' in the meaning of art. 2(2) of the Berne Convention (1886).

<sup>1017</sup> See Allfeld 1902, at 309. But see Röhliberger 1906, at 108-110, arguing that the fact that the right of public recitation applied only to unpublished works did not make 'non-publication' a condition for protection. Allfeld, however, opposed this and asserted that it was a condition for enjoying the right. See Allfeld 1908, at 245: '*Es handelt sich hierbei nicht nur um Bedingungen der Entstehung des Schutzes überhaupt, sondern auch um solche des Schutzes in einer gewissen Richtung*'.

<sup>1018</sup> See e.g. the Belgian decision of the *Tribunal correctionnel de Bruxelles* of 3 February 1896, *Maes v. Ramakers, Le Droit d'Auteur* 1896, at 30, in which a Belgian translation of a German work was held to be no infringement, since the formalities required by German law for acquiring the translation right not been completed. But see Kohler 1907, at 404, arguing that the specific requirements with respect to the right of translation were not covered by art. 2(2) of the Berne Convention (1886).

<sup>1019</sup> See Allfeld 1902, at 309, Röhliberger 1904, introduction, at III-IV, Röhliberger 1906, at 107 and Allfeld 1908, at 245.

<sup>1020</sup> See art. 2(1) of the Berne Convention (1886).

<sup>1021</sup> See e.g. the rulings of the French Court of Cassation of 15 June 1899, *May v. Landsberg, Le Droit d'Auteur* 1899, at 134 et seq. and the Berlin *Tribunal supérieur I* (Germany) of 5 June 1905, *Magnien v. Lachmann, Le Droit d'Auteur* 1905, at 157-159, in which the courts tested foreign works against the domestic standard of originality. See also Röhliberger 1906, at 147.

were deemed sufficiently original and thus qualified for protection in their country of origin would not have been permitted under the Berne Convention.

Another difficulty that existed with interpreting the word ‘conditions’ in Article 2(2) of the Berne Convention (1886) was that its scope completely depended on the viewpoint taken. Berne Union states could look in two directions when interpreting Article 2(2). On the one hand, when taking an inward-looking perspective, Article 2(2) seemed to leave Berne Union states room for imposing certain ‘conditions’ on foreign works as long as these conditions did not affect the coming into existence of copyright. It seems likely that, from such inward-looking perspective, Berne Union states may well have interpreted the term ‘conditions’ in Article 2(2) of the Berne Convention narrowly, so as to retain more scope for imposing domestic ‘conditions’ as to the extent of protection (i.e. the ‘*Wirkungen*’ in the Meyer’s definition).<sup>1022</sup>

On the other hand, when taking an outward-looking perspective, it seems rational that Berne Union states interpreted the term ‘conditions’ in Article 2(2) of the Berne Convention (1886) more broadly. Article 2(2) intended to provide that Berne Union states were not obliged to protect foreign works if they were not protected in their home country, i.e., if the domestic ‘conditions and formalities’ were not fulfilled.<sup>1023</sup> No protection in the country of origin meant no protection in other Union states.<sup>1024</sup> If the term ‘conditions’ would be interpreted narrowly, then Union states could still be forced to protect foreign works that received no copyright in their home country, e.g., if this country applied stricter ‘conditions’ than the protecting state.<sup>1025</sup>

Thus, the scope of the word ‘conditions’ in Article 2(2) of the Berne Convention (1886) was not entirely clear.<sup>1026</sup> As we shall see later, this was an important reason for deleting this word when the prohibition on formalities was introduced.

### 5.2.1.3 SOME EXPLICIT EXCEPTIONS

Although Article 2(2) of the Berne Convention (1886) could be interpreted broadly, it did not cover all conditions and formalities. National procedural requirements, for example, were explicitly excluded from its scope. This was emphasized at the 1884 Berne conference, where it was proposed to state in Point 1 of the Final Protocol:

‘It is understood that the final provision of Article 2 of the Convention is without any prejudice to the legislation of each of the Contracting States

<sup>1022</sup> See e.g. Kohler 1907, at 404, arguing that art. 2(2) of the Berne Convention (1886) merely covered those conditions ‘*welche Voraussetzungen des Rechts oder der Klagbarkeit überhaupt sind*’ but not conditions ‘*die nötig sind, um diesem Rechte im Ursprungslande den vollen Umfang zu geben*’.

<sup>1023</sup> See Kohler 1896, at 350, Röhrlisberger 1906, at 153-154 and De Beaufort 1909, at 350.

<sup>1024</sup> See Kohler 1896, at 340 and De Beaufort 1909, at 351.

<sup>1025</sup> Given that art. 2(2) of the Berne Convention (1886) already raised controversy in the years between the adoption of the Berne Convention in 1886 and the introduction of the prohibition on formalities in 1908 (see paras 4.3.2 and 4.3.3.1), this seemed to have been unacceptable for many countries.

<sup>1026</sup> See e.g. the discussions as to the scope of ‘conditions’ in notes 1017 and 1018 above.

concerning the procedure to be followed before the courts and the competence of those courts'.<sup>1027</sup>

Because the Drafting Committee found this rule unnecessary and superfluous,<sup>1028</sup> it was not adopted. Even so, it was made perfectly clear that Article 2(2) of the Berne Convention (1886) did not encompass national procedural requirements.

Other 'conditions' explicitly excluded from Article 2(2) of the Berne Convention were the presumptions of authorship in Article 11 of the Berne Convention (1886). At the 1885 conference, the Italian delegation questioned how these presumptions relate to the 'conditions' referred to in Article 2(2) of the Berne Convention.<sup>1029</sup> The German delegation asserted that there was no relationship between the two. It stated that the 'conditions' in Article 2(2) signified conditions to be observed for copyright to come into being, while presumptions of authorship had procedural significance only. They indicated that, until proven otherwise, the person whose name appeared on the work was regarded as the author of the work.<sup>1030</sup> Consequently, they were no 'conditions' in the meaning of Article 2(2) of the Berne Convention.<sup>1031</sup>

### 5.2.2 THE 'FORMALITIES' IN THE 1908 AND CURRENT TEXTS

In 1908, the country of origin rule with respect to formalities was transformed into a prohibition on formalities. On this occurrence, the 1886 terminology of 'conditions and formalities' was changed to 'formalities'. This section explains the need for this change of terminology (para. 5.2.2.1) and how this was translated into the German proposition on the eve of the Berlin revision conference (para. 5.2.2.2). We shall see that the language was changed to prevent the prohibition of formalities from having an overly broad effect. The prohibition on formalities was considered to extend only to external conditions ('formalities and *conditions extrinseques*') and not to internal conditions of protection ('*conditions internes*'). As is demonstrated next, this is also how the word 'formalities' was interpreted in practice by legal scholars and national legislators in the years following the 1908 revision of the Berne Convention (para. 5.2.2.3). Lastly, this section examines which internal conditions of protection can be considered to be excluded from the prohibition on formalities (para. 5.2.2.4).

<sup>1027</sup> *Actes 1884*, at 13; Berne Centenary 1986, at 86.

<sup>1028</sup> *Actes 1884*, at 62-63; Berne Centenary 1986, at 103.

<sup>1029</sup> See the Italian delegate Mr Rosmini in *Actes 1885*, at 34; Berne Centenary 1986, at 116.

<sup>1030</sup> See the German delegate Mr Reichardt in *Actes 1885*, at 34-35; Berne Centenary 1986, at 116.

<sup>1031</sup> See *Actes 1885*, at 50; Berne Centenary 1986, at 122. See also the decision of the Court of Cassation of Turin of 25 August 1897, *May frères v. Istituto Italiana d'Arti grafiche*, *Le Droit d'Auteur* 1899, at 20-21 and the decision of the Court of Cassation of Milan of 23 November 1899, *Albrecht et Meister v. Gualassini*, etc., *Le Droit d'Auteur* 1900, at 121-123. See also '*Des moyens de prouver l'existence du droit d'auteur d'après la Convention de Berne*', in *Le Droit d'Auteur* 1899, at 50-52.

## 5.2.2.1 THE NEED FOR ADJUSTMENT OF TERMINOLOGY

The new regime that the 1908 Berlin revision conference established with respect to formalities brought no significant material changes for authors.<sup>1032</sup> In 1886, they had already been liberated from complying with the ‘conditions and formalities’ in other Berne Union states. This was no different under the prohibition on formalities. The only difference was that, to be able to claim protection under the Berne Convention, authors no longer had to prove that they had duly complied with the conditions and formalities in their home country, as under the 1886 country of origin rule.

For Berne Union states, on the other hand, the new regime brought an important change. Because of the introduction of the rule of independence of protection, they were no longer permitted to deny protection to foreign works on the ground that the author had failed to complete the domestic conditions and formalities. Following the 1908 Berlin revision they were only prohibited from imposing formalities on non-domestic works that were eligible for protection under the Berne Convention. Thus, instead of pursuing an inward and outward-looking perspective with respect to the question of ‘conditions and formalities’, Berne Union states could now only take an inward-looking perspective. The only relevant question was: Which formalities and conditions were they prohibited from imposing on non-domestic works?

As observed, under the 1886 Berne Convention this question arguably gave rise to a narrower interpretation of the word ‘conditions’ than under the outward-looking perspective (see para. 5.2.1.2). From an inward-looking perspective, the distinction made by Dr Meyer between conditions and formalities relating to the coming into being of copyright (*‘Voraussetzungen’*), which Berne Union states could not impose on foreign works, and conditions and formalities relating to the extent of protection (*‘Wirkungen’*), which they could impose on foreign works, was mostly relevant.

Although it has not been documented in the proceedings of the Berlin conference why the word ‘conditions’ was deleted, the adjustment has seemingly been inspired by the expanded international obligations resulting from the introduction of the rule of independence of protection. Because, under this rule, the extent of protection is governed exclusively by the law of the country where protection is claimed,<sup>1033</sup> this country should retain discretion to regulate the extent of protection and subject it to ‘conditions’, if necessary. An overly broad interpretation of the word ‘conditions’ should therefore be avoided.<sup>1034</sup> As the language ‘conditions and formalities’ in the 1886 text was sometimes interpreted broadly, so as to give effect to the rule that no protection in the home country implied no protection in the Berne Union (i.e., the

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<sup>1032</sup> See De Beaufort 1909, at 353.

<sup>1033</sup> See art. 4(2) of the Berne Convention (1908), currently, art. 5(2) of the Berne Convention (1971).

<sup>1034</sup> See e.g. Dungs 1910, at 34: *‘Was die Förmlichkeiten anlangt, so sprach die frühere Fassung von Bedingungen und Förmlichkeiten ...; jetzt ist der Bedingungen nicht mehr Erwähnung getan. Dies ist geschehen, um einer zu weiten Auslegung der Vorschrift vorzubeugen’*.

outward-looking perspective), it was presumably thought that the word ‘conditions’ could better be deleted.<sup>1035</sup> This should avoid problems of interpretation.

Accordingly, to the extent that Mr Renault alludes to the narrow interpretation of the word ‘conditions’ in the 1886 text, his assertion that the ‘the Article in the draft only refers to *formalities*, but this is meant to cover the *conditions and formalities* to which the 1886 Convention refers’ can be endorsed. However, to read his statement as including ‘conditions’ in the broad interpretation following the outward-looking perspective would be incorrect.<sup>1036</sup> Still, this does not explain what the term ‘formalities’ in the 1908 Convention covers exactly. This is examined in the next sections.

#### 5.2.2.2 THE GERMAN PROPOSITION

The German authorities that were responsible for drafting the preparatory text for the 1908 Berlin conference sensed the need for a change of language. To articulate that not all ‘conditions’ should be subject to the proposed prohibition on formalities, they suggested distinguishing between ‘formalities and *conditions extrinsèques*’ and ‘*conditions internes*’. They argued that the prohibition on formalities should apply to ‘formalities and *conditions extrinsèques*’ to the full extent, but that Berne Union states should be able to subject non-domestic works that were eligible for protection under the Berne Convention to ‘*conditions internes*’ without restraint.<sup>1037</sup>

At the Berlin conference, the German proposal received quite some opposition. The Italian delegation, in particular, raised the objection that the term ‘*extrinsèque*’ was too unclear and could lead to serious misinterpretation.<sup>1038</sup> It argued that if this term was meant to signify that the prohibition also applied to ‘conditions of a formal nature’ or ‘conditions of form’, it would be redundant because the term ‘formalities’ obviously included such conditions.<sup>1039</sup> However, it proved difficult to find language that better fitted the prohibition. Several delegations proposed alternative wordings, varying from ‘formalities and *conditions extrinsèques*’ (the German proposition) to the simple ‘*conditions de forme*’ (Monaco), the existing ‘formalities and conditions’ (France) and the finally adopted and straightforward term ‘formalities’ (Italy).<sup>1040</sup>

<sup>1035</sup> See De Beaufort 1909, at 352. See also the message of the Swiss Federal Council of 8 October 1909, in: *Le Droit d’Auteur* 1910, 2-7, at 5: ‘*Nous constatons avec satisfaction que le terme peu clair de “conditions” a été supprimé, de sorte qu’il n’est plus question que de formalités*’.

<sup>1036</sup> See *Le Droit d’Auteur* 1910, 2-7, at 5, suggesting that Mr Renault meant to say that ‘formalities’ also include ‘conditions of a formal nature’ or ‘conditions of form’. The latter is a much narrower reading of the word ‘conditions’ in the 1886 Convention than was given to it in legal commentaries. Perhaps this explains why in the proceedings Mr Renault’s statement was put between brackets.

<sup>1037</sup> Propositions of the German authorities, in: *Actes 1908*, 35-52, at 39.

<sup>1038</sup> See Potu 1914, at 53 and the references therein.

<sup>1039</sup> See *Le Droit d’Auteur* 1910, 2-7, at 5.

<sup>1040</sup> *Actes 1908*, at 283-284.

Apart from terminological objections, however, the German proposition was not criticized on substance. Consequently, there appeared to be consensus that the term ‘formalities’ also covered the ‘*conditions extrinsèques*’ as referred to in the German proposition.<sup>1041</sup> On the other hand, the ‘*conditions internes*’ seemed to be excluded from the scope of the prohibition on formalities.<sup>1042</sup> For this reason, the distinction initially made in the German proposition should be more carefully examined.

#### *Formalities and ‘Conditions Extrinsèques’*

The German authorities clarified that by ‘formalities’ they understood a deposit of copies, an inscription in a register and the conveyance of a formal declaration to the authorities. This is in harmony with the 1886 definition of ‘formalities’. In addition, they explained that ‘*conditions extrinsèques*’ signify external conditions that authors had to comply with to secure protection for their works. This includes acts such as the making of an express reservation of rights, the indication of the author’s name and the affixation of any other mark or sign on the copies of a work.<sup>1043</sup> They argued that, similar to the 1886 Berne Convention, Union authors should be liberated from these formalities and ‘external conditions’ under the revised Convention.<sup>1044</sup>

#### *‘Conditions Internes’*

On the other hand, the German authorities defined ‘*conditions internes*’ as intrinsic conditions that establish the modalities of copyright and that are an essential part of it.<sup>1045</sup> These conditions first of all include ‘the constitutive elements for a work to be protected’.<sup>1046</sup> Examples are the requirement of originality and the idea/expression dichotomy. As observed, these conditions seem to have already been excluded from the ‘conditions and formalities’ in the 1886 text. Other ‘*conditions internes*’ affect the inner characteristics and perimeters of copyright without impinging on copyright protection as such. This is the case, for instance, when conditions must be fulfilled to invoke a specific right or to avoid a possible limitation of copyright. Accordingly, these ‘*conditions internes*’ merely involve the extent or quality of protection. Given

<sup>1041</sup> See De Beaufort 1909, at 352-353: ‘*Over de zaak zelve is men het blijkbaar steeds – en ook op de Conferentie van Berlijn – eens geweest; de moeilijkheid lag slechts in het vinden van de juiste uitdrukking. Nu de Conventie alleen spreekt van “formaliteiten” zijn daaronder zonder twijfel ook de “uiterlijke voorwaarden”, welke de Deutsche Regeering bedoelde, begrepen.*’

<sup>1042</sup> See *Le Droit d’Auteur* 1910, 2-7, at 5-6.

<sup>1043</sup> Propositions of the German authorities, in: *Actes 1908*, 35-52, at 39.

<sup>1044</sup> *Ibid.*, at 39. See also *Le Droit d’Auteur* 1910, 2-7, at 6.

<sup>1045</sup> Propositions of the German authorities, in: *Actes 1908*, 35-52, at 39.

<sup>1046</sup> See Osterrieth in: *Actes 1908*, at 169: ‘*les conditions intrinsèques de la protection, c’est-à-dire les éléments constitutifs de l’œuvre à protéger.*’

that, under the rule of independence of protection, the extent of protection was to be governed exclusively by the law of the country where protection is claimed, it was alleged that Berne Union states were at liberty to impose ‘*conditions internes*’. Only this could ensure that their laws would become applicable in full scale.<sup>1047</sup>

### 5.2.2.3 THE INTERPRETATION OF THE WORD ‘FORMALITIES’ IN PRACTICE

Although, since 1908, the Berne Convention only refers to ‘formalities’, in practice, this term was often interpreted in the broader meaning of ‘formalities and *conditions extrinsèques*’ as defined in the German proposition. Most legal commentators of the period following the 1908 revision of the Berne Convention appear to have accepted the distinction that the German authorities proposed between prohibited ‘formalities and *conditions extrinsèques*’ and permitted ‘*conditions internes*’.<sup>1048</sup>

A number of national legislators followed the same distinction for determining to which conditions they could subject the protection of non-domestic works under the revised Berne Convention. In the report addressed by the German government to the *Reichstag* for the ratification of the revised Berne Convention of 1908, for example, it was asserted that the Berne prohibition merely included formalities and conditions of an external nature (‘*nur Bedingungen äusserer Natur*’), thus excluding conditions that affect the effects or consequences of protection in substance (‘*Bedingungen ... welche die Wirkung des Urheberschutzes sachlich beeinflussen*’).<sup>1049</sup>

Finally, in response to calls for an official and authentic explanation of the word ‘formalities’ in Article 4(2) of the Berne Convention (1908), the Berne International Bureau made an effort to define the word ‘formalities’ in an article published in *Le Droit d’Auteur*, the official journal of the Berne Union, in 1910.<sup>1050</sup> Even though the terms ‘*conditions extrinsèques*’ and ‘*conditions internes*’ do not appear prominently in it, this article used the exact same distinction as in the German proposal to define which conditions were prohibited and which were allowed under the revised Berne Convention. The Berne International Bureau confirmed that contracting states were permitted to impose ‘*conditions intrinsèques*’ on non-domestic works.<sup>1051</sup>

<sup>1047</sup> See *Le Droit d’Auteur* 1910, 2-7, at 6.

<sup>1048</sup> See De Beaufort 1909, at 352-353, Dungs 1910, at 34-35, Wauwermans 1910, at 71-72, Potu 1914, at 53-58, Baum 1932, at 927 et seq., Hoffmann 1933, at 374-375, Hoffmann 1935, at 92 and Ladas 1938, I, at 273-274. But see Allfeld 1928, at 418, criticizing the distinction because of the weakness of its distinguishing features. Allfeld maintained that it was difficult to determine whether a condition constituted the right or merely concerned the effects and consequences of protection (*Wirkungen*).

<sup>1049</sup> *Denkschrift zur revidierten Berner Konvention vom 2. April 1909*, in: *Drucksachen des Reichstags 1907/09*, no. 1324, at 30, as reported in: Potu 1914, at 54.

<sup>1050</sup> See *Le Droit d’Auteur* 1910, at 2-7.

<sup>1051</sup> *Ibid.*, at 6. See also Wauwermans 1910, at 72.

## 5.2.2.4 EXAMPLES OF 'CONDITIONS' EXCLUDED FROM THE PROHIBITION

The preceding sections have demonstrated that the Berne prohibition on formalities does not relate to all conditions of protection. Only external conditions of protection ('*äußere Voraussetzungen des Schutzes*') are covered by it.<sup>1052</sup> According to Kohler, such conditions impinge on copyright or its enforcement in all respects.<sup>1053</sup> Internal conditions of protection, i.e., those relating to the substantive contents of copyright protection,<sup>1054</sup> are not covered by the prohibition on formalities. Such conditions are necessary to give full effect to copyright in Berne Union states where protection is sought.<sup>1055</sup> Because, in practice, it might be difficult to distinguish between external and internal conditions,<sup>1056</sup> this section gives examples of '*conditions internes*' that, according to legal literature, are excluded from the prohibition on formalities.

One example of a '*condition interne*' is mandatory publication, non-publication or separate publication. Some countries grant particular rights only to published or unpublished works. In Germany for example the right of public recitation of literary works under the 1901 Copyright Act was recognized only in respect of unpublished works.<sup>1057</sup> This is not a Berne prohibited formality.<sup>1058</sup> Likewise, it is not prohibited to subject the protection of posthumous works to the requirement that these works must be published separately from works previously published. Presently, such rule is still included in French copyright law.<sup>1059</sup> Finally, the *droit de divulgation* (i.e. the author's moral right to decide whether or not to make his work publicly available) is undeniably restricted to unpublished works. Although non-publication is a condition for enjoying this right, it is not a Berne prohibited formality. This condition merely establishes the inner characteristics and perimeters of the *droit de divulgation*.

Another '*condition interne*' that is excluded from the scope of the prohibition on formalities is the condition that works are to be fixed in material form to be eligible for copyright protection.<sup>1060</sup> This condition basically governs the extent of copyright protection in substance. Moreover, since 1967 the Berne Convention openly permits contracting states to make fixation a general condition for protection.<sup>1061</sup>

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<sup>1052</sup> Dungs 1910, at 35.

<sup>1053</sup> See Kohler 1907, at 404, speaking of conditions and formalities '*welche Voraussetzungen des Rechts oder der Klagbarkeit überhaupt sind*'.

<sup>1054</sup> See Dungs 1910, at 35, referring to 'internal conditions' as '*Vorschriften ... bei ihnen ... es sich um den sachlichen Inhalt des Urheberrechtes [handelt]*'.

<sup>1055</sup> See Kohler 1907, at 404.

<sup>1056</sup> See Allfeld 1928, at 418.

<sup>1057</sup> Art. 11(3) of the German Copyright Act of 19 June 1901, *RGBl.* 1901, 227.

<sup>1058</sup> See *Le Droit d'Auteur* 1910, 2-7, at 6.

<sup>1059</sup> Art. L 123-4(4) French Intellectual Property Code.

<sup>1060</sup> At present, a fixation requirement is imposed by law in a number of countries. See e.g. sec. 3(2) UK Copyright, Designs and Patents Act 1988 and 17 USC § 102(a).

<sup>1061</sup> See art. 2(2) of the Berne Convention (1967), currently art. 2(2) of the Berne Convention (1971). For this reason, Ricketson 1987, at 224 and Ricketson & Ginsburg 2006, I, at 327, argue that the fixation

Another example of a '*condition interne*' is the public disclosure of the names of authors of anonymous/pseudonymous works as a condition for receiving the longer term of protection granted to works of known authorship. Most countries require the names to be disclosed by a simple public announcement,<sup>1062</sup> but in some countries it is required to record the authors' names in a public register to be able to claim the longer copyright term. This is the case, for example, in modern German copyright law.<sup>1063</sup> It is commonly understood that these requirements are not Berne prohibited formalities,<sup>1064</sup> but only constitute basic elements for the calculation of the copyright term: it is impossible to calculate the copyright term *post mortem auctoris* without knowing who the unknown author is. Thus, these conditions are necessary to give to copyright law full effect. They ensure that authors receive ample protection.<sup>1065</sup>

A fourth example of '*conditions internes*' is situation specific formalities that are linked to copyright exceptions or limitations. An example is the reservation requirement to retain a reproduction right in newspapers articles.<sup>1066</sup> While notices of reservation of this kind outwardly appear to be '*conditions extrinsèques*' as defined in the German proposal,<sup>1067</sup> at the 1908 Berlin conference, it was unambiguously stated:

'Under Article 9, paragraph 2, of the draft, the copyright in newspaper articles is occasionally subject to a prohibition to reproduce which the author has to give. This is not a *formality* within the meaning of Article 4 and the accomplishment of the *condition* is necessary to guarantee the right.'<sup>1068</sup>

This quotation illustrates that the notice of reservation to retain a reproduction right in newspapers articles is not a Berne prohibited formality, but a permitted condition, presumably a '*condition interne*' in the meaning of the German proposal. Scholars have indeed qualified this notice of reservation as a '*condition interne*', maintaining that it is 'a basic element of protection' that authors must fulfil to prevent the reproduction right in newspapers articles from being limited by application of the law.<sup>1069</sup>

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requirement is not a Berne prohibited formality. They assert that this is due to the application of the general principle '*lex specialis legi generali derogat*' (the specific law overrides the general law).

<sup>1062</sup> See e.g. in contemporary copyright law, arts 37 and 38(3) Dutch Copyright Act, art. L 123-3(3) French Intellectual Property Code and sec. 12(4) UK Copyright, Designs and Patents Act 1988.

<sup>1063</sup> Art. 66(2) German Copyright and Neighbouring Rights Act 1965. A similar registration requirement is imposed in the US (17 USC § 302(c) (1976)) and Japan (art. 75 Japanese Copyright Act).

<sup>1064</sup> See e.g. Kohler 1907, at 225, Allfeld 1928, at 418 and Raestad 1931, at 171.

<sup>1065</sup> See the ruling of the *Tribunal de l'Empire* (Germany) of 10 February 1915, *Le Droit d'Auteur* 1917, at 90 et seq. and the series of articles in *Le Droit d'Auteur* 1917, at 88-90, 100-103 and 111-114.

<sup>1066</sup> See art. 9(2) of the Berne Convention (1908), currently, art. 10bis of the Berne Convention (1971).

<sup>1067</sup> See Snijder van Wissenkerke 1933, at 7-8 and Hoffmann 1933, at 375-376, calling such conditions a '*formality pur et simple*' which nevertheless is exempted from the Berne prohibition on formalities.

<sup>1068</sup> *Actes 1908*, at 240; Berne Centenary 1986, at 149.

<sup>1069</sup> See Potu 1914, at 58 and Ladas 1938, I, at 274, who qualify the notice of reservation as an '*élément de fond*' (a basic element of protection) and a '*condition interne*', respectively. But see Ricketson 1987, at 224 and Ricketson & Ginsburg 2006, I, at 327-328, concluding that the notice of reservation

Interestingly this seems to suggest that the Berne Convention permits contracting states to subject a copyright exception or limitation to formalities, the exception or limitation then being the default rule from which authors can ‘escape’ by explicitly reserving their rights through a notice of reservation. Of course, this is subject to the condition that the copyright exception or limitation complies with the three-step test as laid down, *inter alia*, in Article 9(2) of the Berne Convention (1971). Pursuant to this test, an exception or limitation can only be imposed (i) in certain specific cases, as long as (ii) it does not conflict with a normal exploitation of the work and (iii) it does not unreasonably prejudice the author’s legitimate interests. Because the notice of reservation provides the author with the possibility to escape from the exception or limitation, it may actually ease compliance with the three-step test, for it ensures that authors can retain exclusivity by fulfilling the condition. Nevertheless, Berne Union states may not go as far as introducing overly broad exceptions or limitations that would have the effect of subjecting the enjoyment or the exercise of the right as such to situation specific formalities. This would oppose the first of the three steps, according to which an exception or limitation can only be imposed in certain specific cases.

For this reason, Berne Union states are not allowed to limit the enjoyment or the exercise of the translation right to works, the translation of which is begun with or completed within a given period,<sup>1070</sup> or to subject the enjoyment or the exercise of the translation right as such to the requirement to mark all copies of a literary work with a notice of reservation. Between 1886 and 1908, Berne Union states were only obliged to grant a translation right to foreign works, the translation of which was started or completed within ten years from the date of first publication of the original work.<sup>1071</sup> However, this was a transitional provision only.<sup>1072</sup> In 1908, the translation right was completely assimilated to the reproduction right.<sup>1073</sup> Since then, contracting states have been precluded from setting a time frame for the beginning and completion of a translation.<sup>1074</sup> Moreover, since all exceptions to and limitations of the translation right are subject to the three-step test, Berne Union states are not allowed to introduce an exception or limitation that subjects the enjoyment or the exercise of the translation right as such to a notice of reservation.<sup>1075</sup> Such exception or limitation is not specific enough to satisfy the first of the three steps.

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is a permitted ‘condition’, not on the basis of its qualification as a ‘*condition interne*’, but because it is permitted by a specific rule (art. 10*bis* of the Berne Convention (1971)) that overrides the general rule of art. 5(2) of the Berne Convention (1971): ‘*lex specialis legi generali derogat*’.

<sup>1070</sup> In the nineteenth century, the translation right was often limited this way. For instance, Art. 6 of the German Copyright Act of 1870 granted a translation right in literary works only if the translation was started within one year and completed within three years after the first publication of the work. For dramatic works, the translation should be finished within six months after the work was first issued.

<sup>1071</sup> Art. 5(1) of the Berne Convention (1886), as later amended by the 1896 Paris Additional Act.

<sup>1072</sup> *Actes 1908*, at 245; Berne Centenary 1986, at 151.

<sup>1073</sup> See *Actes 1908*, at 245 et seq.; Berne Centenary 1986, at 150 et seq.

<sup>1074</sup> See art. 8 of the Berne Convention (1908), currently, art. 8 of the Berne Convention (1971).

<sup>1075</sup> See *Le Droit d’Auteur* 1910, 2-7, at 6.

A last example of a requirement that may perhaps qualify as a '*condition interne*' is the requirement of public assertion of the author's moral right of attribution in the UK Copyright, Designs and Patents Act 1988. The Act states that this right cannot be invoked unless it is publicly 'asserted' in one of the manners specified by law.<sup>1076</sup> Whether this requirement is in harmony with the prohibition on formalities depends on the interpretation of Article 6*bis* of the Berne Convention, which states that 'the author shall have the right to claim authorship of the work'. The British legislator understood this provision to oblige Union states to grant authors the right 'to claim' authorship,<sup>1077</sup> thereby justifying the requirement of public assertion as an accepted internal condition of protection. However, various scholars assert that the provision must not be read as granting a right to claim authorship, but a right to be recognized as the author of the work. Therefore, they argue that the UK provision conflicts with the Berne prohibition on formalities, because it precludes authors from enjoying and exercising the right of attribution until they have publicly asserted this right.<sup>1078</sup>

### 5.2.3 CONCLUSION

This section has shown that, from the outset, there was broad understanding that the dividing line between prohibited 'formalities' and permitted conditions runs parallel to the distinction between 'formalities and *conditions extrinsèques*' and '*conditions internes*'. The former, which include requirements such as the registration of works, the deposit of copies of works and the mandatory affixation of a copyright notice to copies of works, are covered by the prohibition on formalities. The latter conditions are excluded from the prohibition. These '*conditions internes*' establish the specific modalities of copyright, such as the substantive contents and extent of protection. It is permitted under the Berne Convention to subject the protection of foreign works to certain basic conditions or contingencies establishing the effects or consequences of protection, in particular the extent and quality of copyright, in substance.<sup>1079</sup>

If Article 5(2) of the Berne Convention is read until the end, there seems to be a strong indication that '*conditions internes*' are indeed excluded from the prohibition on formalities. While the first sentence lays down the prohibition on formalities, the second sentence provides that certain acts are governed exclusively by the laws of protecting states. Article 5(2) of the Berne Convention reads as follows:

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<sup>1076</sup> Sec. 78 UK Copyright, Designs and Patents Act 1988.

<sup>1077</sup> See Bently & Sherman 2009, at 245-246.

<sup>1078</sup> See e.g. Ginsburg 1990, at 128, Cornish & Llewelyn 2007, at 489-490 (para. 12-70) and Ricketson & Ginsburg 2006, I, at 326.

<sup>1079</sup> Ladas 1938, I, at 274. These '*conditions internes*' are similar to the excepted category of conditions establishing 'the effects and consequences of protection ... notably with respect to the extent of protection', as defined by Dr Meyer at the 1884 Berne conference (*supra* text).

‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.’

Accordingly, Article 5(2) of the Berne Convention distinguishes clearly between the ‘enjoyment’ and the ‘exercise’ of copyright, to which the prohibition on formalities applies, and the ‘extent of protection’ and ‘means of redress afforded to the author to protect his rights’, which are governed exclusively by the laws of the protecting state.<sup>1080</sup> This seems to imply that, where the Berne Convention affords contracting states full leeway to regulate the extent of protection (i.e. to establish the manner in which authors can exercise their authority),<sup>1081</sup> it also grants them freedom to subject the extent of protection to certain internal conditions.<sup>1082</sup> Only to the extent that they affect the enjoyment or the exercise of copyright or conflict with other conventional provisions (such as the three-step test) are such conditions prohibited by the Berne Convention. The next section studies what the reference to the ‘enjoyment’ and the ‘exercise’ of copyright in Article 5(2) of the Berne Convention exactly entails.

### 5.3 Formalities as to the Enjoyment and the Exercise of Copyright

The last elements defining the scope of the prohibition on formalities of Article 5(2) of the Berne Convention are purpose related. Subjecting copyright to formalities is prohibited only if it affects the ‘enjoyment’ or the ‘exercise’ of this right.<sup>1083</sup> Hence, formalities that leave the enjoyment or the exercise of copyright unaffected are not covered by the Berne prohibition on formalities. An example of accepted formalities is formalities that establish evidentiary effects. This includes formalities according evidentiary weight to preclude innocent intent defences in mitigation of damages,<sup>1084</sup> providing rebuttable evidence about the validity of a copyright claim<sup>1085</sup> or giving

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<sup>1080</sup> See Baum 1932, at 930.

<sup>1081</sup> De Beaufort 1909, at 351.

<sup>1082</sup> See Baum 1932, at 931: ‘*Allgemein wird gesagt werden können, daß Förmlichkeiten durch die Landesgesetze mit Wirkung für die Verbandsangehörigen immer dann eingeführt werden können, wenn diese Förmlichkeiten lediglich den Schutzzumfang betreffen.*’

<sup>1083</sup> See Ficsor 2003, at 41.

<sup>1084</sup> See 17 USC §§ 401(d) and 402(d), according evidentiary weight to the use of a copyright notice. But see Ginsburg & Kernochan 1988, at 12, stating: ‘Were the actual damages awarded to notice omitting copyright proprietors significantly reduced, it would be difficult to maintain that compliance with the notice formality is no longer a condition to enjoyment and exercise of copyright.’

<sup>1085</sup> See 17 USC § 410(c), conferring prima facie evidence of the validity of copyright and of the facts stated in the certificate, if registration is made before or within five years after the first publication of

constructive notice of a transfer of rights.<sup>1086</sup> Another example is formalities, which, although applying to copyright protected works, have nothing to do with copyright protection as such. The legal deposit of books, which is imposed by law in several countries,<sup>1087</sup> is not a prohibited formality as long as it is detached from copyright law, i.e., as long as failure to deposit does not cause the loss of protection.<sup>1088</sup>

Except for these clearcut examples of formalities that do not affect the enjoyment or the exercise of copyright, there are quite a few cases in which it cannot easily be established whether the ‘enjoyment’ or the ‘exercise’ of copyright is at risk of being exposed to formalities. This section examines a number of cases that have been the subject of academic scrutiny since the introduction of the prohibition on formalities. It is divided in two parts. The first part defines what the term ‘enjoyment’ of rights precisely means and examines what its limits are by analyzing a number of assumed formalities related to the ‘enjoyment’ of rights (para. 5.3.1). The second part does exactly the same, but in relation to the ‘exercise’ of copyright (para. 5.3.2).

### 5.3.1 FORMALITIES AS TO THE ‘ENJOYMENT’ OF COPYRIGHT

The meaning of the word ‘enjoyment’, which was already referred to in Article 2(2) of the Berne Convention (1886), is rather straightforward. According to Dr Meyer’s statement at the 1884 Berne conference, it signified that the 1886 country of origin rule with respect to formalities applied only to conditions and formalities that were necessary ‘for the author’s rights in relation to his work to come into being’.<sup>1089</sup> This suggests that the word ‘enjoyment’ in effect means ‘coming into being’. This is also how the word was explained by legal commentators of the same period. As Planiol, the author of a leading treatise on French civil law, wrote: ‘Having the enjoyment of a property right is to have the aptitude necessary to become the proprietor’.<sup>1090</sup>

In addition to the coming into being of copyright, the reference to ‘enjoyment’ in Article 5(2) of the Berne Convention seems to signify that authors should be able to enjoy a formality-free protection during the existence of copyright. Therefore, it can

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a work. But see Ficsor 2003, at 41, arguing that if courts dismiss copyright infringement cases for the sole reason that a certificate of registration is missing, registration is a *de facto* formality.

<sup>1086</sup> See 17 USC § 205(c), stating that the certificate of recordation gives constructive notice of the facts it contains. Other countries require an instrument in writing to be able to prove a transfer of copyright against the author. See e.g. art. 3(1) Belgian Copyright Act, art. L 131-2 French Intellectual Property Code and art. 12 Luxembourg Copyright Act.

<sup>1087</sup> See e.g. 17 USC § 407, Book I, Title III of the French Code of Heritage (*Code du Patrimoine*) and the UK Legal Deposit Libraries Act (2003), c. 28.

<sup>1088</sup> See Gervais 2005, at 350, Gervais 2006, at 33, Gervais 2010a, at 200 and Gervais 2010b, at 24-25.

<sup>1089</sup> *Actes 1884*, at 43; Berne Centenary 1986, at 95.

<sup>1090</sup> See Planiol 1908-1910, I (1908), at 161 (no. 431): ‘*Avoir la jouissance du droit de propriété, c’est avoir l’aptitude nécessaire pour devenir propriétaire.*’

be generally assumed that ‘enjoyment’ means ‘existence’, covering both the coming into being (para. 5.3.1.1) and the continuation (para. 5.3.1.2) of copyright.<sup>1091</sup>

### 5.3.1.1 THE COMING INTO EXISTENCE OF COPYRIGHT

In general, formalities affecting the coming into being of copyright include all those formalities that are constitutive of the right (see para. 2.2.1).<sup>1092</sup> We have seen many examples of such formalities in this book. Examples are the mandatory registration, deposit and notice requirements which throughout the history of copyright law were imposed by law in many countries (see Chapter 3). To the extent that the acquisition of copyright was conditional on such formalities, the Berne Convention has released authors claiming protection under this Convention from their fulfilment.<sup>1093</sup>

For other types of requirements, it is more difficult to determine whether they are to be considered as formalities in relation to the ‘enjoyment’ of copyright. Examples are the requirements of domestic manufacturing and pre-publication censorship. Outwardly these requirements affect the coming into being of copyright. Yet if they are looked at more closely, they are not necessarily inconsistent with the prohibition on formalities, although they contradict other rules of the Berne Convention.

#### *Domestic Manufacturing Requirements*

If a country lays down a requirement of domestic manufacturing, this implies that it grants no copyright protection to works that have not been manufactured in its own territory. The history of copyright shows that, in the past, various countries imposed domestic manufacturing requirements.<sup>1094</sup> Often, these were stand-alone provisions, but sometimes the law also required authors to prove domestic manufacturing by an affidavit.<sup>1095</sup> Especially in the latter case domestic manufacturing requirements were

<sup>1091</sup> See the ruling of the Dutch Supreme Court of 26 May 2000, *Cassina v. Jacobs*, NJ 2000, 671, note D.W.F. Verkade and *AMI* 2000, at 210-214, note N. van Lingen. But see the decision of the Court of Appeal in Arnhem of 16 March 1999, *Vredestein vs. Ring 65*, *IER* 1999, no. 4, at 182-185, ruling that Article 5(2) of the Berne Convention did not apply to the continuation of copyright.

<sup>1092</sup> See *Le Droit d'Auteur* 1925, at 11 and *Le Droit d'Auteur* 1932, at 102.

<sup>1093</sup> See e.g. De Beaufort 1909, at 262 and 352-353, Dungs 1910, at 34, Wauwermans 1910, at 71, Potu 1914, at 55, Seiller 1927, at 211-212, Baum 1932, at 927, Hoffmann 1935, at 89-91, Ladas 1938, I, at 273, Masouyé 1978, at 33, Ricketson 1987, at 222, Goldstein 2001, at 188, Gervais 2005, at 350-351, Gervais 2006, at 32-33, Ricketson & Ginsburg 2006, I, at 325, Gervais 2010b, at 24-25 and Goldstein & Hugenholtz 2010, at 220.

<sup>1094</sup> See e.g. art. 61 of the German Copyright Act of 11 June 1870, art. 20 of the German Copyright Act of 9 January 1876, art. 27 of the Dutch Copyright Act of 1881, sec. 3 of the US Act of 3 March 1891, sec. 15 of the US Copyright Act 1909 and 17 USC § 16 (1947).

<sup>1095</sup> See e.g. sec. 16 of the US Copyright Act 1909 and 17 USC § 17 (1947). See also art. 10 of the Dutch Copyright Act of 1881.

suspicious of being Berne prohibited formalities. The reason was that the enjoyment of copyright fully depended on compliance with ‘formal’ requirements.<sup>1096</sup>

Although, on the surface, domestic manufacturing requirements may appear to be Berne prohibited formalities, it is questionable whether they actually are. A stronger argument is that, in essence, they are criteria of eligibility for protection under the laws of protecting states. This suggests that they are at odds with the Berne points of attachment rather than the prohibition on formalities. The Berne Convention obliges contracting states to protect (un)published works created by nationals of one of the Union states and works of non-Union authors that have been first or simultaneously published in a Union state.<sup>1097</sup> The Berne Convention does not permit contracting states to apply additional points of attachment, such as first fixation in a Union state or domestic manufacturing. Once a work becomes eligible for protection under the criteria of the Berne Convention, contracting states are obliged to protect it.

Accordingly, domestic manufacturing requirements are primarily in conflict with the Berne points of attachment. Perhaps, secondarily, they are also inconsistent with the Berne prohibition on formalities, but this seems to be the case only if and to the extent that they require an affidavit for proving domestic manufacturing.

### *Pre-Publication Censorship Requirements*

Another example of requirements for which it is unclear whether they fall within the ambit of the prohibition on formalities are pre-publication censorship requirements. These requirements were central to the copyright dispute between the US and China before the Dispute Settlement Body of the WTO in 2009.<sup>1098</sup> The main object of this dispute was Article 4 of China’s Copyright Act, which reads as follows: ‘Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law’.<sup>1099</sup> The US asserted that, in combination with China’s strict censorship laws and regulations, this provision conflicted with the Berne prohibition on formalities,<sup>1100</sup> since it allowed China to deny copyright protection to works that did not successfully pass the pre-publication content review process.<sup>1101</sup>

<sup>1096</sup> See e.g. Goldstein 2001, at 188 Goldstein & Hugenholtz 2010, at 220. In the US, the domestic manufacturing requirement and accompanying affidavit were generally perceived as a ‘formality’ in the meaning of the main international copyright treaties. When the US joined the UCC, foreign works protected under the UCC were exempted from this requirement so as to comply with the uniform notice requirement under the UCC. See McCannon 1963, at 1145-1147.

<sup>1097</sup> Art. 3(1) of the Berne Convention.

<sup>1098</sup> See WTO Panel Report, ‘China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights’, WT/DS362/R, 26 January 2009 (adopted on 20 March 2009).

<sup>1099</sup> Art. 4 of the Copyright Law of the People’s Republic of China, as amended on October 27, 2001.

<sup>1100</sup> First submission of the US, WT/DS362, 30 January 2008, at para. 220 et seq.

<sup>1101</sup> China’s censorship laws and regulations include, *inter alia*, the Regulation on the Administration of Audio and Video Products (State Council Order No. 341), the Regulation on the Administration of Films (State Council Order No. 342), the Regulation on the Administration of Publications (State

Outwardly, China's pre-publication censorship requirements indeed appear to be formalities prohibited by Article 5(2) of the Berne Convention. They have the effect of subjecting the enjoyment (or the enforceability)<sup>1102</sup> of copyright to obtaining prior permission from the censor to publish and disseminate a work. This resembles the early book formalities in the *Ancien Régime*, which also made the acquisition of protection conditional on a 'licence to print' from the censor (see para. 3.1).

However, it can also be argued that the pre-publication censorship requirements of China merely introduce a morality norm as a substantive condition for protection. This is not uncommon. There are other countries in which obscene, blasphemous or immoral works (e.g., pornographic works) have been withhold copyright protection *ex post* for public policy reasons.<sup>1103</sup> If it is accepted that morality is a substantive condition for protection,<sup>1104</sup> then arguably it cannot be maintained that China's pre-publication censorship approval is a Berne prohibited formality. Subject matter that does not meet the morality norm is simply not eligible for protection.<sup>1105</sup>

If it be not accepted that morality is a substantive condition for protection, as was apparently the opinion of the WTO Dispute Settlement Body,<sup>1106</sup> the pre-publication censorship requirements of China would undoubtedly be at variance with the Berne Convention. However it seems that they conflict more directly with Article 17 of the Berne Convention than with the prohibition on formalities. Union states are allowed 'to permit, to control, or to prohibit ... the circulation, presentation, or exhibition of any work' for reasons of state security, protection of public morals or other matters of public order.<sup>1107</sup> Accordingly, while Union states are free to regulate the details of

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Council Order No. 343) and the Regulations on the Administration of Electronic Publications (Order No. 11 of the General Administration of Press and Publication, 30 December 1997).

<sup>1102</sup> China argued that Article 4 of its Copyright Act did not affect the 'enjoyment' of copyright, because it did not cause a denial of 'copyright', but only resulted in a denial of 'copyright protection', which it equated with the 'enforceability' of copyright. See WTO Panel Report, WT/DS362/R (2009), para. 7.61 et seq. As we shall see below, this argument would not stand in court, as Berne Union states are also prohibited from subjecting the 'enforceability' of copyright to formalities (see para. 5.3.2.1).

<sup>1103</sup> See Howell 1994, Goudreau 2008, Sims 2008 and Bently & Sherman 2009, at 117-118. Examples of countries where public policy grounds are invoked to deny copyright protection are the UK, Canada, Australia and New Zealand. The fact that it concerns mostly common law countries can perhaps be explained by the utilitarian copyright approach in these countries, which may well have motivated courts to remove all incentives to create immoral, obscene, blasphemous or libelous works.

<sup>1104</sup> See e.g. Bently & Sherman 2009, at 91, including this requirement in the list of substantive criteria for protection. See also Kohler 1907, at 160, who denies copyright to immoral works by arguing that: '*Unsittliche Erzeugnisse der Literatur genießen keinen Schutz und können keinen Schutz genießen*'. But see Mom 1995, at 93-95, asserting that, presently, the viewpoint that immorality can be no reason to completely deny copyright protection to works appears to be more universally accepted.

<sup>1105</sup> See Bently & Sherman 2009, at 117, indicating that it is uncertain whether the denial of copyright protection to obscene, blasphemous or immoral works implies 'that there is no copyright in the work at all, or that equity will not enforce the copyright'. See also Sims 2008.

<sup>1106</sup> See WTO Panel Report, WT/DS362/R (2009), paras 7.104 to 7.119.

<sup>1107</sup> Art. 17 of the Berne Convention dates back to 1886, when it was incorporated in art. 13 of the Berne Convention (1886). See also *Actes 1884*, at 58; Berne Centenary 1986, at 101.

how copyright protected works are publicly disseminated, they cannot, by virtue of national censorship regulations, deny copyright protection altogether.<sup>1108</sup>

Consequently, while China may subject Berne protected works to pre-publication censorship and prohibit the distribution of works that have not been authorized for publication or dissemination in China, it cannot refuse protecting these works under national copyright law. That would be contrary to China's international obligations under the Berne Convention.<sup>1109</sup> However this does not immediately qualify the pre-publication censorship requirements as Berne prohibited formalities. In fact, Article 17 of the Berne Convention explicitly permits Union states to scrutinize the contents of works.<sup>1110</sup> Therefore the requirements appear acceptable as long as the censorship authority does not judge on the existence (or the enforceability) of copyright.<sup>1111</sup>

### 5.3.1.2 THE MAINTENANCE OF COPYRIGHT

In addition to formalities affecting the coming into being of copyright, the reference to the 'enjoyment' of rights in Article 5(2) of the Berne Convention also suggests that contracting states are prohibited from imposing formalities entailing the loss of protection during the existence of copyright. This is the case when the maintenance of copyright is subject to a formal act, e.g., a registration or making of a declaration with a governmental body. One example is copyright renewal, which for long time was a key constituent of US copyright law (see para. 2.1.2). Another example is the declaration ('*instandhoudingsverklaring*'), which the former Benelux Designs Act required for the continuation of copyright in industrial designs of which the design protection (at that time: max. 15 years) had expired.<sup>1112</sup> The Dutch Supreme Court found this declaration to be in conflict with the Berne prohibition on formalities,<sup>1113</sup> after which it was removed from the Benelux Designs Act on 1 December 2003.

More difficult is the situation where the maintenance of copyright is not subject to a formal act with a state authority but to a requirement of use, as in the case of so-called 'use it or lose it' provisions. These generally exist in two variants. If a work is no longer made commercially available to the public after a statutory period, the

<sup>1108</sup> See Ricketson 1987, at 545-546 and Ricketson & Ginsburg 2006, I, at 844. See also Dreier in Dreier & Hugenholtz 2006, at 69.

<sup>1109</sup> See WTO Panel Report, WT/DS362/R (2009), paras 7.120 to 7.139.

<sup>1110</sup> See Bappert & Wagner 1956, at 75, arguing, with respect to some early film censorship regulations in Germany: '*Der Verbandsangehörige Urheber kann sich deshalb in solchen Fällen genau so wenig auf Art. 4 Abs. 2 [i.e., the Berne prohibition on formalities] berufen, wie wenn etwa sein Werk wegen staatsgefährdenden oder sittenwidrigen Inhalts beschlagnahmt und eingezogen wird*'.

<sup>1111</sup> See Dreier in Dreier & Hugenholtz 2006, at 69, asserting that the permission that Berne Union states pursuant to art. 17 of the Berne Convention may require for the public dissemination of works 'must not be a "formality" within the meaning of art. 5(2)' of the Berne Convention.

<sup>1112</sup> Art. 21(3) of the Benelux Designs Act of 1975.

<sup>1113</sup> See the ruling of the Dutch Supreme Court of 26 May 2000, *Cassina v. Jacobs*, NJ 2000, 671, note D.W.F. Verkade and AMI 2000, at 210-214, note N. van Lingen.

law can either permit others to use the work under a copyright exception or compulsory licence,<sup>1114</sup> or provide that the copyright is deemed to be lost altogether.<sup>1115</sup>

The first variant seems to cause no complications in relation to the prohibition on formalities, as it does not affect the ‘enjoyment’ of rights. Copyright protection does not cease upon non-usage. Moreover, the fact that failure to fulfil the requirement of use leads to the application of a copyright exception or compulsory licence does not make this requirement a prohibited formality concerning the ‘exercise’ of rights. As will be demonstrated in para. 5.3.2, this would only be the case if non-compliance would prevent the author from enforcing or exercising his rights altogether.

The second variant, on the other hand, bears resemblance with copyright renewal at least in its effects. In both cases, non-compliance causes a loss of protection. This shows that the ‘enjoyment’ of copyright is at risk here. However, the requirement of use may perhaps be compatible with the Berne prohibition on formalities if it can be qualified as a requirement of substantive law rather than a prohibited formality. One argument that may support such interpretation is that the requirement of use differs from copyright renewal in that it does not require application in multiple countries, but only a continuation of the commercial exploitation of the work. A ‘use it or lose it’ provision can therefore also be perceived as a way with which contracting states can regulate the extent of protection (see para. 5.2.3). However, they can only apply it to works of which the minimum terms of protection of the Berne Convention have expired. Otherwise it would conflict with the Berne minimum requirements.

### 5.3.2 FORMALITIES AS TO THE ‘EXERCISE’ OF COPYRIGHT

While Article 2(2) of the Berne Convention (1886) only referred to the ‘enjoyment’ of rights, the 1908 prohibition on formalities added the reference to the ‘exercise’ of rights. The reasons for this change have not been documented in the proceedings of the Berlin revision conference, but it seems that the word ‘exercise’ was added so as to elucidate that the prohibition did not only cover constitutive formalities, but also formalities that are prerequisites to sue. Although it had been confirmed in both case law and legal doctrine that the latter formalities were also deemed formalities as to the ‘enjoyment’ of rights,<sup>1116</sup> the drafters of the revised Berne Convention probably

<sup>1114</sup> See e.g. Lessig 2001, at 258-259, proposing the introduction of such a ‘use it or lose it’ provision.

<sup>1115</sup> See art. 10a(6) of the Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights, COM (2008) 464 final, Brussels 16 July 2008, proposing such a ‘use it or lose it’ provision with respect to related rights of phonogram producers and performing artists.

<sup>1116</sup> See German Supreme Court, 26 September 1902, *Juven v. Schönau*, [1902] 35 *Entscheidungen des Reichsgericht in Strafsachen* 360, *Le Droit d’Auteur* 1903, at 5, treating the French legal deposit that was a prerequisite to sue as a formality covered by art. 2(2) of the Berne Convention (1886). See also the ruling of the Civil Court of Justice of Geneva, 20 May 1905, *Bonnard v. Lithographie parisienne*, *Le Droit d’Auteur* 1905, at 144-145. See Röthlisberger 1906, at 107-108 and Kohler 1907, at 404.

wished to avoid any misunderstanding of authors who claimed protection under the Berne Convention being fully released from compliance with formalities, regardless of whether they affected the existence or the enforcement of their rights.<sup>1117</sup>

Despite the reasonable explanation for the reference to the ‘exercise’ of rights, in practice, it gives rise to many problems of interpretation. One reason is that the legal connotation of the ‘exercise’ of rights extends beyond the intended ‘enforcement’ of rights. According to French legal terminology around the period of adoption of the prohibition on formalities, the ‘exercise of a property right’ denotes ‘being able to use that right’,<sup>1118</sup> i.e., ‘to legally enforce it, assign it, license it, etc.’.<sup>1119</sup> This raises the question of whether the reference to the ‘exercise’ of rights in Article 5(2) of the Berne Convention suggests that the prohibition on formalities applies to more than just formalities that relate to the ‘enforcement’ of rights. This question is important because, as we shall see next, legal scholars have sometimes overstretched the scope of the prohibition on formalities by interpreting the word ‘exercise’ too broadly.

This section examines whether and to what extent requirements pertaining to the enforcement of copyright (para. 5.3.2.1), the transfer of copyright (para. 5.3.2.2) and the management of copyright (para. 5.3.2.3) can be seen as prohibited formalities that relate to the ‘exercise’ of rights under Article 5(2) of the Berne Convention.

### 5.3.2.1 THE ENFORCEMENT OF COPYRIGHT

One type of formalities to which the prohibition on formalities applies is formalities affecting the enforcement of rights.<sup>1120</sup> In this book, we have seen various examples of such formalities, such as the legal deposit under the 1793 French decree and the registration requirement under the 1842 UK Literary Copyright Act, both of which functioned as a prerequisite to sue for copyright infringement. To optimally secure international copyright protection, it was thought that all formalities that authors had to complete to be able to enforce their copyrights before the courts or in administrative hearings in Berne Union states other than the country of origin should be removed. This was confirmed by the *Tribunal de Commerce de la Seine* in a 1913 decision, in which it ruled that the French legal deposit, which was continued as a precondition to sue until 1925, did not have to be fulfilled with

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But see the earlier decision of the German Supreme Court, 8 April 1897, [1898] 30 *Entscheidungen des Reichsgericht in Strafsachen* 81, *Le Droit d’Auteur* 1901, at 30-31, stating that the ‘enjoyment’ of copyright in art. 2(2) of the Berne Convention (1886) signified ‘*die rechtliche Verfolgbarkeit des Urheberrechtes*’ (‘the legal prosecutability of copyright’), while leaving it open whether this related to the French legal deposit because it did not affect the existence of copyright as such.

<sup>1117</sup> See *Le Droit d’Auteur* 1910, 2-7, at 5, Petit 1911, at 35 and Potu 1914, at 52.

<sup>1118</sup> See Planiol 1908-1910, I (1908), at 161 (no. 431): ‘[En] avoir l’exercice [du droit de propriété], c’est pouvoir user de son droit de propriété.’

<sup>1119</sup> See Potu 1914, at 52: ‘c’est-à-dire l’exercer en justice, le céder, le transmettre, etc.’ See also Baum 1932, at 930, arguing that the assignment of copyright undoubtedly is also a means of exploiting the copyright, perhaps even the mode of exploitation ‘*par excellence*’.

<sup>1120</sup> See e.g. Wauwermans 1910, at 73 and Potu 1914, at 52.

respect to foreign works for which protection was claimed under the Berne Convention, as this was inconsistent with the prohibition on formalities in relation to the ‘exercise’ of rights.<sup>1121</sup>

For the same reason, when joining the Berne Convention, the US legislator lifted registration as a prerequisite to instituting a copyright infringement action for works of non-US origin. This formality was thought to conflict with the Berne Convention because it subjects the ‘exercise’ of rights to compliance with formalities.<sup>1122</sup>

On the other hand, national procedural requirements are explicitly excluded from the scope of Article 5(2) of the Berne Convention.<sup>1123</sup> This was already so under the 1886 Berne Convention (see para. 5.2.1.3). Examples include the deposit of security for costs (i.e. the ‘*cautio judicatum solvi*’)<sup>1124</sup> and the registration requirement with regard to the recovery of statutory damages and attorney’s fees in the US.<sup>1125</sup> Article 5(2) of the Berne Convention leaves procedural requirements (‘the means of redress afforded to the author to protect his rights’) to be regulated by national law. Because procedural requirements apply only in connection with a particular national lawsuit, they do not impede the enjoyment or the exercise of international copyright as such. Therefore, they can be excluded from the prohibition on formalities.

### 5.3.2.2 THE TRANSFER OF COPYRIGHT

The transfer of copyright, whether by assignment of the right or by the granting of a licence,<sup>1126</sup> can be subject to various requirements of form, such as the requirement

<sup>1121</sup> Commercial Tribunal of the Seine, 13 November 1913, *Magalhaès et Moniz c. Muroz Escamoz, Le Droit d’Auteur* 1914, at 38-40.

<sup>1122</sup> See ‘Final Report of the Ad Hoc Working Group on US Adherence to the Berne Convention,’ [1986] 10 *Columbia-VLA Journal of Law & the Arts* 513, at 565-574. See also Ginsburg & Kernochan 1988, at 12. Initially, the House of Representatives and the Senate disagreed about whether this requirement was congruent with the Berne standards. Whereas the House believed that it was Berne compliant, as it held the requirement to be procedural by nature (H.R. Rep. No. 609, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 40-44), the Senate argued that it should be abolished altogether (S. Rep. No. 352, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 13-25). Eventually, Congress reached a compromise and eliminated the requirement of registration as a prerequisite to sue for copyright infringement for non-US works only.

<sup>1123</sup> See e.g. Röthlisberger 1906, at 108, Nordemann, Vinck, Hertin & Meyer 1990, at 78 and Ricketson & Ginsburg 2006, I, at 326, arguing however that, while Berne Union states are permitted to impose domestic rules of evidence or procedure applicable to judicial proceedings in general, they may not impose procedural requirements (e.g., court fees) that are specific to copyright infringement suits.

<sup>1124</sup> See e.g. Rechtbank ‘s-Hertogenbosch, 11 June 2008, *Adobe & Microsoft v. Patch Marketing* (LJN: BD3658). But see Ricketson 1987, at 223 and Ricketson & Ginsburg 2006, I, at 326, maintaining that the *cautio judicatum solvi* falls foul of the Berne prohibition on formalities.

<sup>1125</sup> The relevant provision (17 USC § 412) was considered to satisfy the Berne standards because it only affects remedies and not the loss of copyright. See H.R. Rep. No. 609, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 40-41 and S. Rep. No. 352, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 14-15.

<sup>1126</sup> See e.g. Guibault & Hugenholtz 2002, at 29, defining the ‘assignment’ of copyright as the complete transfer of the right from the one party to the other and the granting of a ‘licence’ as the contractual permission to exploit the copyright or to perform certain acts in respect of the work protected.

for the transfer to be recorded in a register, be in writing or drawn up in an authentic legal document or bear the transferor's signature.<sup>1127</sup> Over the years, there have been intense discussions, both in jurisprudence and in legal doctrine, about whether these requirements are in harmony with Article 5(2) of the Berne Convention.

In 1926, for example, the Berne International Bureau asserted that Union authors are not obliged to comply with an Italian law subjecting the assignment of copyright to a mandatory registration, because it held this requirement to be a formality as to the 'exercise' of rights.<sup>1128</sup> A few years later, however, it expressed doubt about this assertion in a case involving a Canadian statute, which also required assignments of copyright to be registered.<sup>1129</sup> Because it appeared that requirements of form relating to transfer of copyright were not considered when the prohibition on formalities was drafted, their inconsistency with the Berne Convention was uncertain.<sup>1130</sup> It hoped that the matter would be clarified at the 1928 Conference in Rome, but because this did not happen,<sup>1131</sup> the question remained unresolved.<sup>1132</sup>

However, if the various requirements of form relating to the transfer of copyright are examined more carefully, it will be seen that they do not affect the enjoyment or the exercise of rights. They are either evidence for establishing the existence and the scope of the transfer ('formalities *ad probationem*') or conditions of validity of the contract of transfer vis-à-vis third parties ('formalities *ad substantiam*').<sup>1133</sup> In the former capacity, they create evidentiary effects only. As observed, this is permitted under the Berne Convention. The fulfilment of requirements of form for the validity of a contract, on the other hand, is necessary to give legal effect ('*Rechtswirkung*')

<sup>1127</sup> See e.g. the Portuguese Copyright Act, which requires an instrument in writing for the licensing of copyright (art. 41(2)), a written document bearing signatures for the partial assignment of copyright (art. 43(2)) and a public deed (*escritura pública*) for the complete assignment of copyright (art. 44).

<sup>1128</sup> See *Le Droit d'Auteur* 1926, 109-114, at 112, with respect to the Italian Act of 7 November 1925.

<sup>1129</sup> Art. 39 of the Canadian Copyright Act (1921), 11 and 12 George V., c. 24. See also the rulings of the Tribunal of Toronto, 7 March 1927, *The Canadian Performing Right Society Ltd. v. Famous Players' Canadian Corporation Ltd.*, *Le Droit d'Auteur* 1927, at 133-135 and the Judicial Committee of the Private Council, 1 February 1929, *The Canadian Performing Right Society Ltd v. Famous Players' Canadian Corporation Ltd*, *Le Droit d'Auteur* 1929, at 57, rejecting a claim against a film producer who had used works administered by the Performing Right Society, on the ground that the rights in question had not been registered and thus were not assigned to the Performing Right Society.

<sup>1130</sup> See *Le Droit d'Auteur* 1927, at 135: '*Les rédacteurs de la Convention de Berne révisée n'ont jamais songé aux formalités de la cession, cela nous semble hors de doute. Mais peut-on soutenir que les formalités de cette catégorie se concilient avec l'esprit de l'article 4 de la Convention révisée? Nous n'oserions pas l'affirmer*'.

<sup>1131</sup> See *Le Droit d'Auteur* 1929, at 57.

<sup>1132</sup> See e.g. *Le Droit d'Auteur* 1929, at 83, in which the Berne International Bureau recognized that '*le problème était complexe*'. See also *Le Droit d'Auteur* 1934, at 101.

<sup>1133</sup> Guibault & Hugenholtz 2002, at 148. Examples of formalities *ad probationem* are 17 USC § 205(c) (certificate of recordation), art. 3(1) Belgian Copyright Act, art. L 131-2 French Intellectual Property Code and art. 12 Luxembourg Copyright Act (document in writing) and of formalities *ad substantiam* are 17 USC § 204(a) and art. 77 Japanese Copyright Act (recordation), art. 2(2) Dutch Copyright Act (deed) and arts. 43(2) and 44 Portuguese Copyright Act (document in writing; public deed).

to a legal transaction.<sup>1134</sup> These requirements essentially determine the way in which the author can legally transfer his copyright. Rather than affecting the enjoyment or the exercise of copyright, therefore, they establish the extent to which the author can exploit his rights.<sup>1135</sup> As much as the Berne Convention permits contracting states to preclude the assignment of copyright or create certain presumptions of assignment, it allows them to establish the conditions under which copyright can be assigned,<sup>1136</sup> including the requirements of form relating to the validity of a contract.<sup>1137</sup>

Consequently, it seems safe to assume that Article 5(2) of the Berne Convention does not prohibit requirements of form, which determine the way in which a transfer of copyright must be effectuated or which corroborate the existence or scope of the relevant transaction.<sup>1138</sup> This is an important observation. It suggests that contracting states are permitted to subject the transferability of copyright to formalities of some kind. An example would be the introduction of a mandatory recordation of transfer, giving legal effect to a copyright transfer only if it is recorded in a public register or database. This would have the advantage that, by consulting the register or database, anyone can easily ascertain who owns the copyright in a work. If it is not recorded, it may be assumed that the copyright belongs to the author. A recordation system of this kind would facilitate copyright clearance, thus addressing part of the challenges identified in Chapter 1. As we observed there, one of the causes for the current rights clearance difficulties is the transferability and divisibility of copyright.

This does not imply, however, that all formalities as to the transfer of copyright are permitted. Only to the extent that they relate directly to the transaction by which the right is transferred are they justified.<sup>1139</sup> An example of a formality that conflicts with Article 5(2) of the Berne Convention is the recordation of transfer that, until the US joined the Berne Convention, was included in US copyright law. In its pre-1989 incarnation, recordation was a condition for initiating a copyright infringement suit for persons claiming to be the copyright owner by virtue of a transfer of rights. This recordation of transfer was deemed to be at odds with Article 5(2) of the Berne Convention, because copyright enforcement depended on its fulfilment.<sup>1140</sup>

<sup>1134</sup> Hoffmann 1935, at 93. See also Hoffmann 1933, at 376-377.

<sup>1135</sup> See Baum 1932, at 930. See also *Le Droit d'Auteur* 1927, at 135: '*L'enregistrement n'est pas une condition de l'existence même du droit d'auteur, mais une condition de la validité, à l'égard des tiers, du transfert de ce droit au profit de titulaire actuel*'.

<sup>1136</sup> See Baum 1932, at 931. See also the last part of art. 5(2) of the Berne Convention.

<sup>1137</sup> Wauwermans 1910, at 70.

<sup>1138</sup> See e.g. Wauwermans 1910, at 70, Baum 1932, at 929-931, Hoffmann 1933, at 376, Hoffmann 1935, at 92-93, Bappert & Wagner 1956, at 75-76, Masouyé 1978, at 33, Ricketson & Ginsburg 2006, I, at 326-327, Ginsburg 2010a, at 316-317 and 345-346 and Ginsburg 2010b, at 429-430. But see Marwitz & Möhring 1929, at 341, Raestad 1931, at 79, Ladas 1938, I, at 273 and Ricketson 1987, at 223-224.

<sup>1139</sup> See Ricketson & Ginsburg 2006, I, at 326-327.

<sup>1140</sup> S. Rep. No. 352, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), at 25-26: 'a transferee claiming under an unrecorded document is effectively precluded from enforcing his or her claim, and thus from enjoying and exercising his or her rights, within the meaning of Article 5(2) of Berne'.

This explanation finds support in the rationales behind the Berne prohibition on formalities. The idea was to free authors from the multitude of formalities that they otherwise had to complete in the different Berne Union states to secure international copyright protection. To the degree that formalities are connected with a specific act or transaction, however, they have no international implications. Although the rights may be transferred across borders, the transaction habitually takes place in a single country.<sup>1141</sup> Therefore, the transfer of copyright can easily be governed by the law in that country. That this law imposes particular requirements of form does not create legal obstacles for authors seeking copyright protection at the international level, for these requirements must not be fulfilled in each and every country where protection is sought, but only in the country where the relevant transaction takes place. This is different when right holders are required to record the transfer of rights in national registers to be able to enforce their rights, which would certainly create international difficulties that the Berne prohibition on formalities has tried to avoid.

### 5.3.2.3 *THE MANAGEMENT OF COPYRIGHT*

Similar to the requirements of form that determine the way in which the author can legally transfer his rights, the various modes of exploitation that the law puts at the author's disposal also seem to relate to the extent of protection. Therefore, it seems that these modes of exploitation can be regulated by national law without interfering with the Berne prohibition on formalities.<sup>1142</sup> Even so, ever since the introduction of this rule, it has been questioned whether the collective licensing system, in general, and specific forms of non-voluntary collective licensing, in particular, are consistent with the prohibition on formalities. This section examines these questions, focusing, in particular, on the establishment and functioning of collective rights management organizations (CMOs), non-voluntary and extended collective licensing systems and models allowing right owners to 'opt out' of established licensing systems.

#### *The Establishment or Functioning of CMOs*

In the 1930s, it was openly questioned whether the conditions imposed by national law for the establishment or functioning of CMOs were compliant with the Berne prohibition on formalities.<sup>1143</sup> The Canadian Copyright Amendment Act of 1931, for example, required each CMO for performance rights to deposit with the Copyright Board, at regular intervals, a list of all the works it administered plus an overview of

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<sup>1141</sup> See e.g. Van Eechoud 2003, at 193 et seq., arguing that this can be the country where the relevant act takes place, the country of habitual residence of the transferor, the country where protection is sought or any other country, depending on the applicable choice of law criteria.

<sup>1142</sup> See e.g. Baum 1932, at 930, Masouyé 1978, at 33 and Schönherr 1981, at 297.

<sup>1143</sup> See Snijder van Wissenkerke 1933, at 5 et seq.

all the revenues it generated from the exploitation of these rights. The CMO was not permitted to administer and legally enforce the rights until it had duly fulfilled these requirements.<sup>1144</sup> The Berne International Bureau considered this requirement to be inconsistent with the prohibition on formalities because it subjected the ‘exercise’ of performance rights to deposit.<sup>1145</sup> That it concerned the administration of rights by a CMO instead of the author was deemed irrelevant, since the provisions of the Berne Convention applied to authors as well as to their successors in title.<sup>1146</sup>

For the same reasons, the Berne International Bureau queried whether the Dutch and the German Copyright Acts, which required CMOs to obtain ministerial consent or a ministerial licence to be able to act as a commercial agent in matters of musical performance rights,<sup>1147</sup> were compatible with the prohibition on formalities.<sup>1148</sup>

At present, it seems to be accepted that these conditions are not prohibited by the Berne Convention.<sup>1149</sup> They are not requirements of form on which the enjoyment or the exercise of copyright depends. Copyright exists irrespective of whether a CMO fulfils these requirements. Moreover, even if a CMO fails to complete them, authors are free to exercise their rights individually. Intrinsically, therefore, requirements of this kind have little to do with copyright law, but are rather of a public order. They are aimed at facilitating the control of the functioning of CMOs in the interest of authors and users of the repertoire administered by CMOs.<sup>1150</sup> Provided that they do not preclude the exercise of rights altogether, they appear to be Berne compliant.

### *Non-Voluntary Licensing Systems*

More recently, questions have been raised about the compatibility of non-voluntary licensing schemes with Article 5(2) of the Berne Convention.<sup>1151</sup> Two examples are compulsory licensing and mandatory collective licensing. In cases where the public

<sup>1144</sup> Sec. 10 of the Canadian Copyright Amendment Act of 11 June 1931.

<sup>1145</sup> See *Le Droit d’Auteur* 1932, at 5. See also the resolution adopted by the International Confederation of Authors and Composers Societies (CISAC) in London in 1931, in *Le Droit d’Auteur* 1931, at 69.

<sup>1146</sup> See *Actes 1908*, at 236; Berne Centenary 1986, at 147.

<sup>1147</sup> Art. 30a Dutch Copyright Act, which was introduced on 11 February 1932 and has remained in force until today, and the German Act (*Reichsgesetz*) of 4 July 1933, which has been repealed and replaced by art. 1 of the German Copyright Administration Act (*Urheberrechtswahrnehmungsgesetz*).

<sup>1148</sup> See *Le Droit d’Auteur* 1933, at 110, concluding, however, that: ‘*Il semble que l’opinion générale tende plutôt à ne pas voir dans des mesures de ce genre une formalité interdite par l’article 4, alinéa 2, de la Convention*’.

<sup>1149</sup> See e.g. Hoffmann 1933, at 373-377, Roeber 1933, at 368 et seq., Möhring 1934, at 333, Hoffmann 1935, at 94-96, Mentha 1955, at 157 and Mentha 1965, at 64. See also Snijder van Wissenkerke 1933, at 6-8, asserting however that the provisions of the Canadian Act of 1931 were incompatible with the Berne prohibition on formalities. But see Hubmann 1966, at 33-34.

<sup>1150</sup> See Snijder van Wissenkerke 1933, at 6-7 and Hoffmann 1935, at 94-95.

<sup>1151</sup> See e.g. Doutrelepoint 1998, at 542-543, Lucas 1998, at 1168-1169, Lucas & Lucas 2001, no. 694, at 536-537, Von Lewinski 2004, at 11 and Bernault & Lebois 2006, no. 130-131, at 55-56.

interest in obtaining copyright licences outweighs the copyright owner's interest in retaining exclusivity, legislators can adopt a statutory compulsory licencing scheme, requiring right owners to license particular rights to third parties in return for which they receive reasonable compensation.<sup>1152</sup> For the same reason, a statutory regime of mandatory collective licensing can be introduced,<sup>1153</sup> by operation of which all right owners in a given field are collectively represented by one or more CMOs.

Evidently, these non-voluntary licensing schemes put a restriction on the way in which copyright owners can exercise their rights.<sup>1154</sup> Many legal commentators have therefore argued that these systems are inconsistent with the Berne prohibition on formalities.<sup>1155</sup> They state that Article 5(2) of the Berne Convention does not permit Union states to oblige authors to revert to a public agency to collect the reasonable compensation under a compulsory licensing scheme or to conclude agreements with a CMO to take advantage of their rights. They maintain that the exclusive nature of copyright entails that there should always be room for individual licensing.<sup>1156</sup>

However, that copyright owners are unable to individually exercise their rights is by itself not enough to qualify these licensing systems as prohibited formalities. All copyright limitations somehow restrict the author in the exercise of his rights. Non-voluntary licensing systems are no exception. Rather than precluding the exercise of copyright altogether, they prescribe the manner of exercise of copyright by limiting it to a specific form of licensing. Accordingly, they regulate the extent of protection rather than the enjoyment or the exercise of copyright.<sup>1157</sup> In view of that, it seems

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<sup>1152</sup> US copyright law knows various compulsory licences. Examples are compulsory licences for cable retransmission (17 USC § 111), for the making and distribution of phonorecords (17 USC § 115) and for retransmission by satellite carriers (17 USC § 119). Under the Berne Convention, Union states are allowed to establish compulsory licences in respect of broadcasting and related rights (art. 11*bis*(2) of the Berne Convention) and rights of recording of musical works (art. 13(1) of the Berne Convention).

<sup>1153</sup> A system of mandatory collective rights management exists, inter alia, in the EU in the area of cable retransmission rights. See art. 9(1) of the EU Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L* 248/15, 6 October 1993. See also Von Lewinski 2004, at 2-3, for examples of mandatory collective licensing systems at the national level.

<sup>1154</sup> See e.g. Von Lewinski 2004, at 5, Ficsor 2006, at 42 and Ficsor 2010, at 44.

<sup>1155</sup> See e.g. Peter 1954, at 299, Mentha 1955, at 157, Bappert & Wagner 1956, at 75, Mentha 1965, at 64-65 and Hubmann 1966, at 30 et seq. See also Nordemann, Vinck, Hertin & Meyer 1990, at 78.

<sup>1156</sup> See Nordemann, Vinck, Hertin & Meyer 1990, at 78, arguing that mandatory collective licensing is acceptable under art. 5(2) of the Berne Convention to the extent that it concerns the administration of mere remuneration rights, but not in so far as the author's exclusive rights are involved.

<sup>1157</sup> See Baum 1932, at 932: '*Die aus dem Urheberrecht fließenden Verwertungsmöglichkeiten betreffen den Schutzzumfang, nicht aber den Genuß und Ausübung des Urheberrechts*'. See also Drexl 1990, at 82-83, Lucas & Lucas 2001, no. 694, at 536 and Von Lewinski 2004, at 11. But see Doutrelepon 1998, at 543, doubting whether collective rights management could easily match the concept of the 'extent of protection' in the meaning of the last part of art. 5(2) of the Berne Convention. However, she admits that it may well fall within the category 'means of redress' in the same provision.

consistent with Article 5(2) of the Berne Convention to subject the exercise of rights to a system of compulsory licensing or mandatory collective licensing.<sup>1158</sup>

### *Extended Collective Licensing Systems*

Another licensing system in respect of which the compatibility with the prohibition on formalities has been called into question is extended collective licensing (ECL), which is applied in the ‘Nordic countries’ (Denmark, Finland, Norway, Sweden and Iceland) in various sectors.<sup>1159</sup> ECL is characterized by statutory provisions that give extended effect to clauses in a collective licensing contract concluded between (a certain group of) users and a CMO representing a ‘substantial’ number of copyright owners in a given field. The law extends this agreement to cover an entire class of works or rights, thus binding all copyright owners in the relevant field. To protect the interests of right owners who are not members of the CMO and who do not wish to participate in the collective licensing scheme, ECL systems often give copyright owners the choice to ‘opt out’ and individually manage their rights.<sup>1160</sup>

It has been maintained that the ECL ‘opt out’ procedure should be as simple and straightforward as possible to prevent it from being a ‘*de facto* formality’ prohibited by Article 5(2) of the Berne Convention.<sup>1161</sup> It is questionable however whether this assertion is correct. ECL systems govern the extent to which rights can be exercised no more than mandatory collective licensing systems do. Collective licensing is the statutory default under both systems. As observed, this is not prohibited by Article 5(2) of the Berne Convention. The question remains whether the ‘opt out’ procedure complies with the prohibition on formalities. It seems that it does. The possibility to ‘opt out’ from the ECL scheme does not affect the ‘enjoyment’ or the ‘exercise’ of copyright. The right is exercised in any event, either collectively as statutory default rule or individually if the author ‘opts out’. Accordingly, it only reflects the specific modes of exploitation that the law puts at the author’s disposal. In the system of the Berne Convention, this is a matter left to be regulated by contracting states.<sup>1162</sup>

<sup>1158</sup> See Von Ungern-Sternberg 1973, at 62, note 2, Hilty 1986, at 212, Drexl 1990, at 82-83, Lucas & Lucas 2001, no. 694, at 536-537, Von Lewinski 2004, at 11, Gervais 2005, at 351, Bernault & Lebois 2006, no. 130-131, at 55-56, Gervais 2006, at 34 and Gervais 2010b, at 26. Obviously if the coming into being of copyright depends on the requirement to become a member of a CMO, there is a breach of art. 5(2) of the Berne Convention. See e.g. Hilty 1986, at 212 and Doutrelepon 1998, at 543.

<sup>1159</sup> See Olsson 2005, Koskinen-Olsson 2006 and Koskinen-Olsson 2010.

<sup>1160</sup> See Olsson 2005, para. 6.4, on these ‘opt out’ mechanisms in the laws of the Nordic countries.

<sup>1161</sup> See Ficsor 2006, at 48 and Ficsor 2010, at 62.

<sup>1162</sup> See e.g. Baum 1932, at 930: ‘*Die Frage ... welche Verwertungsmöglichkeiten ein Urheber hat, ist eine Frage der “étendue” des Schutzes, des Schutzzumfanges. Ob und in welchem Umfange solche Verwertungsmöglichkeiten bestehen, hängt daher lediglich von der nationalen Gesetzgebung ab.*’

*Other 'Opt Out' Models*

The question of compatibility with the prohibition on formalities has been raised in relation to other 'opt out' models as well. One example is the government-operated levy or tax system that one scholar proposed a few years ago to legalize peer-to-peer file sharing.<sup>1163</sup> It was suggested to have the rights of reproduction, communication to the public and making available to the public replaced with a compensation scheme. For this purpose, a levy or tax would be imposed on the sale of devices or services that consumers use when sharing files over peer-to-peer networks.<sup>1164</sup> Right owners could 'opt out' of the compensation scheme by making their works available in a given 'digital file format' capable of conveying RMI and perhaps incorporating DRM technology. Works already released in other formats could also be withdrawn from the compensation scheme, but only if right owners would reclaim all copies of these works by giving consumers owning authorized, commercial copies the chance to exchange them for copies in the 'digital file format' free of charge.<sup>1165</sup>

It has been questioned whether the 'opt out' model discussed here complies with the Berne prohibition on formalities.<sup>1166</sup> Some scholars assert that it does not. They argue that it is 'a state-required formality for the enjoyment of minimum exclusive rights'.<sup>1167</sup> By emphasizing that 'international copyright law persists in the notion of exclusive rights', they contend that the proposed compensation scheme is consistent with international copyright law only if exclusivity is the statutory default.<sup>1168</sup> Hence they assert: 'If exclusivity has to be the default . . . , the opt-out mechanism can well be said to be a formality requirement'.<sup>1169</sup> This understanding closely resembles that of legal scholars who deem mandatory collective licensing to be a Berne prohibited formality for the reason that it precludes the enjoyment of exclusive rights.

However, for the same reasons applied to the non-voluntary licensing system and the ECL system, the argument that the 'opt out' model is a Berne prohibited formality because it affects the exclusivity of copyright is not convincing. The 'opt

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<sup>1163</sup> Litman 2004, at 39-50. See also Fisher 2004, at 9-10 and 199-258, proposing a similar compensation system, but based on a voluntary 'opt in' model. Copyright owners would be given the opportunity to be compensated for the online use of their works, if they voluntarily attach a unique file name to their digital works which they could obtain by registering their works with the US Copyright Office.

<sup>1164</sup> Litman 2004, at 44. Alternatively she proposes a model requiring people who wish to engage in non-commercial file sharing to pay, together with their monthly or annual subscription for internet access, a blanket licence fee that would release them from liability for copyright infringement.

<sup>1165</sup> *Ibid.*, at 46-48.

<sup>1166</sup> See Peukert 2005, at 60-69 and, indirectly, Gervais 2005, at 351 and Gervais 2006, at 34.

<sup>1167</sup> Peukert 2005, at 67. See also Gervais 2005, at 351 and Gervais 2006, at 34, stating: 'A government-operated levy or tax system that would replace exclusive rights guaranteed by the Berne Convention by a compensation regime (e.g. a levy) would not only have to comply with the three-step test (to validate the exception) but may also constitute a prohibited formality'.

<sup>1168</sup> See Peukert 2005, 60-69, at 67.

<sup>1169</sup> *Ibid.*, at 61 and 67, confirming: 'These exclusive rights have to come into existence without further formalities as the statutory default'.

out' model is part of a levy or tax system, which is an exception to copyright. To be consistent with international copyright law, the system must first of all comply with the three-step test laid down in the international copyright treaties.<sup>1170</sup> If it does not, it is not permitted to adopt the levy or tax system and the question of whether 'opting out' is consistent with the Berne prohibition on formalities would be totally redundant.

If the proposed compensation system satisfies the three-step test, on the other hand, it is permitted to limit the exclusive enjoyment of copyright. This means that the 'opt out' procedure could only be qualified as a Berne prohibited formality if it affects the enjoyment or the exercise of copyright, not because it affects copyright exclusivity. In fact, it may well be that the possibility to 'opt out' eases compliance with the three-step test because it mitigates some of the adverse effects of the proposed copyright exception. That is, it enables authors to retain exclusivity by opting out of the compensation scheme (see para. 5.2.2.4).<sup>1171</sup> However, the 'opt out' model does not seem to be a prohibited formality. Akin to the non-voluntary licensing and ECL system, it regulates the extent of protection rather than the enjoyment or the exercise of copyright. The possibility to 'opt out' merely reflects the choice that right owners can make between two different exploitation models that the law offers them. They may choose to enjoy the benefits of the compensation system or to enjoy exclusivity of copyright by withdrawing their works from the compensation system.<sup>1172</sup> That the system requires works to be registered with an agency responsible for collecting and distributing the levy or tax does not seem to make a difference.<sup>1173</sup> It is comparable with the need to become a member of, and to register works with, a particular CMO to receive the compensation collected in a collective licensing scheme.

## 5.4 Conclusion

The international prohibition on formalities is not absolute. As one commentator has recently stated: 'It would be patently incongruous to read Article 5(2) as preventing the mandatory doing of anything.'<sup>1174</sup> This chapter has shown that the prohibition on formalities is defined and delimited in three different manners at least.

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<sup>1170</sup> See art. 9(2) of the Berne Convention with respect to the reproduction right and art. 13 of the TRIPS Agreement and art. 10 of the WCT for copyright in general. See also para. 5.2.2.4 above.

<sup>1171</sup> See also Litman 2004, at 45-46, asserting that 'if such a system allows copyright owners to decline to participate, it seems more likely that it will be deemed at least arguably compliant with our treaty obligations under the Berne Convention and the WIPO Copyright Treaty'.

<sup>1172</sup> See Peukert 2005, at 43, arguing that a levy or tax system with in-built 'opt out' possibility 'does not limit exclusivity as such; it just offers the right holder an additional business model to generate income from the uses of her work in cyberspace'. See also, *ibid.*, at 60.

<sup>1173</sup> But see Peukert 2005, at 67.

<sup>1174</sup> See Gervais 2005, at 351 and Gervais 2006, at 33.

First, its scope of application is limited to ‘these rights’. This means that it only applies to rights that contracting states must secure under the applicable treaty (i.e., the minimum set of rights and the rights subject to national treatment) in respect of works of which they are not the country of origin. The applicable treaty is the Berne Convention, in the context of the Berne Convention and the TRIPS Agreement, and the Berne Convention and the WCT jointly, in the context of the WCT.

Second, the prohibition applies to ‘formalities’ only. This must be understood to mean formalities (e.g., registration and deposit) and external conditions (e.g., notice requirements). Conditions establishing the inner characteristics or the consequences and effects of copyright protection in substance are excluded from its scope.

Third, formalities are banned only to the degree that they affect the ‘enjoyment’ or the ‘exercise’ of copyright. This includes formalities relating to the coming into existence, the maintenance and the enforcement of copyright. The Berne prohibition on formalities does not extend to formalities that regulate the extent of protection or the means of redress afforded to authors to protect their rights.<sup>1175</sup> This suggests that formalities are allowed if they establish the manner of exercising copyright, but not if their non-compliance renders the exercise of rights completely impossible.

Consequently, the international copyright framework seems to leave considerable room for reintroducing formalities. In general, all contracting states are permitted to make the protection of domestic works conditional on formalities. This implies that, in principle, an international system of formalities can be established if all countries would subject the protection of domestic works to the same formalities. However, a system of this kind may be difficult to introduce, given the likely antipathy between states to grant to foreign authors a better protection than to national authors and the risk of circumvention of domestic formalities by manipulating the work’s country of origin. This would necessitate a collaborative and coordinated approach.

Other than instituting a general regime of formalities relating to domestic works, the international copyright treaties also permit contracting states to adopt piecemeal approaches, by subjecting specific types of rights, works or modes of exploitation to formalities. We have seen many examples of this. One example is the protection of RMI. Although the Berne prohibition on formalities applies *mutatis mutandis* to the protection provided for in the WCT, the protection of RMI is arguably not touched by it. This would allow contracting states to make the protection of RMI conditional on the registration or deposit of such information in a publicly accessible database. Another example is the transfer of copyright. The prohibition on formalities appears not to extend to requirements of form that establish the manner in which a transfer of copyright must be effectuated or that prove the existence or scope of the relevant transaction. This allows for the adoption of a recordation system, giving legal effect to copyright transfers only upon recordation in a publicly accessible register.

However, whatever regime of formalities contracting states might be permitted to adopt, it cannot address the various challenges in current copyright law identified in

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<sup>1175</sup> See Baum 1932, at 931.

Chapter 1. What the above examples illustrate is that with the current possibilities of introducing formalities, contracting states may perhaps be able to address part of the rights clearance problems, but they cannot tackle the challenges of establishing legal certainty over copyright claims and advancing the free flow of information.

Even if contracting states subject domestic works to constitutive formalities, the effects on creating legal certainty over copyright claims and enhancing the free flow of information would be minimal. Because of the independence of protection, works for which domestic formalities have not been fulfilled will nevertheless be protected in other contracting states. Thus, these works would only enter the public domain in the country of origin, which would therefore become an unprotected island in a sea of copyright protection. Moreover, only in the country of origin could the validity of copyright claims be legally determined by means of formalities. In other countries, the copyrightability of works must still be tested against the standard of originality applied in the protecting state. Accordingly, while the effect of domestic formalities on facilitating rights clearance may be significant, even in an international context (i.e., if the information that the formalities supply is made available universally), the effects on creating legal certainty over copyright claims and enhancing the free flow of information would be limited to domestic works in the country of origin.

Likewise, the registration of RMI and the recordation of transfer can significantly improve rights clearance by making adequate information available about copyright and transfers of copyright, but these formalities do not enlarge the public domain or shed light on the validity of copyright claims. Therefore, such formalities cannot be introduced with the intention of addressing the challenges of creating legal certainty over copyright claims and enhancing the free flow of information either.

In conclusion, the international copyright framework leaves insufficient room for reintroducing formalities with a view to addressing the various challenges in current copyright law. If the object is to establish legal certainty over copyright claims or to advance the free flow of information, then the prohibition on formalities would need to be altered or perhaps even be abolished altogether. The question is whether this is feasible, given the motives behind the abolition of formalities at the national and the international levels. The next chapter scrutinizes one of the most critical arguments against copyright formalities, namely, that copyright is a 'natural right' that comes into existence automatically and, for this reason, cannot be subject to formalities. As we have concluded in Chapter 3 and Chapter 4, together with the complications and costs that completing formalities at the international level would entail, this was perhaps the most salient reason for the adoption of the prohibition on formalities in 1908 and the abolition of copyright formalities in the various countries around the same time.

## Chapter 6

# Relativizing the Legal-Theoretical Concerns with Copyright Formalities

As concluded in the preceding chapter, reintroducing copyright formalities with the aim to address the various challenges in current copyright law may require changing or abolishing the international prohibition on formalities. Leaving aside the question of whether this is politically feasible, given that a substantive revision of the Berne Convention requires the unanimous support of all contracting states,<sup>1176</sup> the question emerges whether amending or abrogating the prohibition on formalities corresponds with the rationales behind this prohibition. As observed in Chapter 4, the prohibition on formalities was introduced to eliminate the difficulties of fulfilling formalities at the international level and to prevent that authors unnecessarily lose protection as a result of technical failures in the process of securing copyright. Under the influence of natural rights thinking (para. 3.3.2.1), it was considered that copyright should attach automatically upon creation and not upon completing statutory formalities.

While there are a few legal techniques that may help to prevent that authors must comply with formalities in multiple countries to secure international protection (see Chapter 7), it is more difficult to negate or accommodate the philosophical concerns with copyright formalities. The belief that copyright, as a ‘natural right’, cannot be subject to formalities is still very much alive. Even today, various copyright experts maintain that it would undermine the notion that copyright originates directly from the act of creation if the enjoyment or the exercise of copyright were to be subject to formalities.<sup>1177</sup> Therefore, these philosophical concerns deserve closer examination.

This chapter examines whether the philosophical claim that copyright is a natural right necessarily leads to the conclusion that copyright cannot be made conditional on formalities. To this end, it carefully analyzes the property and personality rights theories of copyright, in which the idea of copyright as a ‘natural right’ has its roots. More specifically, it studies whether, and to what degree, these theories accept that property and personality rights, in general, and copyright, in particular, are subject

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<sup>1176</sup> See art. 27(3) of the Berne Convention. See also Hishinuma 2010, at 471.

<sup>1177</sup> See Ginsburg 1994, at 133-134 and 147. See also Dietz 1978, at 24-25 (nos 53 and 54) and Von Lewinski 2008, at 43 (no. 3.25) and 119 (no. 5.58).

to formalities. In addition, this chapter analyzes whether reintroducing formalities is permitted under the concept of copyright as a human right. This question is relevant, because, by accepting that authors enjoy a fundamental right to receive protection for the creations of their mind, it seems to be implied that copyright belongs ‘naturally’ to authors and should be granted by the mere fact of the creation of their works.

After a brief introduction to the concept of copyright as a natural right (para. 6.1), this chapter continues with an in-depth examination of the leading philosophies that introduced this concept in copyright law, i.e., the property rights theory of copyright (para. 6.2) and the personality rights theory of copyright (para. 6.3). Subsequently, it scrutinizes the concept of copyright as a fundamental right (para. 6.4). The chapter concludes with an evaluation and assessment (para. 6.5), demonstrating that there is no ground for asserting that it is inappropriate to subject copyright as a natural right to formalities. Copyright formalities are inconsistent with the existing philosophical framework only in so far as they affect the personal link between the author and his work, which is manifested in the author’s moral rights, in particular.

## 6.1 Introduction to the Concept of Copyright as a Natural Right

As observed in para. 3.3.2.1, since the mid-nineteenth century, copyright formalities are believed to be inconsistent with the idea that copyright is a ‘natural right’ that is born with the creation of an original work of authorship. This theoretical conception suggests that copyright is a pre-existing right, concretized by positive law, to which authors are entitled by nature.<sup>1178</sup> Thus, copyright is thought not to be created by the law. The law only recognizes its existence and defines its legal boundaries.<sup>1179</sup> Also, this theory links copyright to the very nature of the author’s personal creation. This suggests that authors should not only be rewarded for the efforts they put in creating a work (economic rights), but also be protected against acts that can damage or alter their work or harm their name or reputation (moral rights).<sup>1180</sup> Formalities that must be complied with to secure protection or that would otherwise cause prejudice to the author’s economic or personal interests are in conflict with this concept.

The theory of natural rights is not easy to grasp.<sup>1181</sup> For one thing, it is difficult to understand – at least for lawyers in contemporary civil law systems – how a right

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<sup>1178</sup> Geiger 2008, at 108.

<sup>1179</sup> See Dietz 1978, at 25 (no. 54) and Von Lewinski 2008, at 119 (no. 5.58).

<sup>1180</sup> See Sterling 1998, at 306. Note that moral rights are not recognized in every country worldwide. One of the most well-known examples of countries that do not, or only marginally, protect moral rights is the US. In the UK, moral rights were fully recognized only when the Copyright, Designs and Patents Act 1988 became effective. See Bently & Sherman 2009, at 241-260.

<sup>1181</sup> See Vivant 1997, at 70-71: ‘we do not know, for our part, what is natural law’. See also Geiger 2008, at 108-109: ‘Because of its vagueness, natural law very easily provides the possibility for misuse and manipulation in favour of the opinion which one would like to uphold.’

may exist ‘naturally’, i.e., why it ought to be acknowledged or recognized and thus would be beyond the authority of a legislator to dismiss.<sup>1182</sup> Probably the concept is best understood if one realizes that, historically, natural rights derived from natural law. Natural law is often understood as a law that either comes from God or has its origin in ‘reason’. It prescribes ‘a body of rules, governing human conduct, which were conceived as part of a natural order of things’.<sup>1183</sup> The transition from natural law doctrine to that of subjective natural rights can be explained by the fact that the natural law doctrine ‘assumes the existence of natural rights, inborn in man, that are valid before any positive legal order is established’.<sup>1184</sup> Since natural law is rooted in morality (either that of God or that of ‘reason’), the authority of these pre-existing legal norms is also determined by morality. Hence, something in the natural order of things determines that one is morally entitled to a certain right. This may be referred to as a claim of ‘natural justice’, a claim that typically is of universal application.<sup>1185</sup> It follows that, if such a claim exists, the legislator will also be morally obliged to recognize this right and embody it in positive law. In this respect, the ‘function of a positive legal order (i.e. of the state), which terminates the state of nature, is ... to guarantee the natural rights by stipulating corresponding obligations’.<sup>1186</sup>

As observed, the idea that copyright is a ‘natural right’ arising automatically with the creation of a work can be traced back to the continental European property and personality rights theories of copyright (*droit d’auteur*), which developed in France and Germany in the course of the nineteenth century (see para. 3.3.2.1). These two theories assume the pre-existence of a ‘natural’ entitlement of man to the product of his mind. The property rights theory justifies this claim by arguing, in line with the labour theory of John Locke, that intellectual goods deserve protection because they are the fruits of the author’s labour. This theory thus adopts a largely object-oriented approach. The personality rights theory, on the other hand, states that a work should be protected since it is an expression of the author’s personality. By emphasizing the personal element in the author’s creation to substantiate the claim that copyright is a natural right, this theory essentially takes a subject-oriented approach.

The property and personality rights theories of copyright continue to represent a deep current in contemporary copyright thinking. In the continental European *droit*

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<sup>1182</sup> In both common law and civil law legal systems, the rule of law determines that legal norms must be laid down in a positive legal order to have normative effect. While in the common law legal system, great weight is attached to the body of precedent developed in case law, in the civil law legal system, all norms must be laid down in positive law. There is not much room, therefore, for recognition of a ‘natural’ legal order outside the positive legal order. At the most, in the civil law legal system, natural law is used as a critical standard to evaluate the positive legal order. See Burns 1995, at 27.

<sup>1183</sup> Jones 1994, 72-81, at 74.

<sup>1184</sup> Kelsen 1967, at 129.

<sup>1185</sup> Aristotle (1998), at 124 (book V, sec. 7), already acknowledges that natural justice (as distinguished from legal justice) ‘everywhere has the same force and does not exist by people’s thinking this or that’. See also Buckle 1993, at 162, concluding that, from an Aristotelian point of view, natural justice is ‘independent of particular positive laws, and applies to all people everywhere’.

<sup>1186</sup> Kelsen 1967, at 129.

*d'auteur* tradition, in particular, copyright is still regarded as a mixture of property and personality interests.<sup>1187</sup> The property rights theory is manifested most clearly in the prohibition and reward elements of copyright law, which concentrate chiefly on material interests (i.e., exploitation rights).<sup>1188</sup> The personality rights element, on the other hand, materializes particularly in connection with moral rights, which concern the author's immaterial interest.<sup>1189</sup> The property and personality rights elements of copyright, including their underlying ideologies, also persist in the idea of copyright as a fundamental right. Both the Universal Declaration of Human Rights and other human rights treaties confer on authors the right to benefit from the protection of the moral and material interests resulting from their intellectual creations.<sup>1190</sup>

In the next sections, the property and personality rights theories of copyright and the concept of copyright as a human right are examined with the aim of establishing whether and to what extent they allow a reintroduction of copyright formalities.

## 6.2 The Property Rights Theory of Copyright

One theory is which the concept of copyright as a 'natural right' is manifested is the property rights theory of copyright. This theory suggests that authors are 'naturally' entitled to enjoy the property in their creations, because they result from the labour they invested in them. It has been claimed, on the basis of this theory, that copyright cannot be subject to formalities, because, as a 'natural authorial property right',<sup>1191</sup> it ought to be protected from the moment of creation of a work of authorship.

This section examines the validity of this claim by scrutinizing the philosophical basis of the property rights theory, which can be found in the Lockean labour theory of property (para. 6.2.1), and analyzing how this theory has historically been applied by copyright scholars to substantiate this claim (para. 6.2.2). It concludes that, while the Lockean philosophy explains how property comes into being as a 'natural right' through the labour that a person exerts on natural resources, it does not suggest that property is necessarily absolute and unconditional. In fact, Locke emphasizes that in the civil society, a representative government may always restrict the enjoyment and the exercise of property by positive law, if the public interest so requires.

Even so, as our analysis shows, throughout the history of copyright, the Lockean labour theory of property has been consistently applied, not only to justify copyright protection, but also to support the claim that, as a natural right, copyright should be protected independent of formalities. Because this claim cannot be based on the

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<sup>1187</sup> See Hugenholtz 2001, at 346. See also Kase 1967, at 2: 'Copyright is generally regarded as a form of property, a personal right of the author, or a combination of personal and property rights.'

<sup>1188</sup> Guibault 2006, at 90.

<sup>1189</sup> *Ibid.*, at 90.

<sup>1190</sup> See, in particular, art. 27(2) of the Universal Declaration of Human Rights [UDHR] and art. 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights [ICESCR].

<sup>1191</sup> The phrase 'natural authorial property right' is borrowed from Deazley 2008a, para 2.

philosophy behind natural property, the question arises whether the aversion against formalities is an incident of copyright law or symptomatic for (natural) property law in general. To answer this question, the last part of this section draws a comparison with other private property rights. In particular, it examines how they are regulated and whether they can be subject to formalities (para. 6.2.3). This section reveals that several other types of property rights are conditional on formalities, which suggests that the assumed incompatibility between formalities and (natural) property rights is less obvious than what copyright law seems to imply at first sight.

### 6.2.1 THE PHILOSOPHICAL FOUNDATION OF PROPERTY

One of the main justifications for copyright protection, which has been applied both historically and currently, is that the fruits of the author's personal labour should be his because he has worked for them. This argument, which lays the groundwork for the idea of copyright as a property right, is based on the labour theory of property that was introduced by John Locke in his *Second Treatise on Civil Government*.<sup>1192</sup>

Whether Locke's labour theory of property also extends to intellectual property is uncertain. Legal scholars are divided on this question.<sup>1193</sup> In the part of the *Second Treatise* where Locke explains his labour theory of property, he makes no reference to intellectual property but only to physical and tangible property.<sup>1194</sup> Even so, in the eighteenth and nineteenth centuries, the labour theory of property was often applied by copyright scholars to defend the idea of copyright as a 'natural authorial property right'<sup>1195</sup> and, later, also to make a case for disentangling copyright and formalities (see para. 6.2.2). But even today, scholars repeatedly refer to it as a justification for copyright,<sup>1196</sup> arguing that, given the labour that authors put into creating their works, they are 'naturally' entitled to enjoy the fruits of their creations.<sup>1197</sup>

Although the question of whether the Lockean labour theory of property may be applied analogously to copyright is interesting and challenging, it goes beyond the

<sup>1192</sup> See Locke 1690 (1988), II (at 265-428) and, in particular, Chapter V: 'Of property' (at 285-302), in which Locke describes his labour theory of property. In this book, the indications I and II refer to the First Treatise and the Second Treatise of Locke's *Two Treatises of Government*, respectively.

<sup>1193</sup> Some scholars assert that Locke's labour theory of property also applies to intellectual property (see e.g. Zemer 2006, at 897 and 906-935), while other scholars argue that, at the most, it can be applied *mutatis mutandis* to the intangible realm (see e.g. Gordon 1993, at 1558-1559 and Reese 1995, at 708 and 710) or that it does not extend to intellectual property (see e.g. Drahos 1996, at 47, Craig 2002, at 21, Epstein 2005, at 21 and Deazley 2008a, para. 7).

<sup>1194</sup> See Locke 1690 (1988), II, Chapter V: 'Of property' (at 285-302), where he gives various examples of conventional property, such as land (sec. 32); products from agriculture (sec. 37), forestry (sec. 43) and fishery (sec. 30); and industrial goods (secs 42 and 43), but not of intellectual property.

<sup>1195</sup> The phrase 'natural authorial property right' is borrowed from Deazley 2008a, para 2.

<sup>1196</sup> See e.g. Hughes 1988, Gordon 1993, Senftleben 2004, at 10-12 and Zemer 2006.

<sup>1197</sup> See Craig 2002, at 15-21, for an exhaustive overview of case law and scholarly writings applying the labour theory of property to support the idea of a 'natural' entitlement to authorial creations.

scope of this book. More interesting for our research is the question of whether the labour theory of property – supposing that it can be applied to intellectual property, in general, and copyright, in particular – gives reason for the claim that copyright as a natural authorial property right ought to be protected without formalities.

This section examines this question by analyzing the Lockean labour theory of property (para. 6.2.1.1) and placing it in the broader context of the *Second Treatise*. In particular, it investigates how property is regulated in Locke's civil and political society (para. 6.2.1.2) and whether property in the civil and political society can still be acquired by labour (para. 6.2.1.3). It concludes that Locke's concept of property by labour does not prevent property rights from being statutorily limited or subject to formalities if there is a legitimate public interest for doing so (para. 6.2.1.4).

#### 6.2.1.1 THE LOCKEAN LABOUR THEORY OF PROPERTY

A central theme in Locke's *Second Treatise on Civil Government* is to explain why natural persons are entitled to the protection of their property, which he understands to include people's 'Lives, Liberties and Estates',<sup>1198</sup> in civil society. Locke believes that civil society is created precisely to protect property that people have acquired in the 'state of nature', thereby presupposing that property exists independently of and prior to the creation of civil society.<sup>1199</sup> Thus, Locke differentiates civil society from the pre-political state of nature, which he describes as a state of perfect freedom in which all men are equal. In the state of nature, every individual has legislative and judicial powers as well as 'the Executive Power of the Law of Nature'.<sup>1200</sup>

In his labour theory, Locke assumes that anyone in the state of nature can acquire property by appropriating the commons through his labour. He argues that, although God has given the earth and all the fruits that it naturally produces to mankind in common, 'there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man.'<sup>1201</sup> He finds this means of appropriation of the commons in the labour that man exerts upon natural resources. Because Locke believes that any person owns himself and, therefore, his own labour, the object that a person's labour enters into becomes the property of this person naturally. He expresses this as follows:

'every Man has a *Property* in his own *Person*. ... The *Labour* of his *Body*, and the *Work* of his *Hands* ... are properly his. Whatsoever then he removes out of the *State* that *Nature* hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state *Nature* placed it

<sup>1198</sup> Locke 1690 (1988), II, secs 87 (at 323) and 123 (at 350).

<sup>1199</sup> Strauss 1952, at 489.

<sup>1200</sup> Locke 1690 (1988), II, secs 4 (at 269) and 13 (at 275).

<sup>1201</sup> *Ibid.*, II, sec. 26 (at 286-287).

in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.<sup>1202</sup>

What Locke describes here is that, as long as there is ‘enough, and as good left in common for others’, man can by his labour acquire a property in the commons. In a subsequent section, he adds that, although the state of nature is a state of plenty,<sup>1203</sup> ‘nothing was made by God for Man to spoil or destroy’. For this reason, he believes that a person can appropriate only as much as he can make use of ‘to any advantage of life before it spoils’.<sup>1204</sup> All the rest must remain in the commons.<sup>1205</sup>

Apart from the ‘enough and as good’ and ‘no spoliation’ criteria, Locke’s labour theory contains no other limitations to the natural appropriation of property.<sup>1206</sup> This suggests that the Lockean concept of natural appropriation is fairly broad and leaves little room for regulating naturally acquired property. If applicable to copyright law, the ‘enough and as good’ criterion may explain the idea/expression dichotomy<sup>1207</sup> or perhaps certain free speech exceptions under copyright law, such as quotations and parodies.<sup>1208</sup> Likewise the ‘no spoliation’ provision may perhaps validate the limited duration of copyright.<sup>1209</sup> But, in general, Locke’s labour theory of property does not seem to justify the introduction of a statutory regime of limitations or formalities in copyright law. This can be explained by the simple fact that, because the setting of Locke’s labour theory is the state of nature, which is not centrally administered but characterized by individual liberty, it is not concerned with the prospect of imposing statutory or government-regulated limits on naturally acquired property.<sup>1210</sup>

Arguing that the inherent limitations of just appropriation are the only limitations to naturally acquired property, however, is incorrect and misleading. Locke clearly distinguishes the state of nature from the civil and political society. He argues that,

<sup>1202</sup> Ibid., II, sec. 27 (at 287-288).

<sup>1203</sup> Ibid., II, sec. 31 (at 290), where Locke, in explaining this state of plenty, cites the New Testament (1 Tim. vi. 12): ‘*God has given us all things richly*’.

<sup>1204</sup> Ibid., II, sec. 31 (at 290). But see, *ibid.*, secs 46 to 50 (at 300-302), stating that the introduction of ‘durable’ goods and money, in particular, gave a person the opportunity ‘to heap up as much ... as he pleased’, thus suggesting that storage of goods is an accepted phenomenon in the state of nature.

<sup>1205</sup> Ibid., II, sec. 31 (at 290), in which Locke readily admits that, in the state of nature, the ‘same Law of Nature, that does by this means give us Property, does also *bound that Property* too’.

<sup>1206</sup> But see Macpherson 1951, at 560-565, reading a third limitation in the *Second Treatise*, namely, that a person can only appropriate as much as he has mixed his labour with, thus suggesting that a person cannot acquire more property than he can produce. However, Macpherson admits that it is uncertain whether such ‘limitation on the natural right to appropriate’ was ever entertained by Locke.

<sup>1207</sup> See Hughes 1988, at 314: ‘some ideas and facts cannot be removed from the common because there would not be the slightest chance of there being “enough and as good” afterwards’.

<sup>1208</sup> See Gordon 1993, at 1583 et seq. See also Senftleben 2004, at 34-41.

<sup>1209</sup> See e.g. Zemer 2006, at 924-925, arguing that, after some time, works must enter the public domain to prevent ‘spoilage of social value’.

<sup>1210</sup> See Strauss 1952, at 491 et seq.

despite the legislative, judicial and executive powers of the law of nature, people in the state of nature cannot appropriately protect their lives, liberties and estates, since they are constantly exposed to possible infringement of their natural rights by other individuals.<sup>1211</sup> The insecurities of the state of nature induce people to exit this state and join the civil and political society. Accordingly, for Locke, the ultimate purpose for creating this society is the preservation of people's lives, liberties and estates.<sup>1212</sup> As the following section shows, when entering the civil and political society, people subject themselves and their property to a representative government that can enact binding laws that may limit private property for public interest objectives.

### 6.2.1.2 THE REGULATION OF PROPERTY IN THE CIVIL SOCIETY

Although the state of nature that Locke portrays in his *Second Treatise*, in theory, is 'a *State of perfect Freedom ... and ... Equality*' that 'has a Law of Nature to govern it',<sup>1213</sup> in reality, it is a state of insecurity. Since everyone is free and equal, the lives, liberties and estates of people are 'constantly exposed to the Invasion of others',<sup>1214</sup> Most people are 'no strict Observers of Equity and Justice'.<sup>1215</sup> Also, since people in the state of nature favour themselves, their legislative, judicial and executive powers cause injustice. It is difficult for men in the state of nature 'to be Judges in their own Cases', because self-love makes 'Men partial to themselves and their Friends' and ill-nature, passion and revenge carries them too far in punishing others.<sup>1216</sup>

For Locke, the state of nature is 'not to be endured',<sup>1217</sup> for it fails to sufficiently safeguard the right of self-preservation, which he believes is 'the most fundamental of all rights'.<sup>1218</sup> He thinks that this is the most important reason for people to leave the state of nature: 'The great end of Mens entering into Society is the enjoyment of their Properties in Peace and Safety'.<sup>1219</sup> By creating the civil and political society, people may remedy the various inconveniences of the state of nature.<sup>1220</sup>

Locke maintains that the logical consequence of this is that the social contract by which people, of their own free will, enter the civil society, obliges them to 'give up

<sup>1211</sup> Locke 1690 (1988), II, sec. 123 (at 350).

<sup>1212</sup> Ibid., II, sec. 124 (at 350-351): 'The great and *chief end* ... of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property*.'

<sup>1213</sup> Ibid., II, secs 4 (at 269) and 6 (at 271).

<sup>1214</sup> Ibid., II, sec. 123 (at 350).

<sup>1215</sup> Ibid., II, sec. 123 (at 350).

<sup>1216</sup> Ibid., II, secs 13 (at 275) and 125 (at 351).

<sup>1217</sup> Ibid., II, sec. 13 (at 276).

<sup>1218</sup> Strauss 1952, at 483. See Locke 1690 (1988), I, sec. 88 (at 206): 'The first and strongest desire God Planted in Men, and wrought into the very Principles of their Nature being that of Self-preservation'.

<sup>1219</sup> Locke 1690 (1988), II, sec. 134 (at 355).

<sup>1220</sup> Ibid., II, secs 13 (at 276), 90 (at 326), 127 (at 325) and 136 (at 359).

all their Natural Power to the Society they enter into'.<sup>1221</sup> Furthermore, 'because no *Political Society* can be nor subsist without having in itself the Power to preserve the Property',<sup>1222</sup> each member of the society must authorize 'the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require'.<sup>1223</sup> By this political contract, people subject themselves to the 'Supreme Government',<sup>1224</sup> and assign the power to a '*Legislative*, which the publick has chosen and appointed' and which is 'acting pursuant to their trust'.<sup>1225</sup>

Accordingly, when entering society, people 'take Sanctuary under the establish'd laws of Government, and therein seek *the preservation of their Property*',<sup>1226</sup> i.e. 'of their Lives, Liberties and Estates'.<sup>1227</sup> Thus, while the state of nature is governed by natural law, the civil and political society has positive laws to govern it.<sup>1228</sup> Locke, in fact, attaches great importance to positive law,<sup>1229</sup> provided that it be 'indifferent, and the same to all Parties'<sup>1230</sup> and enacted by a representative government to whom the power of the members of society has been transferred by fiduciary contract.<sup>1231</sup> Locke believes that laws so enacted represent '*the consent of the Society*',<sup>1232</sup> and for this reason can rightfully bind the members of the civil and political society.<sup>1233</sup>

Locke asserts that people entering the civil society submit all their possessions to the laws of the community.<sup>1234</sup> By subjecting themselves to government, they confer the power on the legislature 'to make Laws for the regulating of *Property* between the Subjects one amongst another'.<sup>1235</sup> Even so, he adds that governments 'can never have a Power to take to themselves the whole or any part of the Subjects Property, without their own consent'.<sup>1236</sup> He reasons that 'this would be in effect to leave them no *Property* at all', while the preservation of property, being the end of civil society,

<sup>1221</sup> Ibid., II, sec. 136 (at 359). Ibid., II, secs 87 to 89 (at 323-325).

<sup>1222</sup> Ibid., II, sec. 87 (at 324).

<sup>1223</sup> Ibid., II, sec. 89 (at 325).

<sup>1224</sup> Strauss 1952, at 487.

<sup>1225</sup> Locke 1690 (1988), II, secs 134 (at 356) and 240 (at 426-427).

<sup>1226</sup> Ibid., II, sec. 127 (at 352).

<sup>1227</sup> Ibid., II, secs 87 (at 323) and 123 (at 350).

<sup>1228</sup> Ibid., II, sec. 136 (at 359): 'the Community put the Legislative Power into such hands as they think fit, with this trust, that they shall be govern'd by *declared Laws*'.

<sup>1229</sup> Strauss 1952, at 489. See Locke 1690 (1988), II, sec. 124 (at 351), arguing that what was wanting in the state of nature is 'an *establish'd*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them', and sec. 134 (at 355), referring to positive law in the civil and political society as 'the great instrument and means' to ensure that people can enjoy 'their Properties in Peace and Safety'.

<sup>1230</sup> Locke 1690 (1988), II, sec. 87 (at 324). Ibid., II, sec. 142 (at 363).

<sup>1231</sup> Ibid., II, sec. 94 (at 329-330), on the representative government, and secs 134 (at 356) and 240 (at 426-427), on the fiduciary contract of assignment of powers.

<sup>1232</sup> Ibid., II, sec. 134 (at 356).

<sup>1233</sup> Ibid., II, secs 95 to 99 (at 330-333).

<sup>1234</sup> Ibid., II, sec. 120 (at 348).

<sup>1235</sup> Ibid., II, sec. 139 (at 361).

<sup>1236</sup> Ibid., II, sec. 139 (at 361).

‘necessarily supposes and requires, that the People should *have Property*’.<sup>1237</sup> Thus, governments cannot ‘dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure’.<sup>1238</sup> If they want to restrict or take away a man’s property, they can only do so ‘with his own consent, *i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them’.<sup>1239</sup>

Consequently, Locke reasons that in the civil and political society, the enjoyment and the exercise of property can be restricted by positive law, provided that this law is issued by a representative government. Nonetheless, there are limits to the degree to which governments can regulate private property. Locke states: ‘the power of the Society, or *Legislative* constituted by them, *can never be suppos’d to extend farther than the common good*’.<sup>1240</sup> Thus, all laws should be designed for ‘no other *end*, but the *Peace, Safety*, and *publick good* of the People.’<sup>1241</sup> Also, Locke maintains that all laws must ‘be conformable to the Law of Nature, *i.e.* to the will of God, of which that is a Declaration.’<sup>1242</sup> This means that, since ‘the *fundamental Law of Nature* [is] *the preservation of Mankind*’, all ‘*Humane Laws*’ should be directed to no other end but preservation as well.<sup>1243</sup> Hence, the government ‘is obliged to secure every ones Property’,<sup>1244</sup> but only ‘as far as is possible’.<sup>1245</sup> Some limitations to private property must be set if that is required for ‘the preservation of ... the rest of that Society’.<sup>1246</sup> This explains why Locke asserts that, when entering the civil and political society, people give up their natural power and put it ‘into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require’.<sup>1247</sup>

### 6.2.1.3 PROPERTY BY LABOUR IN THE CIVIL SOCIETY

The preceding section has shown that, in Locke’s civil and political society, private property is not necessarily absolute and unconditional but can be subject to statutory limitations issued for public interest considerations. The question remains what then is left of the Lockean labour theory of property. Does it still have normative value in Locke’s construction of the civil and political society? Or was it mainly introduced by Locke to justify the creation of the civil and political society (given that, if Locke

<sup>1237</sup> *Ibid.*, II, secs 138 (at 360) and 139 (at 361).

<sup>1238</sup> *Ibid.*, II, sec. 138 (at 361).

<sup>1239</sup> *Ibid.*, II, sec. 140 (at 362).

<sup>1240</sup> *Ibid.*, II, sec. 131 (at 353).

<sup>1241</sup> *Ibid.*, II, secs 131 (at 353) and 142 (at 363).

<sup>1242</sup> *Ibid.*, II, sec. 135 (at 358), where Locke unambiguously remarks that ‘the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others’.

<sup>1243</sup> *Ibid.*, II, sec. 135 (at 357-358).

<sup>1244</sup> *Ibid.*, II, sec. 131 (at 353).

<sup>1245</sup> *Ibid.*, II, sec. 88 (at 324-325).

<sup>1246</sup> *Ibid.*, II, sec. 129 (at 352).

<sup>1247</sup> *Ibid.*, II, sec. 131 (at 353). *Ibid.*, II, secs 89 (at 325), 134 (at 355-356) and 135 (at 357).

maintains that the end of society is the preservation of property, he must also prove that property predates society)? Put differently, the question is whether, in the civil and political society, property can still be perceived as a ‘natural right’ arising from labour or whether it must be seen as a creation of positive law *pur et simple*.

Some scholars, including well-known political philosophers such as Leo Strauss, think that labour alone is insufficient to establish a title to property in Locke’s civil and political society.<sup>1248</sup> Strauss argues that while labour was the only valid property title in the state of nature, in the civil and political society ‘the natural law regarding property ceases to be valid’.<sup>1249</sup> He thinks that, in order to regulate property between the subjects of society, the government should define what property can be acquired and to which extent things can actually be propertized.<sup>1250</sup> This suggests that, in the civil and political society, property can be regulated by positive law only.<sup>1251</sup>

However, to say that, in the civil and political society, labour alone is insufficient to supply a title to property and that ‘once civil society is formed ... the natural law regarding property ceases to be valid’<sup>1252</sup> is not to say that, in the civil and political society, a valid property title cannot begin by labour. Locke states that ‘Man ... had still in himself *the great Foundation of Property*’.<sup>1253</sup> Although people ‘by *positive agreement, settled a Property amongst themselves*’,<sup>1254</sup> he thinks that they can still acquire property by exerting labour upon natural resources. He explains:

‘And amongst those who are counted the Civiliz’d part of Mankind, who have made and multiplied positive Laws to determine Property, this original Law of Nature for the *beginning of Property*, in what was before common, still takes place’.<sup>1255</sup>

Thus, in the civil and political society, property can still be acquired by exerting labour on the commons. Nevertheless, positive law determines the extent to which it can be enjoyed and exercised by members of the society.<sup>1256</sup> This does not mean that

<sup>1248</sup> Strauss 1952, at 493 (‘One privilege enjoyed by man in the state of nature is indeed denied to man living in civil society: labor no longer creates a sufficient title to property’) and 495 (‘Labor ceases to supply a title to property in civil society’).

<sup>1249</sup> *Ibid.*, at 489-490.

<sup>1250</sup> *Ibid.*, at 498. See Locke 1690 (1988), II, sec. 50 (at 302): ‘For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions.’

<sup>1251</sup> Strauss 1952, at 489 and 495.

<sup>1252</sup> *Ibid.*, at 489.

<sup>1253</sup> Locke 1690 (1988), II, sec. 44 (at 298).

<sup>1254</sup> *Ibid.*, II, sec. 45 (at 299).

<sup>1255</sup> *Ibid.*, II, sec. 30 (at 289). *Ibid.*, II, sec. 28 (at 288-289), where Locke remarks: ‘We see in Commons, which remain so by Compact, that ‘tis the taking any part of what is common, and removing it out of the state Nature leaves it in, which *begins the Property*’. In Locke’s *Second Treatise*, civil society, political power and positive laws are created by ‘compact’. See e.g. Laslett 1988, at 113-114.

<sup>1256</sup> See Macpherson 1951, at 562, suggesting that, in the civil and political society, property acquired by labour is not an entity of natural law.

property in the civil and political society is a purely statutory creation.<sup>1257</sup> Rather, society demands it to be clearly defined and regulated by positive law, so as to keep order and peace between its individual members.<sup>1258</sup>

#### 6.2.1.4 CONCLUSION

The Lockean concept of property by labour is not as absolute and unconditional as it appears at first sight. Although the limitations to the appropriation of property in the state of nature leave little room for regulating property that a man naturally acquires by labour, the limits that can be put to the enjoyment and the exercise of property in the civil and political society are relatively broad. While governments are generally obliged to secure private property and, therefore, cannot arbitrarily deprive a person of his rightful possessions, they may limit and even take away a person's property if that is required for the attainment of regulatory or public interest objectives.

Accordingly, assuming that the Lockean labour theory of property also applies to intellectual property, it can be concluded that, from a Lockean viewpoint, copyright can always be statutorily restricted if that would be in the public interest. This sheds new light on the possibility of subjecting it to formalities. Although copyright under the labour theory can be said to arise from the creation of a work, the legislator may always decide to subject its enjoyment or exercise to formalities if there are genuine public interests that take priority over the private interests of copyright owners.

As a sidenote, on one occasion, Locke has even proposed subjecting copyright to formalities. This occurred in his *Memorandum on the 1662 Licensing Act*<sup>1259</sup> and the correspondence on the same topic with John Freke and Edward Clarke.<sup>1260</sup> In these writings, Locke strongly opposed the perpetual monopoly that the London stationers enjoyed pursuant to the Licensing Act of 1662.<sup>1261</sup> Responding to a petition in which the stationers heartily called for a continuation of their printing monopoly,<sup>1262</sup> Locke stated that it would be better if Parliament would 'secure the Authors property in his copy, or his to whom he has transferd it'.<sup>1263</sup> He proposed granting to authors a right to reprint on condition that the work was marked with the author's or the publisher's name or that three copies of any printed work were deposited for the use of the royal

<sup>1257</sup> See Strauss 1952, at 497-498, arguing that, because property antedates society and members of the society can still acquire it by labour, it must exist independently of the civil and political society.

<sup>1258</sup> *Ibid.*, at 494.

<sup>1259</sup> 'Locke's Memorandum on the 1662 Act', in: De Beer 1976-1989, V (1979), 785-791, and *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

<sup>1260</sup> For this correspondence, see De Beer 1976-1989, V (1979), at 282-283 (letter no. 1856), at 288-289 (letter no. 1858), at 291-292 (letter no. 1860), at 294-295 (letter no. 1862) and at 785-796.

<sup>1261</sup> See Astbury 1978 and Deazley 2008a.

<sup>1262</sup> See 'John Freke and Edward Clarke to Locke, 14 March [1695]', in: De Beer 1976-1989, V (1979), at 291-292 (letter no. 1860), indicating that members of the Stationers' Company urged Parliament to secure 'the regulation of property and disposal of it by making their Register the Standard of it'.

<sup>1263</sup> 'Locke's comments on the Licensing Bill, 1695', in: De Beer 1976-1989, V (1979), 795-796, at 795.

library and the public libraries of the Universities of Oxford and Cambridge.<sup>1264</sup> The certificate of deposit should vest in the author the sole right to reprint and to publish the work. To this effect, he proposed adopting a provision along these lines:

‘A receipt under the hand of the Kings Library Keeper and under the hand of the Vice Chancellor of each university to whom they are deliverd who are hereby required to give such receipts, for the said books, shall vest a priviledg in the Author of the said book his executors administrators and assignes of solely reprinting and publishing the said book for \_\_\_\_ years from the first edition thereof.’<sup>1265</sup>

Accordingly, although Locke condemned the stationers’ abuse of the registration process and their ignorance of the deposit requirement,<sup>1266</sup> his writings reveal that he did not at all object to subjecting the protection of copyright (in particular, authors’ rights) to compliance with statutory formalities – perhaps because this would pursue certain public interest objectives that were at the heart of his *Memorandum*, such as the enhancement of public access to literature and scholarship, the stimulation of the dissemination of information and the encouragement of study.<sup>1267</sup>

#### 6.2.2 THE IDEA OF COPYRIGHT AS A NATURAL PROPERTY RIGHT

Although it is uncertain whether the Lockean labour theory of property is applicable to copyright, in the eighteenth and nineteenth centuries, it was consistently invoked by scholars to prove that copyright is a natural property right that vests in the author and originates from authorial labour.<sup>1268</sup> The idea was introduced by book publishers in various European countries. In an attempt to protect their business, they prompted debates about the special nature of literary property, arguing that books are the fruits of creative labour and thus the property of their creators.<sup>1269</sup> This allowed publishers to retain their monopoly, as authors usually assigned all their rights to them.

From the mid-nineteenth century onwards, Locke’s labour theory of property was called upon once again, this time to support the idea that, as a natural property right, copyright should be protected ‘automatically’ with the creation of a work. It was on

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<sup>1264</sup> *Ibid.*, at 795-796.

<sup>1265</sup> *Ibid.*, at 796.

<sup>1266</sup> ‘Locke’s Memorandum on the 1662 Act’, in: De Beer 1976-1989, V (1979), 785-791, at 786, where Locke argues that stationers sometimes abused the register for their own gain, and 790-791, where he states that they often deliberately neglected the deposit obligation under the 1662 Licensing Act.

<sup>1267</sup> See Zemer 2006, at 899-900 and 900-905.

<sup>1268</sup> See e.g. Kamina 2001, at 390, Pfister 2005, at 124 (footnote 20) and Deazley 2008a, paras 2 and 7.

<sup>1269</sup> See Kase 1967, at 8 (and the references therein) and Gieseke 1995, at 115-135. See also Ladas 1938, I, at 5, describing that the idea of intellectual property rights was first advanced in eighteenth-century Germany and from there spread to other continental European countries, such as France.

the strength of this argument that, in continental European states in particular, calls were made to protect copyright independently from compliance with formalities.

To explain how the idea of copyright as a natural authorial property right entered the copyright arena and ultimately gave rise to the belief that copyright ought to be protected independently of formalities, this section describes the binary application of the Lockean labour theory of property in the field of copyright law in eighteenth and nineteenth century Europe. It explains how this theory was used to make a case for property in intellectual creations (para. 6.2.2.1) and for disentangling copyright and formalities (para. 6.2.2.2). It will be seen that scholars invoking Lockean theory to substantiate their case merely concentrated on the part where Locke explained his labour theory, without putting this theory in the broader context of Locke's civil and political society. The outcomes are therefore misleading. Although the labour theory may explain why copyright vests in the author, we have seen that it does not support the idea that copyright is absolute and unconditional and therefore cannot be subject to formalities. Even so, toward the end of the nineteenth century the idea spread that authors should enjoy a 'natural' and formality-free property in their creations.

#### 6.2.2.1 THE RECOGNITION OF PROPERTY IN INTELLECTUAL WORKS

In the UK, after the adoption of the 1710 Statute of Anne, publishers faced a loss of their monopoly. Unlike the perpetual right that they enjoyed under the old system of stationers' copyright, the Statute of Anne granted a limited copyright term only.<sup>1270</sup> In order to protect their book monopoly, they started a relentless campaign, known as the 'Battle of the Booksellers', for restoring perpetual copyright.<sup>1271</sup> To add force to their claims, the UK book publishers argued that, independently of the statutory copyright granted by the Statute of Anne, authors enjoyed a pre-existing, perpetual copyright at common law.<sup>1272</sup> This claim was based on the Lockean notion that the product of the mind is, by right, the 'natural' property of its creator.<sup>1273</sup>

At first, it seemed that the publishers indeed succeeded in their strategy. In 1769, the Court of King's Bench ruled, in the case of *Millar v. Taylor*,<sup>1274</sup> that the author

<sup>1270</sup> The Statute of Anne granted a twenty-one year term of protection for already existing copyrights (i.e. the old stationers' copyright). For new statutory copyrights, it granted a term of protection of fourteen years, after the expiration of which copyright automatically returned to the living author for another term of fourteen years. See secs I and XI of the Statute of Anne (1710).

<sup>1271</sup> For an exhaustive discussion of the 'Battle of the Booksellers', see Patterson 1968, at 154-179.

<sup>1272</sup> Sherman & Bently 1999, at 12. See also Patterson 1968, at 15 and 153, explaining that, should this argument be accepted by the courts, the door stood open for UK publishers to preserve their perpetual monopoly, because in those days it was common that authors assigned all their rights to them.

<sup>1273</sup> See Lord Mansfield in *Millar v. Taylor*, 98 *Eng. Rep.* 201, at 252, 4 *Burr.* 2303, at 2398 (Court of King's Bench, 1769), arguing that 'it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish'. See also Enfield 1774, at 21.

<sup>1274</sup> *Millar v. Taylor*, 4 *Burr.* 2303, 98 *Eng. Rep.* 201 (Court of King's Bench, 1769).

of a book maintained a common law copyright after publication and that this right was not abolished by the Statute of Anne. Hence, in this case, the court recognized that under common law, authors enjoyed a natural property right in their work.<sup>1275</sup> In 1774, however, the *Millar* ruling was reversed by the House of Lords in the case of *Donaldson v. Beckett*.<sup>1276</sup> While the House of Lords acknowledged that authors of unpublished literary works possessed a copyright at common law, it held that, after publication, the Statute of Anne put an end to this right. Following the publication of a work, authors could obtain protection by virtue of the statute only.<sup>1277</sup> In 1854, the House of Lords confirmed this reading in the case of *Jeffreys v. Boosey*.<sup>1278</sup> As a consequence, it became widely accepted in the UK that ‘the property of authors in their published productions depends entirely upon statutory enactment, and that no common law privilege remains, even supposing that it ever existed’.<sup>1279</sup>

The *Donaldson* case is generally considered to have settled the statutory basis of copyright law, limiting copyright in published works to the statutorily determined rights and obligations. Nevertheless, this did not stop the belief that authors enjoy a ‘natural’ property right in their works.<sup>1280</sup> As one commentator explains: ‘Attitudes as to the existence of the common law right ... waxed and waned throughout the nineteenth century’.<sup>1281</sup> In 1798, for example, the Court of King’s Bench ruled that, even after publication, common law remedies remained applicable (see para. 3.2.2.1 above).<sup>1282</sup> Moreover, the early-nineteenth century debates on copyright term reveal that authors like Robert Southey and William Wordsworth asserted that they should be ‘naturally’ entitled to enjoy copyright in perpetuity.<sup>1283</sup> Even so, by its ruling in the *Jeffreys v. Boosey* case, the House of Lords firmly established UK copyright ‘as a purely statutory phenomenon specifically grounded in public interest concerns’, thus rejecting the idea of copyright as a ‘natural authorial property right’.<sup>1284</sup>

<sup>1275</sup> Patterson 1968, at 15 and 170-172. Note, however, that the *Millar* case was decided by a majority of three to one, with a dissenting opinion rendered by Justice Yates, who argued (4 *Burr.* 2303, at 2359, 98 *Eng. Rep.* 201, at 231): “‘That every man is intitled to the fruits of his own labour”, I readily admit. But he can only be intitled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules of property’. He found that the stationers’ claim did not fall within any known kind of property at common law. Therefore, he asserted that the only copyright was the statutory copyright. See 4 *Burr.* 2303, at 2386, 98 *Eng. Rep.* 201, at 245-246.

<sup>1276</sup> *Donaldson v. Beckett*, 4 *Burr.* 2408, 98 *Eng. Rep.* 257, 2 *Brown’s Parl. Cases* 129, 1 *Eng. Rep.* 837 (House of Lords, 1774).

<sup>1277</sup> This is how most legal scholars explain the *Donaldson* case. But see Deazley 2006, at 13-25, arguing that, contrary to current beliefs, the House of Lords in the *Donaldson* case did not acknowledge, but in fact rejected, the existence of a common law copyright in the author’s unpublished manuscript.

<sup>1278</sup> *Jeffreys v. Boosey*, 10 *Eng. Rep.* 681, 4 *H.L.C.* 815 (House of Lords, 1854).

<sup>1279</sup> Chappell & Shoard 1863, at 1.

<sup>1280</sup> See Rose 1993, at 107-112.

<sup>1281</sup> Deazley 2006, at 27.

<sup>1282</sup> *Beckford v. Hood*, 101 *Eng. Rep.* 1164, 7 *T.R.* 620 (Court of King’s Bench, 1798).

<sup>1283</sup> For a comprehensive account of, and references to their writings, see Bently 2008, at 68-71.

<sup>1284</sup> Deazley 2008c, para. 2. See also Deazley 2006, at 56-67.

On the European mainland, the idea of intellectual property set off along similar lines as in the UK, although it developed in a different direction in the course of the nineteenth century. In France, the theory of literary property was introduced by the Parisian booksellers, who wished to validate their claim for protection in an attempt to counter the protests of provincial booksellers against their printing monopoly.<sup>1285</sup> In the seventeenth and eighteenth centuries, the French book trade had largely been monopolized by Parisian booksellers, who were given an important task in assisting the censor, thus enabling them to exercise a strict control over competing publishers from the provinces. Moreover, Parisian booksellers were favoured by the Crown in the granting and renewal of book privileges.<sup>1286</sup> The provincial publishers found this unacceptable and protested strongly, in particular when in 1723 the Parisian printing monopoly was strengthened by the then adopted *Code de la Librairie*.<sup>1287</sup>

In defending their monopoly, the Parisians sought justification for the protection that they were granted by way of royal privileges. Instead of relying upon economic necessity or historical precedent, they supported their claim by appealing to the idea of a property right that originates in natural law.<sup>1288</sup> In 1725, they requested Louis d'Héricourt, attorney at law, to prepare a report. In this report, D'Héricourt firmly rejected the idea that publishers become the owners of a work by royal privilege. He pleaded that the property of the work initially accrues to its author. Only through the acquisition of the manuscript is it transferred to the publisher. He argued:

‘a Manuscript ... is so much the property of its Author, that it is no more permissible to deprive him of it than it is to deprive him of money, goods, or even land; since, as we have observed, it is the fruit of his personal labour, which he must be at liberty to dispose of as he pleases, in order to obtain, in addition to the glory to which he might aspire, a profit which might supply his own needs, and even those of any persons who are connected to him’.<sup>1289</sup>

By invoking the Lockean claim that a work is the fruit of the author's personal labour, D'Héricourt argued that privileges did not constitute the printing monopoly, but merely acknowledged the ‘natural’ property rights of authors.<sup>1290</sup> This suited the Parisian booksellers perfectly. Pursuant to the *Code de la Librairie*, only designated

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<sup>1285</sup> Kamina 2001, at 388-389.

<sup>1286</sup> See Birn 1970, explaining the emergence of the book monopoly of the favoured Parisian publishers and analyzing the resulting conflict with the non-favoured provincial publishers.

<sup>1287</sup> On the *Code de la Librairie*, see para. 3.1.1.3 above.

<sup>1288</sup> Birn 1970, at 144. See also Dock 1962, at 115-118.

<sup>1289</sup> Louis d'Héricourt's memorandum (1725-1726), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org, transl. by A. Counter. The original phrase reads as follows (at 2-3): ‘qu'un Manuscrit ... est, en la personne de l'Auteur, un bien qui lui est rellement propre, qu'il n'est pas plus permis de l'en dépouiller que de son argent, de ses meubles, ou même d'une terre; parce que, comme nous l'avons observe, c'est le fruit du travail qui lui est personnel, dont il doit avoir la liberté de disposer à son gré, pour se procurer, outre l'honneur qu'il en espère, un profit qui lui procure ses besoins, et même ceux des personnes qui lui sont unies’.

<sup>1290</sup> Birn 1970, at 145.

*libraires* or *imprimeurs* were allowed to trade in books.<sup>1291</sup> As a result, authors had no choice but to abstain from publication or to transfer the ownership of their works to them. This allowed the Parisian booksellers to continue their monopoly.

In the 1760s, on the occasion of another address from the Parisian booksellers to defend their interests before the royal administration,<sup>1292</sup> the idea that authors have a pre-existing property in intellectual works was once more emphasized. This address, which was based on a letter from the French philosopher Denis Diderot,<sup>1293</sup> echoes D'Héricourt's views. To support the booksellers' monopoly, Diderot also argued in favour of private property in literary works,<sup>1294</sup> stating that royal privileges only recognized the property that authors 'naturally' possess as a result of creating their works.<sup>1295</sup> Thus Diderot believed that literary property did not find its origin in royal privileges. He merely regarded the latter as positive acts that officially approved the contract of transfer of literary property from the author to the bookseller.<sup>1296</sup>

The idea of literary and artistic property became more firmly established after the old book privilege system was replaced by the French revolutionary decrees of 1791 and 1793. These decrees treated intellectual works as private property, enduring for five or ten years after the author's death.<sup>1297</sup> Consequently, copyright was no longer seen as a public grant (a privilege), but as a private property right protected by civil law.<sup>1298</sup> In addition, because the Declaration of the Rights of Man of 1789 regarded property as 'an inviolable and sacred right' that is included among 'the natural and imprescriptible rights of man',<sup>1299</sup> it was increasingly accepted that copyright, being a private property right, was also based on considerations of natural law.

Nevertheless, there remained considerable debate about the question of the nature of literary and artistic property. As concluded in para. 3.2.3.2, in the first half of the

<sup>1291</sup> Art. 4 of the *Code de la Librairie* of 1723.

<sup>1292</sup> Parisian Booksellers memorandum (1764), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>1293</sup> See Chartier 2002, at 61 and 65 and Rideau 2008, at para. 3.

<sup>1294</sup> Diderot's Letter on the book trade (1763), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org), transl. by L. Mulholland, at 16-17.

<sup>1295</sup> In arguing for property in authorial creations, Diderot strongly relied on the author's personality. He believed that for authors 'the dissemination of thought and the respect due to it' were more important than the economics of a book, which was the business of publishers. See Piriou 2002, at 95. See also Kretschmer & Kawohl 2004, at 31, observing that 'Diderot experimented with a non-labour, genius based theory of literary creation'. See also Pfister 2002, at 251 and Rideau 2008, at para. 6.

<sup>1296</sup> See e.g. Chartier 2002, at 62, arguing that Diderot saw book privileges not as a royal favour 'that can be granted, refused, or revoked by the sovereign at will'. See also Chartier 1994, at 15-16.

<sup>1297</sup> Art. 2 of the decree of 13-19 January 1791; art. 2 of the decree of 19-24 July 1793.

<sup>1298</sup> This development can be explained against the backdrop of the rise of civil law around the turn from the eighteenth to the nineteenth centuries. See Habermas 1989, at 75, explaining that '[with] the great codifications of civil law a system of norms was developed securing a private sphere in the strict sense, a sphere in which private people pursued their affairs with one another free from impositions by estate and state, at least in tendency. These codifications guaranteed the institution of private property and, in connection with it, the basic freedoms of contract, of trade, and of inheritance.'

<sup>1299</sup> Arts II and XVII of the French Declaration of the Rights of Man and of the Citizen of 1789.

nineteenth century, various legal scholars asserted that copyright was not and could not be a true property right.<sup>1300</sup> They postulated that ‘property’ is a concept that only applies to physical or tangible subject matter.<sup>1301</sup> If it could also apply to intellectual works, then it would create the threat of monopolizing knowledge and undermining freedom of expression.<sup>1302</sup> In addition, they argued that intellectual works could not be owned, as the essential condition of property, i.e., to exclusively enjoy its object, is absent in copyright.<sup>1303</sup> Once a work is published, the author loses control over who enjoys the authorial expression that it embodies.<sup>1304</sup> Finally, they rejected the idea that copyright, should it be classified as property right, is perpetual.<sup>1305</sup> For all these reasons, these scholars maintained that intellectual works were incapable of being appropriated and that copyright should rather be seen as a social contract, i.e., as a private claim of authors against society.<sup>1306</sup> Therefore, they perceived copyright as a ‘monopoly’ or ‘privilege’ granted by the legislator on behalf of the public.

Although the social contract theory enjoyed a short revival in the late nineteenth century,<sup>1307</sup> the property rights theory remained highly influential during nearly the entire nineteenth century.<sup>1308</sup> Even today, the concept of copyright as property right figures prominently in the French Intellectual Property Code,<sup>1309</sup> as well as in other

<sup>1300</sup> See Pfister 2005, at 128-141. Amongst the opponents of literary and artistic property were Augustin-Charles Renouard, Edouard Calmels, Louis Wolowski, Léonce de Lavergne, Pierre-Joseph Proudhon and Charles Demolombe. *Ibid.*, at 122-125.

<sup>1301</sup> See e.g. Renouard 1838-1839, I, at 456.

<sup>1302</sup> See Mr Lestiboudois at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 716, querying: ‘*si l’œuvre humaine est la propriété de l’homme, si la chose façonnée par le génie créateur est à lui, que devient la pensée qui a présidé à la création?*’ and later concluding: ‘*Une pensée enfin ne peut être inféodée à un homme parce que les conceptions d’un individu ne peuvent être exclusives des conceptions d’un autre*’. See also Pfister 2005, at 130-131.

<sup>1303</sup> See Mr Berville, member of Parliament, at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 715, remarking that: ‘*publicité et propriété sont deux mots qui se repoussent naturellement, qui sont complètement incompatibles*’.

<sup>1304</sup> See e.g. Renouard 1838-1839, I, at 436-437 and 454, asserting: ‘*Donner et retenir la pensée est une impossibilité*’. See also Pfister 2005, at 132-137.

<sup>1305</sup> See Pfister 2005, at 136-141.

<sup>1306</sup> See Mr Lestiboudois at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 716, referring to such ‘*Contrat social*’. See also Pfister 2005, at 140-153.

<sup>1307</sup> See e.g. French Court of Cassation, 25 July 1887, *Grus v. Ricordi et Durdilly et comp.*, *Dalloz* 1888, 1, 5, at 12, using rethoric of the social contract theory to explain the nature of copyright: ‘*Attendu que les droits d’auteur et le monopole qu’ils confèrent sont désignés à tort, soit dans le langage usuel, soit dans le langage juridique, sous le nom de propriété; que loin de constituer une propriété comme celle que le Code Civil a définie et organisée pour les biens meubles et immeubles ils donnent seulement à ceux qui en sont investis le privilège exclusif d’une exploitation temporaire*’.

<sup>1308</sup> See Ladas 1938, I, at 5. See e.g. French Court of Cassation, 16 August 1880, *Gaudichot dit Michel Masson*, *Sirey* 1881, 1, 25, at 27, expressing the nature of copyright in positive terms as a property right: ‘*Attendu que, d’après les principes généraux du droit, la propriété littéraire et artistique, essentiellement mobilière, a les mêmes caractères et doit avoir le même sort que toute autre genre de propriété, moins la limitation que l’intérêt public a fait apporter à sa durée*’.

<sup>1309</sup> See art. L 111-1(1) French Intellectual Property Code, which literally speaks of the author’s right as ‘*un droit de propriété incorporelle*’ (an incorporeal property right).

national copyright laws across the globe.<sup>1310</sup> This shows how significant the impact of the property rights theory was, not just on the development of the French *droit d'auteur* doctrine, but on the reception and evolution of copyright in general. Given the high regard for property, this theory 'was very useful in the 18th and 19th centuries for the purpose of obtaining universal recognition of the author's right'.<sup>1311</sup>

#### 6.2.2.2 THE DISENTANGLEMENT OF COPYRIGHT AND FORMALITIES

While establishing the key justificatory basis for the idea of copyright as a 'natural' authorial property right, the Lockean labour theory was initially not used to support the idea that copyright as a 'natural' property right should emerge automatically and without formalities upon the creation of a work. In fact, the debates in France reveal that a person's opinion about the nature of copyright did not necessarily mirror his opinion about formalities. As observed in para. 3.2.3.3, in the 1830s, Gastambide, who supported the property rights theory, argued in favour of copyright formalities, while Renouard, who supported the social contract theory, rejected them.

In the mid-nineteenth century, when the idea of copyright as a 'natural' authorial property right had been firmly recognized and the focus had shifted from protecting publishers to protecting authors, things changed. The Lockean labour theory was yet again invoked, but this time to demonstrate that authors have a 'natural' entitlement to protection.<sup>1312</sup> Illustrative is the remark of Mr Dognée, the president of the *Institut des artistes liégeois* in Belgium, during the plenary session of the 1878 international conference on artistic property in Paris (see para. 4.2.1.2). He stated as follows:

'To each person the fruit of his work. It would be alarming if modest creators were denied a legitimate benefit, if they were forced to complete formalities in order to establish their property.'<sup>1313</sup>

This remark shows that, in the second half of the nineteenth century, an argument along the lines of the Lockean labour theory of property was used to defend the idea that copyright should arise 'naturally' upon creation of a work. This encouraged the idea that copyright ought to be protected without compliance with formalities.

At the end of the nineteenth century, symptoms of 'natural rights' reasoning with regard to copyright could be detected even in countries like the Netherlands. This is

<sup>1310</sup> See e.g. sec. 1(1) UK Copyright, Designs and Patents Act 1988: 'Copyright is a property right ...'. The idea of copyright as property right is also reflected in national legislation regulating copyright in an Intellectual Property Code (e.g., France, Spain, Chile, Ecuador) and in the names of international organizations that deal with copyright (e.g., the World Intellectual Property Organization).

<sup>1311</sup> Ladas 1938, I, at 8.

<sup>1312</sup> See Mr Dognée and Mr Lionel Laroze, in: *Congrès International de la Propriété Artistique 1878*, at 54 and 55, arguing that copyright as a property right is a 'sacred' and therefore an inviolable right.

<sup>1313</sup> Mr Dognée in *Congrès International de la Propriété Artistique 1878*, at 54: 'A chacun le fruit de son œuvre. Il serait à craindre que de modestes producteurs fussent dépouillés d'un bénéfice légitime, s'ils étaient astreints à accomplir des formalités préalables pour faire constater leur propriété.'

quite remarkable, because until then Dutch copyright had always been justified by utilitarian or pragmatic motives.<sup>1314</sup> Dutch lawmakers and legal theorists had simply been unwilling to accept the property rights theory and other theories explaining the ideological foundation of copyright. At its annual meeting in 1877, for example, the *Nederlandse Juristenvereniging* (Dutch Society of Lawyers) discussed the question: ‘According to what principle is the State required to protect the rights of writers and artists to the product of their labour?’<sup>1315</sup> This question was answered by a plain: ‘no such legal principle exists’.<sup>1316</sup> The majority of lawyers rejected both the literary or intellectual property theory (40 to 9), the theory that, like labourers, authors should be entitled to receive a reward for their labour (42 to 7),<sup>1317</sup> and the theory of a tacit contract by which a purchaser of a copy of a work commits himself to abstain from reprinting the work of the author (48 to 1).<sup>1318</sup> If the lawmaker was bound by a legal principle for protecting copyright, it was thought to exist in the public interest.<sup>1319</sup> A proposal to this effect was adopted by a majority of 36 to 10 (with 3 abstentions).<sup>1320</sup> This may explain why, in 1881, the Dutch government explicitly refuted the concept of intellectual property,<sup>1321</sup> but instead recognized ‘that the State has the power and the obligation to create by law a temporary and exclusive author’s right’.<sup>1322</sup>

This statement shows that, as late as 1881, the Dutch lawmaker adopted a purely positivistic approach to copyright law. This was not quite uncommon at the time.<sup>1323</sup> Even so, during the Parliamentary debates on the 1881 Copyright Act, Mr H.J.A.M. Schaepman asserted that, by the above statement, the government could have never intended the protection of copyright to be a ‘creation of the law’.<sup>1324</sup> The Dutch Minister of Justice, Mr A.E.J. Modderman, confirmed this and explained:

<sup>1314</sup> See De Beaufort 1909, at 70 et seq.

<sup>1315</sup> *Handelingen NJV* 1877, I, 33.

<sup>1316</sup> See the preliminary report of Mr J. Fresemann Viëtor, in: *Handelingen NJV* 1877, I, 34-49, at 44.

<sup>1317</sup> See Mr A.F. de Savornin Lohman in *Handelingen NJV* 1877, II, at 5 et seq. and 43 et seq.

<sup>1318</sup> *Handelingen NJV* 1877, II, 70-71.

<sup>1319</sup> Hugenholtz 1998, at 202.

<sup>1320</sup> See *Handelingen NJV* 1877, II, 69-71, at 71: ‘dat in het algemeen belang door de wet een recht tot uitsluitende reproductie moet worden gegeven’. See also Veegens 1896, at 412.

<sup>1321</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 58. The reason why the Dutch government and various Dutch jurists did not accept the idea of ‘intellectual property’ was that, in their view, copyright had nothing to do with ‘property’. They believed that adopting the term ‘intellectual property’ would entail the risk of confusion of tongues and misunderstanding.

<sup>1322</sup> See the Memorandum in Reply, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 51, expressing it as follows: ‘Wat den theoretischen grondslag van het auteursrecht betreft, de Regeering erkent geen zoogenaamde intellectueelen eigendom, maar wel de bevoegdheid en den plicht van den Staat om ... door de wet een tijdelijk uitsluitend recht ... te scheppen.’

<sup>1323</sup> See e.g. Hirsch Ballin 1947, at 16-17, observing that, with the rise of legal positivism in Dutch civil law in the course of the nineteenth century, the natural rights thinking gradually lost support.

<sup>1324</sup> Mr H.J.A.M. Schaepman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 56.

‘The word “*create*” is not used here in the sense that the lawmaker, in the view of the Government, would be free to *refrain from* establishing the author’s right, but to express that, in the absence of a regulation by law, the right would be worthless and without a real existence.’<sup>1325</sup>

While persisting in the idea that copyright must be regulated by positive law, this remark seems to display an undercurrent of ‘natural rights’ thinking in the sense that the Minister of Justice acknowledges that the author’s right ought to be recognized by the lawmaker. This contains the shadow of the idea of a ‘natural’ entitlement to copyright. This may perhaps also explain why, in the 1881 Copyright Act, the genesis of copyright was distangled from the fulfilment of formalities. The Explanatory Memorandum unambiguously stated that copyright comes into being with the act of creation:

‘The exclusive right arises from the act of authorship, not from the deposit of the work; the latter is a condition for the exercise of the right only.’<sup>1326</sup>

In practice, however, the formality-free coming into being of copyright under the 1881 Dutch Copyright Act was a legal fiction only. As demonstrated in Chapter 3, if a work was not deposited within one month after publication, copyright would cease to exist.<sup>1327</sup> Thus, the right could not be enjoyed if the statutory formalities were not fulfilled.<sup>1328</sup> For this reason, it appears wrong to attach much weight to the ‘natural rights’ claim that seems embedded in the above statements and in the recognition by the Dutch lawmaker that authors have the right ‘to reap the fruits of the products of their mind’.<sup>1329</sup> Rather, it seems to be an early symptom of natural rights infiltrating the otherwise pragmatic and positivistic legal thinking on ‘intellectual property’ that characterized the Netherlands in the second half of the nineteenth century (see para. 3.3.2.4). This would explain why the Dutch lawmaker, despite entertaining ‘natural rights’ arguments, strongly held on to a positivistic concept of copyright law.

The idea that copyright as a natural property right arises ‘automatically’ upon the creation of a work had a significant impact on copyright law and theory in various

<sup>1325</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 58: ‘Wanneer het woord “scheppen” gebruikt is, is het niet gebezigd in dien zin, dat het den wetgever, naar de opvatting van de Regering, ook zou vrijstaan het auteursrecht niet in ‘t leven te roepen, maar met de bedoeling om te doen uitkomen dat, zonder regeling bij de wet, het recht geen waarde ja ook geen reëel bestaan heeft.’

<sup>1326</sup> Explanatory Memorandum, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 94: ‘Het uitsluitend recht ontstaat door het auteurschap, niet door de inzending van het werk; deze is slechts eene voorwaarde voor de uitoefening van het recht’.

<sup>1327</sup> Art. 10 of the Dutch Copyright Act of 1881. See para. 3.3.1.2 above.

<sup>1328</sup> Memorandum in Reply, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 95-96: ‘zoo wordt hier gaarne opnieuw de verklaring afgelegd, dat de inzending het auteursrecht niet scheidt, maar dat gemis aan inzending het doet vervallen.’

<sup>1329</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 59, referred to copyright as ‘het recht van auteurs enz. om vrucht te plukken van de voortbrengselen van hun geest’.

countries. As observed in Chapter 3 and Chapter 4, it was one of the main causes for the abolition of copyright formalities at the national level and, arguably, an auxiliary cause for the introduction of the international prohibition on formalities. Even today the idea has not lost its importance. This can be illustrated by the French Intellectual Property Code, which articulates that the mere fact of creation of a work of the mind confers on its author the protection afforded by French copyright law.<sup>1330</sup>

### 6.2.3 THE REGULATION OF PRIVATE PROPERTY RIGHTS

The previous sections have revealed that, while, from a philosophical viewpoint, the idea that property is a natural right does not necessarily imply that it is absolute and unconditional, in copyright law, it has been asserted that, if copyright is a property right that derives from natural law, its existence and its exercise cannot be subject to formalities. This claim seems odd, given that the Lockean labour theory of property, upon which it is allegedly based, nowhere suggests that property must be formality-free. In fact, Locke has explicitly underscored that private property, despite its roots in natural law, must be clearly defined and regulated by positive law and that it can always be limited by the legislator to attain public interest objectives.

To detect whether the aversion against formalities is peculiar to copyright law in particular, or characteristic of private property law in general, this section examines how private property is regulated and whether and to what extent it can be subject to formalities. To this end, it first sketches the legal framework of property regulation by explaining how, on the basis of the rule of law, natural property must be codified in positive law to have normative effect (para. 6.2.3.1). Subsequently, it studies how much room there is for limiting private property by scrutinizing the legal-theoretical justifications for property limitations (para. 6.2.3.2). Lastly, to discern how common or widespread formalities in property law are, this section draws a comparison with other private property laws (para. 6.2.3.3). It reveals that, while property often exists without formalities, formalities in property law are absolutely not a rarity.

#### 6.2.3.1 THE CODIFICATION OF NATURAL PROPERTY RIGHTS

As already emphasized by Locke, to have legally binding effect, all natural property rights must be concretized by social convention and, consequently, be contingent on conventional regulation. This implies that natural property rights must be defined by positive law and that, like all other property rights, natural property is subject to title conditions and property limitation rules that are laid down in positive law.

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<sup>1330</sup> Art. L 111-1(1) French Intellectual Property Code reads: '*L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle*'.

Title conditions and property limitation rules are necessary features of all modern property institutions.<sup>1331</sup> Title conditions, which must be fulfilled before a person (or a group) is invested with proprietary interests over a given resource, define property relationships between a subject and an object, thus creating legal certainty as well as transparency and clarity of the law. They vary from substantive conditions, such as creation, long possession and long usage of an object, to formal conditions, such as public registration and other constitutive formalities.<sup>1332</sup> Property limitation rules are rules that, often for reasons of general interest, restrict the ownership control powers of proprietors.<sup>1333</sup> Together these title conditions and property limitation rules set the boundaries of all private property institutions. They establish who is legally entitled to exercise proprietary control over what resources and whether, and to what degree, a person's private property can be utilized by another person or the state.

That natural property rights must be codified in and regulated by positive law is a result of the general principles of the rule of law. The rule of law states that, to have normative effect, a legal rule must be known by all citizens and, for that purpose, be laid down by law. But that is not all. To actually guide human conduct, the law must meet certain conditions.<sup>1334</sup> In order to be practicable and to create legal certainty, it must be generally applicable, promulgated, clear and consistent.<sup>1335</sup> It is commonly understood that, for these reasons, legal rules must be laid down in positive law,<sup>1336</sup> because natural law is too unclear and unspecific. As one commentator states:

‘Positive law is law whose content is clear, specific, and determinate enough to guide and coordinate human conduct, to create stable expectations, and to be enforceable in court. The principles of natural or moral law are too general, too open ended, take in too much private conduct, and admit of too many conflicting interpretations to function as positive law.’<sup>1337</sup>

That legal rules must be laid down in positive law does not imply that natural law has entirely lost its function. While the two are not necessarily related, positive law can borrow its authority from prior natural law or delegate some ‘meta-legal norms’

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<sup>1331</sup> See Harris 1996, at 5.

<sup>1332</sup> *Ibid.*, at 39-40.

<sup>1333</sup> *Ibid.*, at 33-36.

<sup>1334</sup> See e.g. Raz 1979, at 213 and Marmor 2004, at 2-9.

<sup>1335</sup> See e.g. Fuller 1964, at 33 et seq., Raz 1979, at 214-219, Finnis 1980, at 270-273 and Marmor 2004, at 5-7. Courts often apply these principles of the rule of law. See e.g. German Federal Constitutional Court, decision of 7 July 1971, *Private Tonbandvervielfältigungen*, *BVerfGE* 31, 255, at 264, which underlines the need for clarity and justiciability of legal norms (*‘Normklarheit und Justitiabilität’*).

<sup>1336</sup> See *Re Manitoba Language Rights*, [1985] 1 *S.C.R.* 721 (Supreme Court of Canada, 1984), at 749-750, stating that ‘the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order’, thus concluding that: ‘The rule of law simply cannot be fulfilled in a province that has no positive law.’

<sup>1337</sup> Murphy 2005, at 4-5.

that derive from natural law (e.g. morals or justice).<sup>1338</sup> However, if it delegates such norms, ‘then these norms are transformed into norms of positive law’.<sup>1339</sup>

The intersection between natural law and positive law is nicely illustrated in two German court decisions discussing the nature of copyright in the second half of the twentieth century. In 1955, the Federal Supreme Court (*Bundesgerichtshof*) issued a decision which portrayed the author’s right to control the exploitation of his work as a natural right that comes into being by the act of creation. The Court stated that copyright is not a legislative grant, but follows from the nature of the work, i.e., the author’s intellectual property, which is merely recognized and regulated by positive law.<sup>1340</sup> The German Federal Constitutional Court (*Bundesverfassungsgericht*) ruled similarly in a 1988 decision, in which it was asked to determine whether a copyright limitation was in line with the property rights clause in Article 14 of the Basic Law (*Grundgesetz*) of Germany. The Court judged that, without codification in positive law, copyright would lack real existence. It explained this as follows:

‘Copyright and the economic rights derived from it are property in the sense of Article 14(1), first sentence, Basic Law. Property is the allocation of a right to a legal entity. In order to be practicable, it necessarily needs to be given a definitive legal form by the legislator. This is particularly true for intellectual property, because – not least given the nature of the authorial creation – there often is no direct factual bond between the author and the user of a work.’<sup>1341</sup>

Thus, while private property may perhaps derive from natural law, it must always be laid down in and be defined by positive law. This corresponds with the principles of the rule of law and is essential for the legal system to operate successfully.

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<sup>1338</sup> See Hill 1921, at 131, observing that ‘just as every positive law borrows all its efficacy from prior natural law, even so every positive right borrows all its strength and force from prior natural right. Positive law is an application of natural law, it makes natural law clearer, it adds to the moral sense of obligation and future sanction’. See also Kelsen 1967, at 354.

<sup>1339</sup> Kelsen 1967, at 354.

<sup>1340</sup> German Federal Supreme Court, decision of 18 May 1955, I ZR 8/54, *UFITA* 1955, II, 314-335, at 322-323: ‘Die Herrschaft des Urhebers über sein Werk ... wird ihm hiernach nicht erst durch den Gesetzgeber verliehen, sondern folgt aus der Natur der Sache, nämlich aus seinem geistigen Eigentum, das durch die positive Gesetzgebung nur seine Anerkennung und Ausgestaltung findet.’

<sup>1341</sup> German Federal Constitutional Court, decision of 11 October 1988, *Vollzugsanstalten*, *BVerfGE* 79, 29, at 40: ‘Das Urheberrecht und die daraus abgeleiteten vermögenswerten Rechte sind Eigentum im Sinne des Art. 14 Abs. 1 Satz 1 GG. Eigentum ist die Zuordnung eines Rechtsguts zu einem Rechtsträger. Dies bedarf, um praktikabel zu sein, notwendigerweise der rechtlichen Ausformung durch den Gesetzgeber. Das gilt in besonderem Maße für das geistige Eigentum, da – nicht zuletzt angesichts der Natur der Urheberleistung – ein unmittelbares tatsächliches Band zwischen dem Urheber und dem Werknutzer in einer Vielzahl von Fällen fehlt.’

6.2.3.2 *JUSTIFICATIONS FOR LIMITING PRIVATE PROPERTY*

It is one thing to say that private property, even if derived from natural law, must be enacted by positive law and another to ask whether and to what degree a legislator may limit private property by imposing a certain title condition or subjecting it to a property limitation rule. This question is relevant for our book, since it determines the extent to which a legislator, when securing private property by positive law, can make its enjoyment or its exercise conditional on formalities.

It is generally accepted that the enjoyment or the exercise of private property can be limited. As Locke already pointed out, even if it derives from natural law, private property can be subject to statutory limitations if that be in the public interest (see para. 6.2.1.2). This is also acknowledged by the European Convention on Human Rights (ECHR), which protects private property by virtue of Article 1 of its first protocol.<sup>1342</sup> This states that, notwithstanding the right to the peaceful enjoyment of a person's property, a member state retains the right 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'.<sup>1343</sup> This rule, the effects of which are discussed exhaustively in para. 6.4.2 below, shows that considerations of 'general interest' may justify subjecting private property to limitations.<sup>1344</sup>

The justifications for imposing limitations on private property rights can be quite diverse. One type of justification, which seems to have been highly influential at the time of the drafting of the property rights clause in Protocol 1 of the ECHR, is the social function theory of property.<sup>1345</sup> A known advocate of this theory is Duguit, a French theorist of constitutional law, who presented property as an objective duty or obligation to employ the wealth produced by property to support and enlarge social interdependence.<sup>1346</sup> Duguit stated that property was not aimed to protect the private interests of individuals, but to fulfil an important social function in society. This implied that private property could be restricted by legislative intervention if its use inflicted harm on the public interest or if it remained without utility to the possessor or to society.<sup>1347</sup> The social function theory of property had great impact on property law in civil law countries such as Germany, France and Italy.<sup>1348</sup> Its influence seems to extend to Article 14 of the German Basic Law, which states that property entails obligations and that its use shall serve the public interest (see para. 6.4.2).

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<sup>1342</sup> Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], adopted by the members of the Council of Europe in Rome on 4 November 1950.

<sup>1343</sup> Art. 1 of Protocol no. 1 to the ECHR, adopted in Paris on 20 March 1952.

<sup>1344</sup> See Çoban 2004, at 107-108 and Anderson 1999, at 547, concluding that the concept of 'general interest' under the ECHR does not materially differ from the concept of 'public interest'.

<sup>1345</sup> Çoban 2004, at 108.

<sup>1346</sup> See Duguit 1923, at 320, arguing that property 'is the social function of the possessor of wealth'.

<sup>1347</sup> *Ibid.*, at 320-326, giving examples of unutilized property, such as land that remains uncultivated and durable goods that are deserted, left unrepaired or simply remain unutilized by their proprietors.

<sup>1348</sup> Pejovich 2008, at 88-89 and 147.

From a classical-liberal perspective, two other types of justifications are typically invoked.<sup>1349</sup> Relying on an autonomy-based notion of self-protection,<sup>1350</sup> the first of these justifications, i.e. the principle of harm, states that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’.<sup>1351</sup> To apply this principle, the concept of harm must be properly defined.<sup>1352</sup> One way of doing so is to link the principle of harm to the theory of autonomy-based freedom of Joseph Raz, which suggests that, to be free, a person must have prospects and opportunities. Depriving him of these prospects and opportunities would reduce his chances for autonomous development, thus causing him harm.<sup>1353</sup> From this it can be inferred that governments, which are obliged to secure the autonomy of people and ‘to advance an autonomy-enhancing social and economic environment’,<sup>1354</sup> may use coercion, e.g., by imposing property limitation rules, if that is required to prevent harm.<sup>1355</sup> Hence, if autonomy is valued highly, the autonomy of one person can justifiably be restricted ‘for the sake of the greater autonomy of others or even of that person himself in the future’.<sup>1356</sup>

The second classical-liberal justification for limiting property can be found in the principle of liberty, as described by John Rawls in the first of his two principles of justice. It assumes that, in a just society, ‘[each] person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all’.<sup>1357</sup> Among other fundamental rights, these basic liberties include the right to hold private property.<sup>1358</sup> As the principle of liberty has priority over any other principle,<sup>1359</sup> it cannot be restricted but ‘for the sake of liberty itself’.<sup>1360</sup> This implies that, in cases of competing interests and conflicts of rights, a balancing test must be applied to establish the priority of the one basic liberty over the other.<sup>1361</sup> In contrast to the other justifications, which involve an assessment with public interest and harm, the principle of liberty is less suitable for defining determinate limitations

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<sup>1349</sup> Çoban 2004, at 110-113.

<sup>1350</sup> See Mill 1859, at 21-22, arguing that ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.’

<sup>1351</sup> *Ibid.*, at 22.

<sup>1352</sup> Çoban 2004, at 110.

<sup>1353</sup> Raz 1986, at 413.

<sup>1354</sup> Çoban 2004, at 111.

<sup>1355</sup> Raz 1986, at 416-417.

<sup>1356</sup> *Ibid.*, at 419.

<sup>1357</sup> Rawls 1982, at 5. While initially the principle read ‘each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others’ (see Rawls 1971, at 60 (§ 11)), it was adjusted after it had been exposed to critique by Hart. See Hart 1973, at 542-555.

<sup>1358</sup> Rawls 1971, at 61 (§ 11).

<sup>1359</sup> *Ibid.*, at 61 (§ 11), stating that ‘a departure from the institutions of equal liberty ... cannot be justified by, or compensated for, by greater social and economic advantage’. *Ibid.*, at 244 (§ 39).

<sup>1360</sup> *Ibid.*, at 244 (§ 39).

<sup>1361</sup> Çoban 2004, at 113.

on property. Rather this principle is fit for establishing limits on fundamental rights, including property rights, on a case-by-case basis (see also para. 6.3.3.2).

The justifications for property limitations imply that, for reasons of public interest or in case of harm, competing interests or conflicts of rights, private property can be justifiably restricted. This suggests that, if there is a legitimate reason for doing so, a legislator can limit private property by imposing title conditions, property limitation rules or formalities. The next section demonstrates that it is not uncommon, in specific cases, for private property rights to be conditional on formalities.

### 6.2.3.3 *FORMALITIES ASSOCIATED WITH PROPERTY RIGHTS*

Although formalities are rarely imposed on ‘ordinary’ tangible property that can be taken physical possession of fairly easily, such as consumption goods (e.g. food and clothing) and inexpensive consumer goods (e.g. furniture, electronic equipment and tools), formalities are more commonly imposed on property that does not fit these characteristics.<sup>1362</sup> Registration of property, for example, is useful when it concerns relatively valuable property that can be identified more precisely by description than by possession (e.g. landed property) or that warrants registration for the purpose of facilitating valid title transfers (e.g. movable property such as motor vehicles). Also, registration can be helpful to point out partial ownership interests in property (e.g. company shares and charges on property) and to concretize intangible property that cannot be physically possessed (e.g. intellectual property).<sup>1363</sup> This section describes a number of property registration schemes, the rationales of which – to a greater or lesser extent – can be compared to the rationales of copyright formalities.

One field in which formalities are common is real property and land ownership, in particular. Although landed property is tangible in the sense that one can stand on it, build a house on it, exploit it, and so forth, proving to be the rightful owner of a plot of land may be fairly difficult.<sup>1364</sup> Obviously, one can put a fence around land to show that it is propertized. However, if the land is abandoned for some time and the fence is removed, the land owner has no evidence to establish his property title or to prove where the exact boundary of the plot begins or ends. This bears a resemblance to copyright law, where the proprietary bond between the right owner and the work and the precise legal boundaries of the right are also difficult to establish.

Consequently, without legal documents verifying the ownership and demarcating the boundaries of land, there is a great risk of legal uncertainty for both land owners and third parties that intend to purchase a plot of land or utilize, cultivate or develop it without knowing that it is propertized. The notarial deed recording the vesting or

<sup>1362</sup> See Baird & Jackson 1984, at 303-311.

<sup>1363</sup> Ibid, at 304. See also Lurger 2006, at 50-51.

<sup>1364</sup> See Baird & Jackson 1984, at 305.

transfer of landed property may be satisfactory for a land owner to prove his title, but it does not necessarily allow third parties to obtain information about whether a plot of land is propertized and to whom it rightfully belongs. Such information can be acquired only if it is made available to the public. For this reason, most countries have set up land registers that are open for public inspection. This is intended to provide land owners, purchasers of land and third parties with adequate legal certainty.<sup>1365</sup>

Land registration typically takes the form of a recordation of the property title or of the notarial deed in which the transfer of ownership or the vesting of real rights in land is recorded.<sup>1366</sup> The national systems of land registration vary from constitutive systems, in which registration is a prerequisite for completing the transfer or vesting property in land,<sup>1367</sup> to declaratory systems, in which registration is not required for acquiring ownership in land but only for rendering the creation or transfer of landed property enforceable in relation to third parties.<sup>1368</sup> Although the legal effects of land registration may vary from country to country,<sup>1369</sup> therefore, both the enjoyment and the exercise of landed property can be made conditional on formalities.

Land registration obviously is not the only form of property registration. Another type of property that is often subject to registration is motor vehicles. Although the requirement to register cars and motorcycles is usually of a public law character,<sup>1370</sup> in some countries, registration also plays a significant role in establishing good faith acquisitions of property. In the Netherlands, for example, the mere fact that a person who has been transferred the property of a car takes possession of it is not enough to establish bona fide acquisition.<sup>1371</sup> To that end, he should have also examined the validity of the car registration papers.<sup>1372</sup> The same applies in Italy.<sup>1373</sup> The idea is that, since there is a car registration system, the purchaser of a used car must

<sup>1365</sup> See Zevenbergen 2003, at 125, 128-130 and 137. See also Zevenbergen 2002, at 3.

<sup>1366</sup> See Henssen 1995 and Zevenbergen 2002, at 48-62.

<sup>1367</sup> See e.g. secs 7(1) and 11 of the UK Land Registration Act (2002), c. 9 (for England and Wales), sec. 3(1)(a) of the UK Land Registration (Scotland) Act (1979), c. 33 (for Scotland) and secs 25 and 37 to 39 of the Irish Registration of Title Act 1964 (no. 16/1964). See also arts 873 and 891 of the German Civil Code and art. 3:84 in conjunction with art. 3:89 of the Dutch Civil Code.

<sup>1368</sup> See e.g. arts 34 and 38(1) of the Spanish Mortgage Law of 8 February 1946 and arts 28 and 30(1) of the French decree n° 55-22 of 4 January 1955 concerning the reform of land registration.

<sup>1369</sup> See Schmid & Hertel 2005, at 27-46.

<sup>1370</sup> The car registration system adds to improving road safety, since the certificate of registration allows authorities to determine whether only those categories of vehicles are driven for which a person has a driving licence. Also, registration may be proof of payment of taxes on motor vehicles. See Recitals 2 and 4 of Council Directive 1999/37/EC of 29 April 1999 on the registration documents for vehicles, *OJ L 138/57*, 1 June 1999. See also European Court of Justice, judgment of 21 March 2002, case C-451/99, *Cura Anlagen GmbH v. Auto Service Leasing GmbH*, [2002] ECR I-03193, para. 41.

<sup>1371</sup> Salomons 2008, at 153.

<sup>1372</sup> See e.g. the rulings of the Dutch Supreme Court of 4 April 1986, *Apon v. Bisterbosch*, *NJ* 1986, 810, note W.M. Kleijn and of 7 October 2005, *Coppes v. Van de Kolk*, *NJ* 2006, 351, note W.M. Kleijn.

<sup>1373</sup> See arts. 815 and 1153 to 1156 of the Italian Civil Code (*Codice civile*) in conjunction with art. 93 of the Italian Traffic Code (*Codice della Strada*) of 30 April 1992.

ascertain whether the seller is the legal owner of the car, thus reducing ‘the possibility of thieves in the chain of title and other nonconsensual title transfers’.<sup>1374</sup> A register of copyright information could reduce the same uncertainty about the authenticity of copyright ownership in situations where the copyright is assigned or licensed to third parties.<sup>1375</sup>

Additionally, the laws of some countries oblige companies to register charges on land and intangible movable property, such as goodwill, intellectual property, book debts and uncalled share capital in the companies charges register.<sup>1376</sup> Furthermore, companies that issue shares are often obliged by law to keep a register of shares.<sup>1377</sup> Although these charges and shares represent capital and asset value rather than true property, they resemble property in so far as they signify partial ownership interests and can be transferred to third parties.<sup>1378</sup> Just like the intangible link between works and copyright owners, the connection between companies and capital and between companies and shareholders is not immediately visible. That is undesirable for many reasons, related to both public law (e.g. tax payments) and private law (e.g. mergers and acquisitions where capital and asset value are transferred from the one company to the other). The registers are aimed at the establishment of more clarity about these issues and the provision of ample information about the ownership situation of a company.

Finally, as observed in Chapter 2, registration schemes are habitually in place for the acquisition and transfer of intellectual property rights, such as patents, designs and trademarks. Given that, similar to copyright, these rights may also be qualified as natural property,<sup>1379</sup> it appears odd that, in copyright law, formalities are regarded as being inconsistent with natural property rights ideology. It does not follow from philosophical principles that property rights, even if derived from natural law, must exist without formalities. From a legal-theoretical viewpoint, therefore, there seems to be no reason why copyright – or at least the economic elements of copyright that originate from and are related to property – cannot be subject to formalities.

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<sup>1374</sup> Baird & Jackson 1984, at 310.

<sup>1375</sup> See ALAI, ‘Memorandum on Creative Commons Licenses’ (2006), discussing the legal uncertainty surrounding Creative Commons licences that is caused by the impossibility for licensees (the public) to control whether the licensor is really the copyright owner and/or holds all the relevant rights.

<sup>1376</sup> See e.g. sec. 93 of the UK Companies Act (1989), c. 40 and sec. 99 of the Irish Companies Act 1963 (no. 33/1963).

<sup>1377</sup> See e.g. arts 2:85 and 2:194 of the Dutch Civil Code.

<sup>1378</sup> Lurger 2006, at 41.

<sup>1379</sup> To the extent that the Lockean labour theory of property applies to intellectual property, copyright as well as patents, trademarks and design rights may qualify as natural rights, provided that they are the result of the author’s, inventor’s or creator’s labour. See Hughes 1988, at 297-330 and Harris 1996, at 200. See also Vivant 1997, at 60-61 and, with respect to US patent law, Mossoff 2007.

### 6.3 The Personality Rights Theory of Copyright

Another theory upon which the claim that copyright cannot be subject to formalities is often based is the personality rights theory of copyright. This theory suggests that works merit protection, not because of the intellectual labour that authors invest in their creations, but to protect the personality of authors, which is manifested in their works.<sup>1380</sup> From this premise, the conclusion has been drawn that protection must commence from the moment that the personality of the author is expressed in the work. This implies that copyright should attach upon creation and, consequently, that the enjoyment of copyright should not be conditional on formalities.

This section studies the validity of the claim that copyright, as a personality right, cannot be subject to formalities. In so doing, this section follows the same outline as the previous section. It starts with an examination of the philosophical foundation of the personality rights theory of copyright, which can be found in the late eighteenth and early nineteenth century works of Kant, Fichte and Hegel (para. 6.3.1). Next, it analyzes how, in the nineteenth century, the theory matured and gave rise to the idea that copyright should exist independently of formalities (para. 6.3.2). Even though it cannot be deduced from the philosophers' writings that copyright must be protected without formalities, it will be demonstrated that, by linking copyright to the 'higher' fundamental right of personality, their theories strengthened the idea that copyright must arise automatically, without formalities, upon the creation of a work.

The belief that copyright protects the author's personality as reflected in his work thus initiated the idea that at least the coming into existence of copyright should not depend on formalities. This raises the question of whether this is consistent with the system of regulation of fundamental rights, particularly those related to the right of personality. This question is examined in the last part of this section, which draws a comparison with certain fundamental rights and studies how they are regulated and whether they can be subject to formalities (para. 6.3.3). It concludes that formalities may be imposed to regulate the exercise of fundamental rights in the public interest, but that formalities can never be a *sine qua non* for their protection.

#### 6.3.1 THE PHILOSOPHICAL FOUNDATION OF PERSONALITY RIGHTS

The theory that works must be protected because it reflects the personality of their creators is grounded on the works of Immanuel Kant, Johann Gottlieb Fichte and Georg Friedrich Wilhelm Hegel. At the end of the eighteenth century, Kant and Fichte were engaged in a discussion about unauthorized reprinting and publication of books. Both of them wrote essays in which they vigorously argued for copyright protection on the basis that the author's personality was manifested in the work. By

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<sup>1380</sup> Hughes 1988, at 330.

depicting copyright as an intrinsic part of the fundamental right of personality, Kant and Fichte elevated its status to a ‘natural’ and inborn right of the author.

In the early nineteenth century, the personality of the author was also at the heart of Hegel’s justification for copyright protection. He treated copyright as an example of property in which authors can manifest their will. In contrast to Kant and Fichte, however, he did not qualify copyright as a ‘natural’ or innate right that derives from the author’s fundamental right of personality. Instead, it will be seen that, in Hegel’s view, the acquisition of property is a factual deed and not a ‘natural’ act and that, to have legally binding effect, property must be well defined by positive law.

This section describes the personality rights theory of copyright, as developed by Kant (para. 6.3.1.1), Fichte (para. 6.3.1.2) and Hegel (para. 6.3.1.3), and examines if there is anything in their writings that reveals whether these philosophers approve or oppose copyright formalities. It demonstrates that, while Kant and Fichte are utterly silent on the issue, Hegel believed that formalities can play an important role, not only in acquiring property, but also in giving it a determinative form.

### 6.3.1.1 KANT’S ‘ON THE INJUSTICE OF REPRINTING BOOKS’

The idea that creative works merit protection on account of the author’s personality was first developed by Immanuel Kant in his essay ‘*Von der Unrechtmäßigkeit des Büchernachdrucks*’ (‘On the Injustice of Reprinting Books’).<sup>1381</sup> Kant considers the right to control the reprinting of books to originate from the author’s natural right of self-expression.<sup>1382</sup> On the basis of the principle that what is written in a book is part of the author’s personality,<sup>1383</sup> he argues that in a book the author expresses his own thoughts.<sup>1384</sup> Thus, for Kant, a book is not merely a physical object capable of being owned, but also a means through which the author speaks to his readers.<sup>1385</sup>

From this premise Kant construes a right that allows authors to control the public dissemination by others of the speech that is contained in their writings. This right is separate from the property right in the book as a physical object (*ius in re*). Kant believes that a copy of a book may belong to anyone and that the rightful possessor of a copy may use and circulate it in his own name and at his own discretion.<sup>1386</sup> By publishing a book, on the other hand, a publisher delivers the author’s speech to the public. Therefore, Kant considers book publishing to be a business that a publisher carries out in the name of the author.<sup>1387</sup> In view of that, he argues that a publisher is

<sup>1381</sup> Kant 1785. See also Kant 1797, sec. 31 (at 127-129).

<sup>1382</sup> Kretschmer & Kawohl 2004, at 31.

<sup>1383</sup> See Ladas 1938, I, at 8 and Kase 1967, at 10.

<sup>1384</sup> See Geller 1994, at 168, arguing that, since Kant refers to the author’s thoughts and not necessarily to the author’s personality, he relies on ‘a somewhat less expansive view of self-expression’.

<sup>1385</sup> Kant 1785, at 406: ‘*In einem Buche als Schrift redet der Autor zu seinem Leser*’.

<sup>1386</sup> *Ibid.*, at 406.

<sup>1387</sup> *Ibid.*, at 406-407.

not entitled to publish a book, and thus speak in the author's name, without having obtained an explicit mandate from the author.<sup>1388</sup> From this, Kant concludes that any unauthorized publication of books is prohibited by operation of the law.<sup>1389</sup>

Accordingly, for Kant, the author of a book has the right 'to prevent anyone from presenting him as speaking to the public without his consent'.<sup>1390</sup> This right to refuse the public dissemination of his speech is not a property right,<sup>1391</sup> but an inalienable right (a '*ius personalissimum*') of the author.<sup>1392</sup> This should not be confused with a personal right. Kant nowhere used the term 'personal right' in relation to the right of the author. In Kant's view, it is rather the publisher who is authorized by the author to speak in his name who enjoys a personal right.<sup>1393</sup> Only he has acquired the right, at the exclusion of all others, to reproduce the author's book and to deliver his speech to the public. Anyone that publishes a book without authorization makes illegitimate use of the author's discourse (*furtum usus*) and, consequently, infringes the personal right of the publisher to address the public in the name of the author.<sup>1394</sup>

Kant's conception of the author's right (*ius personalissimum*) is rather limited. It only allows the author to protect 'the autonomy of self-expression', meaning that he alone may decide whom to permit to publish his book and to speak in his name.<sup>1395</sup> Once the author has mandated a publisher to transmit his speech to the public, Kant assumes that he has 'entirely and without reservation given up to the publisher his right to the managing of his business with the public'.<sup>1396</sup> Hence, only the publisher, and not the author, is entrusted with the exploitation of the book.<sup>1397</sup> In addition, the author has no rights to control the 'integrity' of his book. Kant finds translations and modifications of books acceptable as long as they are not presented as a discourse of the author of the original.<sup>1398</sup> Lastly, Kant's theory of authors' rights does not extend

<sup>1388</sup> Ibid., at 412. See also Kant 1797, sec. 31 (at 128).

<sup>1389</sup> See Kant 1797, sec. 31 (at 128), stating: '*Der Büchernachdruck ist von rechtswegen verboten*'.

<sup>1390</sup> Kant 1785, at 416, referring to the author's right as a right '*zu verhindern, daß ein anderer ihn nicht ohne seine Einwilligung zum Publicum reden lasse*'.

<sup>1391</sup> See Kant 1785, at 403, arguing that the only kind of property in the literary domain, i.e., the author's ownership to his thoughts, cannot prevent unauthorized reprinting, because 'the author's ownership to his thoughts ... remains his in spite of any reprinting'. See also Kawohl 2008b, para. 3.

<sup>1392</sup> Kant 1785, at 417. See also Kant 1797, sec. 31 (at 129).

<sup>1393</sup> See Strömholm 1967-1973, I (1967), at 190: '*Les remarques qu'il consacre au droit de l'auteur, et à la construction juridique de celui-ci, ont un caractère subsidiaire et accidentel. C'est le droit de l'éditeur qu'il qualifie comme un droit personnelle*'. See also Saunders 1992, at 113.

<sup>1394</sup> See Kant 1797, sec. 31 (at 128-129).

<sup>1395</sup> Geller 1994, at 168-169.

<sup>1396</sup> Kant 1785, at 408.

<sup>1397</sup> This explains why Kant qualifies the unauthorized publication of a book as a wrong committed, not upon the author, but upon the authorized publisher. In his view, only the publisher is injured by such illegitimate act. Ibid., at 408 and 412. See also Kant 1797, sec. 31 (at 128).

<sup>1398</sup> See Kant 1785, at 417.

to artistic works, because he argues that the creator's immaterial discourse in a work of art is inseparable from the physical object in which it is embodied.<sup>1399</sup>

Kant names the author's right (*ius personalissimum*) 'an innate right, invested in his own person'.<sup>1400</sup> He defines an 'innate right' as 'a right that belong to anyone by nature, independently of any juridical act',<sup>1401</sup> thus elevating the class of the author's right to a 'higher right' existing in the domain of natural law.<sup>1402</sup> Kant distinguishes 'innate rights' from 'acquired rights' that are founded on a positive legal act.<sup>1403</sup> The personal right of the publisher arguably belongs to the latter category of rights. This suggests that the publisher's right is a product of positive or statutory law and thus a man-made right in the sense that it proceeds from the will of a lawmaker.<sup>1404</sup>

Because Kant's essay does not deal with copyright formalities, it is impossible to say anything about his position on this topic. However, if, on the basis of his theory, the argument is made that copyright cannot be subject to formalities, because it is a 'natural right' that is based on the author's personality, then the logical consequence is that this only relates to the (limited) author's right to protect the autonomy of self-expression. The publisher's right to control the exploitation of the author's work has not been qualified by Kant as a natural right. On the basis of Kant's essay, therefore, it arguably cannot be assumed that the publisher's right, which has more in common with current copyright, at least as far as the economic rights are concerned, would in any way be affected by natural rights claims opposing copyright formalities.

### 6.3.1.2 FICHTE'S 'PROOF OF THE ILLEGALITY OF REPRINTING'

Kant's ideas on author's rights were expanded on by Fichte in his essay '*Beweis der Unrechtmäßigkeit des Büchernachdruck*' ('Proof of the Illegality of Reprinting').<sup>1405</sup> In this essay, Fichte describes the grounds on which the author of a book could lay claim to a right of intellectual ownership in his work, by explaining how ideas, once communicated, could remain the author's property.<sup>1406</sup> Thus, Fichte – and afterward also Hegel – takes no distance from the idea of literary property.<sup>1407</sup> However, he so

<sup>1399</sup> Ibid., at 415-416. See also Saunders 1992, at 112.

<sup>1400</sup> Kant 1785, at 416, speaking of the author's right as '*ein angebornes Recht in seiner eignen Person*'.

<sup>1401</sup> Kant 1797, at XLIV (introduction), explaining that: '*das angeborne ... Recht ist ... dasjenige Recht ... welches, unabhängig von allem rechtlichen Act, jedermann von Natur zukommt*'.

<sup>1402</sup> See Saunders 1992, at 113-114, arguing that, in his essay, Kant differentiates the author's right 'in a manner characteristic of natural law thinking from rights established in positive law'.

<sup>1403</sup> Kant 1797, at XLIV (introduction).

<sup>1404</sup> See Kant 1797, at XLIV (introduction), distinguishing between '*[der] Rechte, als systematischer Lehren, in das Naturrecht, das auf lauter Principien a priori beruht, und das positive (statutarische) Recht, was aus dem Willen eines Gesetzgebers hervorgeht*'. See also Saunders 1992, at 114.

<sup>1405</sup> Fichte 1793. Ibid., at 472-473, referring to Kant's 'On the Injustice of Reprinting Books', which he claims not to have known when writing his 'Proof of the Illegality of Reprinting'.

<sup>1406</sup> Woodmansee 1984, at 444-445.

<sup>1407</sup> Kawohl 2008b, para. 3.

obviously seeks the justification of copyright in the author's personality and in the fundamental right of self-expression that his concept of literary property belongs to the category of personality rights rather than that of property rights.<sup>1408</sup>

Fichte's justification of the author's right proceeds from the same distinction that Kant made between the physical and the intellectual aspects of a book. The novelty of his theory is that he further divided the latter into 'a material aspect, the content of the book, the ideas it presents' and 'the form of these ideas, the way in which, the combination in which, the phrasing and wording in which they are presented.'<sup>1409</sup> He then assigns a property right to each of these aspects. For Fichte, the ownership of the book as printed matter 'passes indisputably to the buyer upon purchase of the book'.<sup>1410</sup> However, the buyer does not acquire full intellectual ownership, but only 'the possibility of appropriating the author's ideas'.<sup>1411</sup> Upon publication the content of a book clearly ceases to be 'the exclusive property of its first proprietor'.<sup>1412</sup> Still, it continues to be his property in common with the many others who make the author's ideas their own by reading the book and thinking through its content.<sup>1413</sup>

The form in which the author's ideas are expressed, on the other hand, 'remains forever his exclusive property'.<sup>1414</sup> Fichte infers this from the argument that, even if two people, independently of each other, can think about a topic in exactly the same way, it is absolutely impossible that they ever assimilate ideas into their own system of thought in exactly the same form.<sup>1415</sup> Fichte argues that, when writing a book, the author 'must give his thoughts a certain form, and he can give them no other form than his own because he has no other'.<sup>1416</sup> Given that 'each individual has his own thought processes, his own way of forming concepts and connecting them',<sup>1417</sup> he asserts that 'no one can appropriate [the author's] thoughts without thereby altering their form'.<sup>1418</sup> Therefore, Fichte concludes that, after publication, the form in which the author has expressed his ideas is and remains his exclusive property.<sup>1419</sup>

This distinction between freely usable 'ideas' and the protected 'form' of these ideas changed the perception of copyright in two important ways.<sup>1420</sup> As observed, on the object side, copyright came to be seen as no longer protecting concrete items, but abstract authored works (para. 3.3.2.3). On the subject side, the abstract 'form'

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<sup>1408</sup> Kawohl & Kretschmer 2009, at 212.

<sup>1409</sup> Fichte 1793, at 447.

<sup>1410</sup> *Ibid.*, at 447. *Ibid.*, at 449-450.

<sup>1411</sup> *Ibid.*, at 448.

<sup>1412</sup> *Ibid.*, at 450.

<sup>1413</sup> *Ibid.*, at 447-448 and 450.

<sup>1414</sup> *Ibid.*, at 451.

<sup>1415</sup> *Ibid.*, at 451.

<sup>1416</sup> *Ibid.*, at 451.

<sup>1417</sup> *Ibid.*, at 450.

<sup>1418</sup> *Ibid.*, at 451.

<sup>1419</sup> *Ibid.*, at 457.

<sup>1420</sup> Kawohl & Kretschmer 2009, at 211.

concept provided a very strong justification for copyright to be vested in the author (para. 3.3.2.1). It not only accentuated the personal element in the author's creation, but also linked everything done to the work back to the personality of the author by assuring protection against any taking of the personal and unique form in which the author had expressed his ideas.<sup>1421</sup> According to Fichte, the author has the right not merely to demand paternity of his work, but also 'to prevent anyone from infringing upon his exclusive ownership of this form and taking possession of it'.<sup>1422</sup>

The author-centred element in Fichte's theory becomes particularly evident in the relationship between the author and the publisher. For Fichte, the author's property of his ideas in their specific form of expression is so personal that he considers it to be inalienable. For this reason, he believes that publishing contracts cannot be based on an assignment of the author's rights, but only grant to publishers the usufruct of the author's property.<sup>1423</sup> Thus Fichte regards publishers as the representatives of the author.<sup>1424</sup> This explains why he considers the unauthorized publication of a book to be not merely an infringement of the publisher's right to the usufruct of the author's property, but to also hinder 'the author in the exercise of his absolute right'.<sup>1425</sup>

In his essay, Fichte defines the nature of the author's right as 'his natural, inborn, and inalienable right of ownership'.<sup>1426</sup> This suggests that Fichte considers this right to exist by virtue of natural law and that he believes that it merits protection, even if it has not been recognized by positive law.<sup>1427</sup> However, this definition says nothing about Fichte's position toward formalities. Since Fichte does not further address this issue, it can only be guessed what his viewpoint on the topic really was.

### 6.3.1.3 HEGEL'S 'ELEMENTS OF THE PHILOSOPHY OF RIGHT'

Another legal philosopher who is often associated with the personality rights theory of copyright is Hegel. In his '*Grundlinien der Philosophie des Rechts*' ('Elements of the Philosophy of Rights'),<sup>1428</sup> he explains, broadly speaking, how individuals can be free, i.e., how they can 'actualize their personality and subjectivity in a fulfilling social context'.<sup>1429</sup> Hegel describes three consecutive spheres of 'right' that progress

<sup>1421</sup> Ibid., at 216.

<sup>1422</sup> Fichte 1793, at 451-452.

<sup>1423</sup> Ibid., at 457, explaining that, through the grant of the usufruct of the author's property, the publisher is authorized 'to sell to whomever he can and wants, not the author's ideas and their form, but only the possibility of appropriating the former thanks to their appearance in print'.

<sup>1424</sup> Ibid., at 457, where Fichte articulates that '[in] all respects, then, [the publisher] acts not in his own name but in the name and by mandate of the author', and 459.

<sup>1425</sup> Ibid., at 459.

<sup>1426</sup> Ibid., at 460-461.

<sup>1427</sup> Ibid., at 461, insinuating that the author's right need not be explicitly enacted ('*Daß man ein solches Recht nicht verletzt sehen wolle, wird wohl ohne ausdrückliche Erinnerung voraus gesetzt*').

<sup>1428</sup> Hegel 1821 (1991).

<sup>1429</sup> Wood 1991, at xvii.

toward the actualization of this freedom. The first sphere is ‘abstract right’.<sup>1430</sup> This is the sphere in which people are concerned only with their ‘outwardness’, which extends from a person’s external body to the external objects that he owns.<sup>1431</sup> The person’s will is only partly free.<sup>1432</sup> In the sphere of ‘abstract right’, people pursue universal or general interests. The second sphere is ‘morality’,<sup>1433</sup> which forms the step to the ‘inwardness’ of a person. The person’s will ‘acquires determinate shape in the mode of singular individuality or subjectivity’, but still is only partly free.<sup>1434</sup> This is the sphere of subjective freedom in which people ‘measure their choices and reflect on their actions from the standpoint of conscience’.<sup>1435</sup> Here, people pursue merely individual interests. The third sphere is ‘ethical life’.<sup>1436</sup> It is the sphere where the universal notions of ‘abstract right’ and the individual subjective feelings of ‘morality’ merge. In this sphere, people pursue universal or general interests, because they perceive them as being in their own individual interests. This is the sphere in which people are actually free.<sup>1437</sup>

This section describes the Hegelian concepts of property and intellectual property in the spheres of ‘abstract right’ and ‘ethical life’. The sphere of ‘morality’ shall not be discussed, since it is a transitional phase in the development toward the ‘ethical life’ in which individuals become detached from the material world. The subjective freedom consists precisely in being free from the limitations that the material world imposes on the person’s will.<sup>1438</sup> It thus is purely an inward-looking sphere.

#### *The Hegelian Concept of Property in the Sphere of ‘Abstract Right’*

Property plays a critical role in the first sphere of ‘abstract right’.<sup>1439</sup> Hegel assumes that, through property, a person gives his will existence (*Dasein*).<sup>1440</sup> He believes that by appropriating a thing, a person manifests his will in relation to the thing, i.e., he confers upon the thing an end other than that which it immediately possessed. That is, he gives it his soul.<sup>1441</sup> Hegel reasons that a thing can become a person’s

<sup>1430</sup> On ‘abstract right’, see Hegel 1821 (1991), secs 34 to 104 (at 67-132).

<sup>1431</sup> Hegel 1821 (1991), sec. 41 (at 73). See also Wood 1991, at xiv and Schroeder 2006, at 466-468.

<sup>1432</sup> See Hegel 1821 (1991), secs 10 and 11 (at 44-45).

<sup>1433</sup> On ‘morality’, see Hegel 1821 (1991), secs 105 to 141 (at 135-186).

<sup>1434</sup> Dallmayr 1993, at 111.

<sup>1435</sup> Wood 1991, at xiv.

<sup>1436</sup> On ‘ethical life’, see Hegel 1821 (1991), secs 142 to 360 (at 189-380).

<sup>1437</sup> See Wood 1991, at xvi, explaining that, for Hegel, ‘[the] only real guarantee of freedom is a well-constituted ethical life, which integrates the rights of persons and subjects into an organic system of customs and institutions providing individuals with concretely fulfilling lives’.

<sup>1438</sup> Hegel 1821 (1991), sec. 104 (at 131-132).

<sup>1439</sup> *Ibid.*, sec. 45 (at 77), arguing that ‘from the point of view of freedom, property, as the first *existence* (*Dasein*) of freedom, is an essential end for itself’.

<sup>1440</sup> *Ibid.*, sec. 46 (at 78).

<sup>1441</sup> *Ibid.*, sec. 44 (at 76).

private property, because a person is a specific entity whose will may become objective in a thing.<sup>1442</sup> He thus sees in property ‘the *existence (Dasein)* of personality’.<sup>1443</sup>

Hegel’s ideas of property also apply to intellectual property. For Hegel, the thing that one can take possession of can also be an intangible object. He states that, while intellectual accomplishments are ‘of an inward and spiritual nature ... , the spirit is equally capable, through expressing them, of giving them an external existence’.<sup>1444</sup> Furthermore, because they can also be disposed of and become objects of contract, Hegel finds that works of the mind can be defined as ‘things’ on which authors can manifest their will.<sup>1445</sup> Therefore, authors can claim them as their property.

Hegel emphasizes that a person’s inner idea and will that something be his is not enough to constitute property. Property should also be recognized as such by others. This implies that a person must take possession of a thing by giving it the predicate of his private property, which must appear in it in an external form.<sup>1446</sup>

One way to take possession of a thing is by imposing a form on it.<sup>1447</sup> For Hegel, the creation of a literary work is a legitimate way to manifest one’s will in and take possession of one’s intellectual work.<sup>1448</sup> The transition of intellectual property into externality (‘in which it falls within the definition of legal and rightful property’)<sup>1449</sup> might take two forms.<sup>1450</sup> First, it can ‘be immediately transformed into the external quality of a thing (*Sache*)’, namely, the literary work *qua* thing, whereby ‘the form which makes it an external thing ... is of a mechanical kind’.<sup>1451</sup> If someone buys a literary work *qua* thing, he may appropriate the thoughts and ideas that the author has communicated and thereby take possession of ‘the *universal ways and means* of so expressing himself’.<sup>1452</sup> However, he does not take possession of the second form of externality, i.e., the distinctive mode of expression of the author’s thoughts and ideas.<sup>1453</sup> Hegel believes that the author of a book has not immediately alienated ‘the *universal ways and means* of reproducing’ the expression of his thoughts and ideas in a distinctive form.<sup>1454</sup> The author remains the exclusive owner of these.<sup>1455</sup>

<sup>1442</sup> Ibid., sec. 46 (at 77).

<sup>1443</sup> Ibid., sec. 51 (at 81). Ibid., sec. 41 (at 73).

<sup>1444</sup> Ibid., sec. 43 (at 74-75).

<sup>1445</sup> Ibid., sec. 43 (at 75).

<sup>1446</sup> Ibid., sec. 51 (at 81).

<sup>1447</sup> Ibid., sec. 56 (at 85), where Hegel explains that, when a form is imposed on a thing, ‘it combines the subjective and the objective’.

<sup>1448</sup> See Kretschmer & Kawohl 2004, at 32, concluding that ‘formation has in Hegel’s theory a similar function as labour in Locke’s’.

<sup>1449</sup> Hegel 1821 (1991), sec. 43 (at 75).

<sup>1450</sup> See Kretschmer & Kawohl 2004, at 32, asserting that ‘Hegel employed a twin concept of form (on the objective side) and formation (on the subjective side).’

<sup>1451</sup> Hegel 1821 (1991), sec. 68 (at 98).

<sup>1452</sup> Ibid., sec. 68 (at 98).

<sup>1453</sup> Ibid., sec. 69 (at 99-101).

<sup>1454</sup> Ibid., sec. 69 (at 99).

But formation is not the only way in which one can take possession of a thing.<sup>1456</sup> Hegel believes that, because possession is a personal claim to or a projection of the person's will on a thing, 'the most complete mode' of taking possession of a thing is by designating its ownership,<sup>1457</sup> i.e., by marking the thing as his own.<sup>1458</sup> He writes: 'It is precisely through the ability to make a sign and by so doing to acquire things (*Dinge*) that human beings display their mastery over the latter'.<sup>1459</sup> By marking a thing with a sign, a person can easily indicate that he has placed his will in it.<sup>1460</sup>

This is important for the topic of this book. If possession through marking is the most adequate way in which a person can externally manifest his will in a property, then fulfilling formalities as a means to complete a copyright claim would be totally acceptable.<sup>1461</sup> Although formation remains the most appropriate way to take initial possession of a work of authorship, its intangible character may cause difficulties in substantiating a genuine property claim on this basis alone. Intellectual property can not be physically grasped.<sup>1462</sup> From a Hegelian perspective, the difficulties of taking possession of intellectual property can be remedied by designating ownership, e.g., by means of completing formalities. This may help 'to distinguish the legal right of property from the mere fact of physical relations with tangible objects'.<sup>1463</sup>

But how does this relate to the nature of the author's right in Hegelian theory? In contrast with Kant and Fichte, Hegel does not explicitly qualify the author's right as a natural or innate right. He does not even consider it to be inalienable.<sup>1464</sup> Although Hegel speaks of the absolute and universal right of people to manifest their will in a thing so as to appropriate it,<sup>1465</sup> this right is arguably not a 'natural right'. Being able to manifest one's will in a thing is just a skill that all human beings possess.<sup>1466</sup>

<sup>1455</sup> Ibid., sec. 69 (at 100-101), explaining the effect of honour in preventing plagiarism, arguing that it is honour – and not necessarily right and the law – that 'should deter people from committing it'.

<sup>1456</sup> Ibid., sec. 54 (at 84), where Hegel argued that a person can take possession of a thing by physically seizing it, by giving it form or by designating its ownership.

<sup>1457</sup> Ibid., sec. 58 (at 88).

<sup>1458</sup> Schroeder 2006, at 469-470 and 471: 'Far from being a poor substitute for physical custody, marking is a more adequate form of possession.' But see Kretschmer & Kawohl 2004, at 32, arguing that mere symbolic marking of the property is not an appropriate way to acquire property.

<sup>1459</sup> Hegel 1821 (1991), sec. 58 (at 88).

<sup>1460</sup> Ibid., sec. 58 (at 88): '[The] effect of the sign is more or less implicit (*an sich*) in the other ways of taking possession, too. If I seize a thing or give form to it, the ultimate significance is likewise a sign, a sign given to others in order to exclude them and to show that I have placed my will in the thing.'

<sup>1461</sup> See Schroeder 2006, at 471.

<sup>1462</sup> Ibid., at 470.

<sup>1463</sup> Ibid., at 470.

<sup>1464</sup> Hegel 1821 (1991), sec. 69 (at 99), stating that by publishing a work the author does not *immediately* alienate his rights, thus suggesting that, in principle, copyright can be alienated. See also Schroeder 2006, at 482-484. But see Kretschmer & Kawohl 2004, at 32, maintaining that 'Hegel distinguishes between disposable things of "external" nature and inalienable "inner" capabilities'.

<sup>1465</sup> Hegel 1821 (1991), secs 44 (at 75) and 52 (at 82).

<sup>1466</sup> See Schroeder 2006, 484-491, concluding that 'Hegel believes that there are no natural rights of any sort'. But see Burns 1995, at 30, arguing that the 'abstract principles of natural law' that Hegel refers to in his writings 'establish certain types of rights, which might be termed natural rights'.

Moreover, as we shall see next, for Hegel, ‘abstract right’, such as property, must also be defined by positive law when it passes to the sphere of ‘ethical life’. In this respect, formalities can play a key role in making ‘abstract right’ determinate.

*The Hegelian Concept of Property in the Sphere of ‘Ethical Life’*

Hegel believes that property rights acquire new significance when their existence in the sphere of ‘ethical life’ has been transformed from a ‘general’ abstract right – via ‘morality’ – to a ‘universal’ positive right. Whereas property rights were ‘previously *immediate* and *abstract*’, in the state, all acquisitions and transactions of property must ‘be undertaken and expressed in the *form* which [the universal will expressed in positive law] gives to them’.<sup>1467</sup> In this sphere, all property, including intellectual property and copyright, must be formally defined by positive law.<sup>1468</sup>

Hegel arrives at this conclusion because he holds the opinion that in ‘ethical life’, abstract right has no ‘validity and objective actuality’ without ‘an *existence* in which it is *universally recognized, known, and willed*’.<sup>1469</sup> In order to become law and have binding force on everyone in the state, he thinks that abstract right should be posited in an objective existence, be known as universally valid and take on a determinate form.<sup>1470</sup> Hegel argues that this can only be achieved by way of positive law,<sup>1471</sup> thus ascribing to positive law the task of making abstract right determinate.<sup>1472</sup>

In making abstract right determinate, Hegel finds that ‘*formalities* which make it capable of proof and valid before the law’ can play a central role.<sup>1473</sup> He states:

‘When right is posited as what it is in itself, it is law. I possess something or own a property which I took over as ownerless; this property must now also be recognized and posited as mine. This is why there are *formalities* in society with reference to property: boundary stones are erected as symbols for others to recognize, and mortgage books and property registers are compiled.’<sup>1474</sup>

<sup>1467</sup> Hegel 1821 (1991), sec. 217 (at 249).

<sup>1468</sup> Drahos 1996, at 89. See Hegel 1821 (1991), sec. 69 (at 100). *Ibid.*, preface (at 13), defining positive rights (‘laws of right’) as ‘something *laid down*, something *derived from* human beings’, as opposed to natural rights (‘laws of nature’), which are ‘simply there and ... valid as they stand’.

<sup>1469</sup> Hegel 1821 (1991), sec. 209 (at 240).

<sup>1470</sup> *Ibid.*, secs 210 to 214 (at 240-246).

<sup>1471</sup> *Ibid.*, secs 211 (at 241-243), drawing a comparison between customary law and legal code, and 212 (at 244), where Hegel writes: ‘In positive right, what is *legal (gesetzmäßig)* is therefore the source of cognition of what is *right (Recht)*, or more precisely, of what is *lawful (Rechters)*’.

<sup>1472</sup> Wood 1991, at xv-xvi: ‘It is the function of positive law ... to make rights determinate. Our rights as persons have validity only when they are expressed in law.’ See also Burns 1995, at 29-31.

<sup>1473</sup> Hegel 1821 (1991), sec. 217 (at 249).

<sup>1474</sup> *Ibid.*, sec. 217 (at 250).

While Hegel takes note of some allegedly negative aspects of formalities, such as that formalities exist only to attract money for the authorities,<sup>1475</sup> he is not convinced by them. He argues that formalities can play a fundamental role in establishing legal certainty over property claims by alerting the public to their existence. He writes:

‘[The] essential aspect of such forms is that what is right in itself should also be posited as right. My will is a rational will; it has validity, and this validity should be recognized by others. Here is the point at which my subjectivity and that of others must be put aside, and the will must attain a security, stability, and objectivity which form alone can give it.’<sup>1476</sup>

Accordingly, Hegel considers formalities to be essential indicators for identifying property. Especially in cases where property claims are uncertain, e.g., because the proprietor has no physical possession of the property, he seems to find it appropriate that lawmakers subject the enjoyment or the exercise of the relevant property right to a formality of some kind. Hegel reasons that, in such cases, individuals put aside their subjective property claims in the interest of the common good.

### 6.3.2 THE IDEA OF COPYRIGHT AS A RIGHT OF PERSONALITY

In the mid-nineteenth century, the theories of Kant, Fichte and Hegel were adopted by legal scholars in continental Europe, who further developed the idea of copyright as a right of personality.<sup>1477</sup> In Germany, in particular, the personality rights theory of copyright evolved into a separate, stand-alone copyright theory that was taught to give an ideological explanation for why authors merit protection for the intellectual achievements springing from their personality. In France and subsequently also in other continental European countries, the belief that a work emanates from the personhood of the author gradually led to the recognition of moral rights.<sup>1478</sup>

The personality rights theory also had a great impact on copyright formalities. In Germany, the belief that copyright protects the author’s personality as manifested in his work led to the idea that copyright should be secured upon creation, because that is the moment in which the author’s personality is expressed in the work. Given that creation became the sole relevant act upon which copyright attached, it was said that no formalities of any kind were required for copyright to come into being.

To explicate how the idea of copyright as a personality right evolved, this section first briefly describes how, in the nineteenth century, the personality rights theory of copyright became central to German legal thinking and led to the recognition of the

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<sup>1475</sup> Ibid., sec. 217 (at 250).

<sup>1476</sup> Ibid., sec. 217 (at 250).

<sup>1477</sup> See e.g. Kase 1967, at 11, Vogel 1994, at 589-590 and Drahos 1996, at 80. See also Kawohl 2008c, para. 2, stating, however, that Hegel’s theory was not often mentioned by German legal scholars who developed the personality rights theory of copyright in the second half of the nineteenth century.

<sup>1478</sup> See Pfister 2005, at 126-127, 152-153 and 178-181.

author's moral right in continental Europe (para. 6.3.2.1). Next, it explains how this theory added to the idea that copyright should come into existence independently of formalities (para. 6.3.2.2). This section reveals that the supporters of the personality rights theory of copyright strongly objected to formalities that are a *sine qua non* for protection and that they accepted formalities as to the *exercise* of rights only if there was a legitimate public interest at stake. As we shall see in para. 6.3.3 below, this is consistent with the way in which other personality rights are regulated.

### 6.3.2.1 THE RECOGNITION OF A COPYRIGHT DERIVING FROM PERSONALITY

In nineteenth century Germany, there was ample room for the rise of the personality rights theory of copyright. The property rights theory of copyright was not generally accepted. Under the influence of the Historical School of Law,<sup>1479</sup> Germany saw a revival of the study of Roman law, pursuant to which property can merely extend to physical goods.<sup>1480</sup> Moreover, German publishers who engaged in the unauthorized reprinting and publication of books stated that it is impossible that property exists in intellectual creations.<sup>1481</sup> Therefore, the theory of intellectual property, while having some supporters, soon lost popularity in nineteenth century Germany.<sup>1482</sup>

Although the idea of copyright as a personality right (*Persönlichkeitsrecht*) was already elaborated on by Neustetel in 1824,<sup>1483</sup> it was not until the 1850s that it was further expanded by scholars such as Bluntschli and Volkmann,<sup>1484</sup> who emphasized the inextricable bond between the author and his work.<sup>1485</sup> Bluntschli maintained that copyright automatically springs from the author's personality, because the latter is directly reflected in the author's creation. He stated as follows:

*‘Das Werk als Geistesproduct gehört zunächst dem Autor an, der es erzeugt hat, nicht als eine körperliche Sache, ... sondern als eine Offenbarung und ein Ausdruck seines persönlichen Geistes. Zwischen Autor und Werk besteht ein*

<sup>1479</sup> On the rise of the Historical School of Law in Germany, see Gale 1982, at 123 et seq.

<sup>1480</sup> See e.g. Neustetel 1824, at 4-15 (para. 2) and Dahn 1877, at 111.

<sup>1481</sup> See Woodmansee 1984, at 443-444 and Saunders 1992, at 108-109.

<sup>1482</sup> See Kawohl 2008b, para. 3, explaining that, at the end of the eighteenth century, only few German scholars had adopted Locke's labour theory of property and that, because natural law discourse at that time was declining, it was unlikely to be accepted as justification for copyright in Germany.

<sup>1483</sup> Neustetel 1824, at 44-61 (para. 6), calling the unauthorized publication of a book an offence against *‘das unmittelbar aus der Persönlichkeit des Schriftstellers folgende Recht der Bekanntmachung’*. His work echoes the Kantian theory of the author's natural freedom to express himself, arguing that the author has a right to be able to communicate his thoughts and, therefore, to decide on the delivery of his speech and the publication of his book to the public. See also Kawohl 2008d, para. 4.

<sup>1484</sup> See Bluntschli 1853-1854 and Volkmann 1856.

<sup>1485</sup> See also Harum 1857, at 52-57 (paras 25 and 26), who also strongly relied on the Kantian theory of the author's natural freedom to express himself, but who did not further expand on this theory.

*natürlicher Zusammenhang, wie zwischen Schöpfer und Geschöpf, und jener hat ein natürliches Recht, dass dieses Verhältnis geachtet werde.*<sup>1486</sup>

This idea was adopted by Volkmann. In an attempt to establish that artistic works merit copyright protection as much as literary works do, he used similar personality rights arguments. Volkmann argued that artistic skills are part of the personality of the artist. He regarded these skills as the means with which the artist endeavours to transform the inner perception, which he may borrow from a certain image, into an outwardly perceptible form, such as a painting, a stone or a copper plate.<sup>1487</sup>

In the last quarter of the nineteenth century, the idea of copyright as a personality right was further developed and integrated into a uniform personality rights theory by Gareis and Gierke.<sup>1488</sup> Gareis classified copyright, together with other ‘individual rights’ (*Individualrechten*),<sup>1489</sup> as a separate category of rights within the system of German civil law.<sup>1490</sup> He believed that copyright gives authors the power to exercise control over what is individual about their own person and to have the authenticity of the result of their individual creativity recognized and protected.<sup>1491</sup>

Gierke undertook a similar exercise. He counted copyright among the personality rights (*Persönlichkeitsrechten*), which he defined as ‘rights to one’s own person’.<sup>1492</sup> Gierke regarded personality rights as civil rights that are allied to the general ‘right of personality’, i.e., a fundamental right that underpins and reaches to the inside of all subjective rights.<sup>1493</sup> While Gierke acknowledged that copyright also contains an economic component,<sup>1494</sup> he categorized it as a personality right, because its object, the work of the mind, is the product of the author’s personality.<sup>1495</sup> He thus believed that copyright should be protected as an absolute right of the author.<sup>1496</sup>

Although the personality rights theory of copyright appears to have been mostly influential in Germany, where it developed into a distinct theory of copyright, it also left its traces in other countries. In France, the idea that copyright postulates ‘the *continuum* between the author and the work’<sup>1497</sup> incontrovertibly contributed to the recognition of the author’s moral rights. In the 1870s, it inspired Morillot to develop his theory of moral rights, stating that, apart from an economic element, there is also

<sup>1486</sup> Bluntschli 1853-1854, I (1853), at 191-192.

<sup>1487</sup> Volkmann 1856, at 19.

<sup>1488</sup> Vogel 1994, at 589-590.

<sup>1489</sup> See Gareis 1877, at 197-198, naming the right to one’s name, the right to a commercial name, the trademark right and the design patent right as other examples of ‘individual rights’.

<sup>1490</sup> *Ibid.*, at 199-202, positioning individual rights next to real rights (property law), claim rights (law of obligations) and rights enshrined in family law and in the law of legacies.

<sup>1491</sup> *Ibid.*, at 197-198 and 200.

<sup>1492</sup> Gierke 1895-1917, I (1895), at 702 et seq.

<sup>1493</sup> *Ibid.*, I (1895), at 702-703.

<sup>1494</sup> *Ibid.*, I (1895), at 706-707 and 766.

<sup>1495</sup> *Ibid.*, I (1895), at 756. See also Vogel 1994, at 590.

<sup>1496</sup> *Ibid.*, I (1895), at 703.

<sup>1497</sup> Vivant 1997, at 92-93.

a personal, moral component to copyright.<sup>1498</sup> At present, several copyright laws still recognize the dual, i.e., moral and economic, nature of copyright.<sup>1499</sup> But the theory also survived in twentieth century legal writing. In the 1950s, Desbois, for example, argued that creative works reflect the author's personality and that the unauthorized publication of a work affects the person of the author as much as his work.<sup>1500</sup>

### 6.3.2.2 THE DISENTANGLEMENT OF COPYRIGHT AND FORMALITIES

Apart from laying the groundwork for a widespread recognition of the protection of the personality and integrity of authors,<sup>1501</sup> the personality rights theory of copyright also gave rise to the idea that copyright should come into existence independently of formalities. By qualifying copyright as '*eines unmittelbar aus geistiger Schöpfung fließenden Rechtes*',<sup>1502</sup> the supporters of the personality rights theory assumed that it is born automatically, without formalities, upon the creation of a work.<sup>1503</sup>

In contending for a copyright that arises directly upon the creation of a work, the supporters of the personality rights theory did not rely on 'natural law'. In nineteenth century Germany, natural law arguments had generally been condemned under the influence of the Historical School of Law.<sup>1504</sup> Copyright therefore was not perceived as a natural, inborn right of the author,<sup>1505</sup> but as a positive right that is the result of enactment by the lawmaker.<sup>1506</sup> Yet authors were not totally without help if their personality rights were not duly protected by the state.<sup>1507</sup> Gierke, for example, argued that they could have recourse to 'the right of self-help'.<sup>1508</sup> This would allow authors to take corrective or preventive measures if, without legislative intervention, irreparable damages for their personality right were anticipated.<sup>1509</sup>

<sup>1498</sup> See Morillot 1872 and Morillot 1878, at 108-125.

<sup>1499</sup> See e.g. Art. L 111-1(2) of the French Intellectual Property Code: '*Ce droit comporte des attributs d'ordre intellectuel et moral ainsi que des attributs d'ordre patrimonial*'.

<sup>1500</sup> See Desbois 1950, at 63. See also Vivant 1997, note 64 (at 118-119), and the references therein.

<sup>1501</sup> See e.g. Ladas 1938, I, at 9, Saunders 1992, at 115, Vogel 1994, at 590 Goldstein 2001, at 9 and Goldstein & Hugenholtz 2010, at 20.

<sup>1502</sup> Gierke 1895-1917, I (1895), at 753.

<sup>1503</sup> *Ibid.*, I (1895), at 755: '*durch die Schöpfung eines Geisteswerkes [entsteht] in der Person seines Schöpfers ein gutes Recht*'. See also Bluntschli 1853-1854, I (1853), at 199: '*Das Autorrecht ... entsteht aus der Urhebererschaft*'.

<sup>1504</sup> See Gareis 1877, at 198.

<sup>1505</sup> *Ibid.*, at 198-199.

<sup>1506</sup> *Ibid.*, at 199 and 201. See also Gierke 1895-1917, I (1895), at 707, referring to copyright and other personality rights as '*besondere gesetzliche Rechte*', thus situating these rights in positive law.

<sup>1507</sup> See Vogel 1994, at 590.

<sup>1508</sup> See Gierke 1895-1917, I (1895), at 705-706.

<sup>1509</sup> *Ibid.*, I (1895), at 338. For a recent discussion on the application of self-help provisions in copyright law, see Cohen 1998, being very critical about a wide acceptance of an author's right of self-help in copyright matters, because this may upset the balance with legitimate users' interests.

Instead of applying natural rights rhetoric, the supporters of the personality rights theory stated that copyright arises immediately upon the creation of a work because it is an utterly personal (*'menschlichen'*) right<sup>1510</sup> that is directly connected with the fundamental right of personality. By attributing to copyright a higher metaphysical status, they accentuated the personal and inextricable bond that links authors to their works. Illustrative is the following comment of Dahn, explaining:

*'Den Kern des Urheberrechts bildet das höchst individuelle Geistesband, das "vinculum spirituale", welches den Schöpfer eines Geistesproducts und sein Geschöpf verknüpft und welches so höchst persönlich ist wie die Ehre, wie die Eigenart des Menschen.'*<sup>1511</sup>

Because copyright was deemed to protect the inextricable, intellectual bond that exists between the author and his work, it was believed to be a highly personal right that, unless determined otherwise by the legislator, is born with, remains attached to and dies with the author.<sup>1512</sup> The supporters of the personality rights theory therefore argued that the legislator should protect copyright from the moment of creation, not to recognize that copyright comes into being 'naturally' upon creation, but because, from this moment, the author's personality is manifested in the work.<sup>1513</sup>

This had important consequences for copyright formalities. Although personality rights, in general, could be subject to formalities,<sup>1514</sup> it was stated that, for copyright, formalities were needless, since the act of creation constituted the most satisfactory legal basis for securing protection. Consequently, because copyright was deemed to come into existence through the very act of creation (*'die geistige Schöpfungsthat'*) and through the act of creation alone,<sup>1515</sup> no formalities of any sort were required for securing protection of the author's personality as reflected in his creation.

As observed in Chapter 3, in Germany, this initiated the abolition of virtually all constitutive formalities at the end of the nineteenth century. If the German legislator imposed copyright formalities, they affected the *exercise* of the right only. This was considered to be justified, provided that it was based on a true public need.<sup>1516</sup>

This is in line with the mindset in late nineteenth century Germany that aimed to fairly reconcile the interests of the beneficiaries of civil rights with the interests of

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<sup>1510</sup> See e.g. Bluntschli 1853-1854, I (1853), at 186: *'Heutzutage gehört das Autorrecht zu den allgemein anerkannten menschlichen Rechten'*.

<sup>1511</sup> Dahn 1877, at 113.

<sup>1512</sup> See Gierke 1895-1917, I (1895), at 707: *'Die Persönlichkeitsrechte sind an sich höchstpersönliche Rechte, die in einer bestimmten Person entstehen, an sie gebunden bleiben und mit ihr untergehen.'*

<sup>1513</sup> *Ibid.*, I (1895), at 707 and 787.

<sup>1514</sup> *Ibid.*, I (1895), at 707.

<sup>1515</sup> *Ibid.*, I (1895), at 766 and 787-788.

<sup>1516</sup> See Fischer 1870, at 33-34 and Dambach 1871, at 205-207.

other persons and those of society.<sup>1517</sup> Rather than being an end in itself, copyright was said to be directed at fulfilling a social function within the broader context of society.<sup>1518</sup> This explains why limited formalities (e.g., situation specific formalities) could be imposed to uphold the balance between copyright and the public interest.<sup>1519</sup> Yet, copyright formalities could not lead to a defeat of the author's right to protection of his personality as manifested in his work. That was deemed unacceptable.

### 6.3.3 THE REGULATION OF OTHER PERSONALITY-RELATED RIGHTS

The preceding section has demonstrated that the idea that copyright derives from the author's personality has been an important reason for the claim that the existence of copyright must not be subject to formalities. Although formalities as to the exercise of copyright may be acceptable, at least if they do not lead to a loss of protection, the personality rights theory objects to formalities that are a *sine qua non* for protection.

This raises the question whether this is in harmony with the way in which other personality rights are regulated. Such rights exist in the sphere of fundamental rights in particular. Examples are a person's right to a name and rights related to personal liberty and autonomy, such as the right of privacy and the freedom of (political and religious) speech and thought. This section examines how these personality-related fundamental rights are regulated by describing their codification in international and national law (para. 6.3.3.1) and studying the natural inherent limitations of personal liberties (para. 6.3.3.2). In addition, it investigates whether and to what degree these personality-related fundamental rights can be subject to formalities (para. 6.3.3.3).

This section reveals that, in cases of competing interests or conflicts of rights, the *exercise*, though not the existence, of personality-related fundamental rights can be subject to formalities. This corroborates our findings in the previous section that the personality-related aspects of copyright ought to be formality-free, unless there is a public interest that gives cause for imposing formalities as to their exercise.

#### 6.3.3.1 THE CODIFICATION OF PERSONALITY-RELATED RIGHTS

Personality-related fundamental rights are traditionally understood as rights that are inherent to human life and that exist independently of positive law. Like most other

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<sup>1517</sup> See Bluntschli 1853-1854, I (1853), at 193: '*Aufgabe der Gesetzgebung und der Jurisprudenz ist es daher, die beiderseitigen Rechte des Autors und des Publicums an dem veröffentlichten Werke richtig auseinandersetzen.*' See also Gierke 1895-1917, I (1895), at 755 and Kohler 1880, at 37 et seq.

<sup>1518</sup> See Geiger 2008, at 104-105.

<sup>1519</sup> Ortloff 1861, at 332-334.

fundamental rights, they are said to have roots in natural law.<sup>1520</sup> Ultimately, these rights derive from the concept of personal freedom, i.e., ‘the one sole and original right that belongs to every human being by virtue of his humanity’.<sup>1521</sup> The chief natural and innate right of man being the right to the unconstrained exercise of his freedom,<sup>1522</sup> every person must have the right to defend one’s own ‘life, liberty and property’<sup>1523</sup> and ‘to autonomously determine one’s own inner life without wrongful interference by others’.<sup>1524</sup> Thus, if it is assumed that all men are naturally born free, they should enjoy the right to protect their liberty and personality by birth.

Similar to natural property rights, the general principles of the rule of law dictate that personality-related fundamental rights, even if they originate from natural law, should be properly defined by positive law to have normative effect.<sup>1525</sup> These rights have been codified, first, in national constitutions and, later, in the mid-twentieth century, in international conventions on human rights, such as the International Bill of Human Rights, i.e., the Universal Declaration of Human Rights (UDHR) plus the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols,<sup>1526</sup> and the European Convention on Human Rights (ECHR).

### 6.3.3.2 THE NATURAL INHERENT LIMITATIONS OF PERSONAL LIBERTIES

That men ‘naturally’ enjoy personality-related fundamental rights by birth does not imply that these rights are also unconditional. That would be practically impossible, since personal liberties are not unique to a single person, but shared with other free individuals.<sup>1527</sup> To ensure freedom for everyone in society, therefore, the liberty and personality of other people must be duly respected. As observed, this is also implicit in Rawls’ principle of liberty (para. 6.2.3.2). This requires recognition both for the fundamental rights of other individuals and for public rights that aim to preserve the

<sup>1520</sup> See Jones 1994, at 2-3 and 72.

<sup>1521</sup> See Kant 1797, at XLV (introduction), stating: ‘*Freyheit ... ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit, zustehende Recht*’. See Saunders 1992, at 113.

<sup>1522</sup> See Hart 1955, at 175, arguing that ‘if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free’.

<sup>1523</sup> Heyman 1998, at 1317 et seq., stating that the ‘rights to life, liberty and property’ establish freedom in the external realm. As observed, Locke also referred to the rights to life, liberty and property.

<sup>1524</sup> *Ibid.*, at 1323 et seq., stating that the ‘rights of personality’ establish freedom in the internal realm.

<sup>1525</sup> See Jones 1994, at 81.

<sup>1526</sup> Universal Declaration of Human Rights [UDHR], adopted by the UN General Assembly in Paris on 10 December 1948; International Covenant on Economic, Social and Cultural Rights [ICESCR] and International Covenant on Civil and Political Rights [ICCPR], plus the First Optional Protocol to the ICCPR, adopted by the UN General Assembly in New York on 16 December 1966; Second Optional Protocol to the ICCPR, adopted by the UN General Assembly in New York on 15 December 1989.

<sup>1527</sup> Heyman 1998, at 1314.

democratic and societal order.<sup>1528</sup> The fundamental rights that flow from the concept of personal freedom are diverse and range from rights to life, liberty and property to rights of personality, such as the right to freedom of speech and the right to privacy. Given that these rights vary in content, yet derive from the same concept of personal freedom, there may be cases of conflicts of rights. To avoid such conflicts of rights, most personality-related fundamental rights can be limited by the law.<sup>1529</sup>

Thus, most personality-related fundamental rights are not absolute, but subject to natural inherent limitations that derive from ‘their place within the larger framework of rights, and the duty to respect the rights of others’.<sup>1530</sup> Even if it is recognized that persons ‘naturally’ possess the right to protect their liberty and personality by birth, which suggests that this right ought to be safeguarded by the law, the lawmaker or a judge may subject it to certain limitations if this is needed to protect the liberty and personality of other members of society.<sup>1531</sup> This is also acknowledged by the 1789 French Declaration of the Rights of Man,<sup>1532</sup> the principles of which are still recalled in the current French Constitution.<sup>1533</sup> In addition, there can be a moral justification for why one fundamental freedom should prevail over the other.<sup>1534</sup>

That, in particular circumstances, the exercise of personality-related fundamental rights can be statutorily limited has also been recognized in national constitutions in which these rights are codified. Some constitutions contain general clauses allowing fundamental rights to be subject to limitations, provided that they are prescribed by the law and are reasonable and justifiable in a free and democratic society,<sup>1535</sup> while other constitutions lay down limitation clauses for specific categories of personality-related fundamental rights. This is the case, for example, in the Netherlands, where a number of personality-related fundamental rights can be limited by or pursuant to the law.<sup>1536</sup> Also, in Germany, Article 2(1) of the Basic Law states that everyone has

<sup>1528</sup> See Dworkin 1978, at 191, stating that ‘although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit’.

<sup>1529</sup> See e.g. Finnis 1980, at 223, Heyman 1998, at 1314 and Eberle 2008, at 35-40.

<sup>1530</sup> Heyman 1998, at 1306.

<sup>1531</sup> *Ibid.*, at 1306. See also Kant 1797, at XXXIII-XXXIV (introduction), at XXXIV, asserting: ‘*Also ist das allgemeine Rechtsgesetz: handle äußerlich so, daß der freye Gebrauch deiner Willkühr mit der Freyheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne*’.

<sup>1532</sup> See art. IV of the 1789 French Declaration of the Rights of Man and of the Citizen, emphasizing that limits to the right of personal liberty must be set by the law. See also Eberle 2008, at 37 (note 91).

<sup>1533</sup> Preamble of the French Constitution, *Journal Officiel de la République Française*, 5 October 1958.

<sup>1534</sup> See Hart 1955, at 178. In addition to personality-related fundamental rights that can be subject to a limitation, there are also fundamental rights that are so elementary and morally self-evident that they are absolute and do not allow for any exceptions, such as the prohibition of torture or slavery.

<sup>1535</sup> See sec. 1 of the Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act (1982), c. 11 (UK), sec. 5 of the New Zealand Bill of Rights Act 1990, Public Act No. 109 of 28 August 1990, and sec. 36(1) of the Constitution of the Republic of South Africa, Law no. 108 (1996).

<sup>1536</sup> See e.g. arts 4 (right to vote), 6(1) (freedom of religion), 7(1) and (3) (freedom of speech), 10(1) (right to privacy) and 11 (right to personal integrity) of the Dutch Constitution.

the right to the free development of his personality, ‘insofar as he does not violate the rights of others or offend against the constitutional order or the moral law’.<sup>1537</sup>

Comparable limitations to personality-related fundamental rights are contained in the international treaties on human rights. These understand that fundamental rights and freedoms do not come alone and recognize that one’s personality can be freely and fully developed only if certain duties and responsibilities to the community are imposed on their addressees.<sup>1538</sup> Therefore, they permit contracting states to subject the exercise of some personality-related fundamental rights to limitations, provided that they are (i) prescribed by law, (ii) serve a legitimate aim, and (iii) are necessary in a democratic society. The latter means that there must be a ‘pressing social need’ and that a limitation must be ‘proportionate to the legitimate aim pursued’.<sup>1539</sup> For example, while, pursuant to Article 10 of the ECHR, every person enjoys the right to freedom of expression, the exercise of this right ‘may be subject to ... formalities, conditions, restrictions or penalties’, provided that they satisfy the three conditions mentioned above.<sup>1540</sup> Similar limitations can be imposed with regard to the right of privacy,<sup>1541</sup> and a number of other personality-related fundamental rights.<sup>1542</sup>

### 6.3.3.3 FORMALITIES ASSOCIATED WITH PERSONALITY RIGHTS

That the exercise of personality-related fundamental rights in specific circumstances can be limited or subject to formalities is not merely a theoretical conclusion. There are various examples of personality-related fundamental rights that are conditional on formalities. This section describes two personality rights, the registration systems of which have rationales that are similar to those of copyright formalities.

One example of a personality-related fundamental right the exercise of which can be and often is subject to formalities is the right to a name.<sup>1543</sup> Although the right to have and to use a name is absolute, most states have in place a system of registering

<sup>1537</sup> The text of art. 2(1) of the Basic Law (*Grundgesetz*) of Germany reads as follows: ‘*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*’

<sup>1538</sup> See, generally, art. 29(1) UDHR and the preambles of the ICESCR and the ICCPR and, specifically with respect to the right to freedom of expression, art. 19(3) ICCPR and art. 10(2) ECHR.

<sup>1539</sup> See European Court of Human Rights, judgments of 7 December 1976, *Handyside v. UK* (appl. no. 5493/72), §§ 48-50 and 26 April 1979, *The Sunday Times v. UK* (appl. no. 6538/74), § 62.

<sup>1540</sup> Art. 10(2) ECHR. See also art. 19 in conjunction with art. 29(2) UDHR and art. 19(3) ICCPR.

<sup>1541</sup> See art. 12 in conjunction with art. 29(2) UDHR, art. 17(1) ICCPR and art. 8(2) ECHR.

<sup>1542</sup> See e.g. art. 18 in conjunction with art. 29(2) UDHR, art. 18(3) ICCPR and art. 9(2) ECHR (freedom of thought and religion), and art. 13(1) in conjunction with art. 29(2) UDHR, art. 12(3) ICCPR and art. 2(3) of Protocol no. 4 to the ECHR (freedom of movement and choice of residence).

<sup>1543</sup> See art. 24(2) ICCPR and art. 7(1) of the Convention on the Rights of the Child [CRC], adopted by the UN General Assembly in New York on 20 November 1989. See also European Court of Human Rights, judgment of 22 February 1994, *Burghartz v. Switzerland* (appl. no. 16213/90), § 24 and Van Dijk et al. 2006, at 685-686, recognizing that the right to a name (i.e. to a first name and a family name) falls within the scope of the right to respect for private and family life in art. 8 ECHR.

names from birth, usually as part of a more sophisticated civil registration system of births, marriages and deaths.<sup>1544</sup> Birth registration is deemed important, for it gives a person not just an identity (by establishing proof of a person's name, age and parentage), but also an official legal existence as a member of society and proof of nationality.<sup>1545</sup> Because birth registration aims to give the otherwise abstract identity of a person a more concrete and fixed form, its rationale is comparable to copyright formalities that aim to concretize abstract authored works. The documents resulting from civil registration, whether these are simple extracts or official legal documents, such as passports and identity cards, enable persons to prove their identity and other important facts.<sup>1546</sup> This creates legal certainty for third parties that can rely on these documents to identify the persons with whom they participate in social life or have economic or legal relationships. In addition, it establishes important benefits for the registered person, who, without proof of identity, cannot always fully participate in social, economic or political life.<sup>1547</sup> For this reason, the right to birth registration is sometimes regarded as being a fundamental human right by itself.<sup>1548</sup>

Another fundamental right that in most countries can only be legally executed in accordance with statutory formalities is the right to marry.<sup>1549</sup> Often the law requires marriages to be recorded in a register, e.g., the civil register of births, marriages and deaths.<sup>1550</sup> The idea is that if two people, through the act of marriage, make a legally binding commitment to each other, this should be duly and lastingly notified to third parties, such as state authorities and private parties. That is because marriage entails important proprietary and inheritory legal consequences. Just like the bond between authors and works or between assignees and the copyright that is assigned to them, the marital bond between two people is not tangible. The certificate of marriage can create adequate proof of the marital relationship, but it cannot satisfactorily provide the public with information because it typically remains in the hands of the persons concerned and therefore is not always directly available for public scrutiny. This is why most countries require marriages to be registered.<sup>1551</sup> Only this can ensure that the public has ample legal certainty about the legal consequences of marriage.

<sup>1544</sup> Countries that maintain civil registries include the Netherlands (*Register van de Burgerlijke Stand*), France (*Office de l'État civil*), Germany (*Standesamt*), the UK (local register offices), the majority of states in the US (Offices of Vital Statistics) and most other countries around the world.

<sup>1545</sup> UNICEF-IRC 2002, at 1, 2 and 21-22.

<sup>1546</sup> See United Nations 2002, paras 22 (at 5) and 35 (at 8).

<sup>1547</sup> UNICEF-IRC 2002, at 4-7. See also United Nations 2002, para. 27 (at 5-6).

<sup>1548</sup> See e.g. Marta Santos Pais, 'Editorial', in: UNICEF-IRC 2002, at 1. See also art. 24(2) ICCPR and art. 7(1) CRC, which establish a direct link between the right to a name and birth registration.

<sup>1549</sup> See art. 12 ECHR, providing that men and women have the right to marry 'according to the national laws governing the exercise of this right'.

<sup>1550</sup> See e.g. arts 1:43 to 1:49a of the Dutch Civil Code, mapping out the formalities for getting married.

<sup>1551</sup> Such registers are consistent with the international treaties. See European Court of Human Rights, judgment of 18 December 1974, *X v. Federal Republic of Germany* (appl. no. 6167/73), stating that a refusal to register a marriage that was not concluded in accordance with the formal procedures laid down by the law constitutes no breach of art. 12 ECHR. See also Van Dijk et al. 2006, at 844.

## 6.4 The Idea of Copyright as a Fundamental Right

The previous two sections, which dealt with the idea of copyright as a property right and as a personality right, steered the discussion close to the idea of copyright as a fundamental right, which has sparked a fierce debate in the last sixty years.<sup>1552</sup> Since 1948, authors enjoy a fundamental right to benefit from the protection of the moral and material interests resulting from their works.<sup>1553</sup> In addition, authorial creations have found protection under the property rights clause of Article 1 of Protocol No. 1 of the ECHR.<sup>1554</sup> Lately, the idea has also been voiced that the author's moral rights might be protected under the right of privacy or the freedom of expression.<sup>1555</sup>

The recognition of copyright as a fundamental right appears to have strengthened the idea that copyright is a right that emanates from the person of the author and that should be protected from the moment the author put his labour or personality in the work. At first sight, copyright formalities fit this concept poorly. As one drafter of the copyright clause in Article 27 of the UDHR stated, the vocation for creating intellectual works is common to all men, regardless of their social position, and thus warrants protection in the same way as all other fundamental human rights.<sup>1556</sup> Other legal commentators have asserted that, from the viewpoint of human rights, creation alone might not be a sufficient argument for authors to claim a fundamental right in intellectual works, but that this might be different if a work is intimately linked to its creator.<sup>1557</sup> This suggests that, in the fundamental rights discourse, a distinction should perhaps be made between the author's moral and material interests.<sup>1558</sup>

To determine whether and to what degree formalities are consistent with the idea of copyright as a fundamental right, this section investigates the (inter)national legal framework of human rights. It first examines the fundamental right to protection of intellectual works in Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR (para. 6.4.1) and then explores the material and moral interests that this right aims to protect, by separately examining the fundamental right of property (para. 6.4.2) and the fundamental rights related to personality (para. 6.4.3). By studying the property and personality rights aspects of copyright from the viewpoint of human rights, this section supplements the foregoing sections. That is also the reason why it follows a different outline. It does not scrutinize philosophical, legal-historical and theoretical arguments, but concentrates predominantly on contemporary positive law.

This section analyzes the relevant provisions of the main international treaties on human rights (i.e., the UDHR, ICESCR and ICCPR and the ECHR). At the national

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<sup>1552</sup> See e.g. Yu 2007, at 1047-1075, for an overview of the recognition of, and controversy surrounding, the protection of the moral and material interests of authors under the UDHR and ICESCR.

<sup>1553</sup> See art. 27(2) UDHR and art. 15(1)(c) ICESCR.

<sup>1554</sup> See the references to case law of the European Court of Human Rights in para. 6.4.2 below.

<sup>1555</sup> See e.g. Vivant 1997, at 106-107, Hugenholtz 2001, at 346 and Drexl 2007, at 167 et seq.

<sup>1556</sup> Cassin 1960, at 229. On Cassin's essay, see Vivant 1997, at 86-87 and Torremans 2008, at 198.

<sup>1557</sup> Vivant 1997, at 86 et seq.

<sup>1558</sup> *Ibid.*, at 106-107.

level, it focuses on the Basic Law of Germany, since this protects both the author's material interests under the fundamental right of property (Article 14) and his moral interests under the fundamental right of personality (Article 2(1) in conjunction with Article 1(1)). Also, it analyzes the case law of the European Court of Human Rights and the German Federal Constitutional Court (*Bundesverfassungsgericht*).

The section concludes that, from a human rights perspective, it is problematic to subject the author's moral rights to formalities, since these rights aim to protect the personal bond between authors and their creations. The author's economic rights, on the other hand, can be made conditional on formalities without causing interference with the national or international framework of fundamental rights.

#### 6.4.1 THE FUNDAMENTAL RIGHT TO PROTECTION OF CREATIONS OF THE MIND

Pursuant to Article 27(2) UDHR and Article 15(1)(c) ICESCR, each person has the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This right has a twofold objective. It aims to protect the personal bond between authors and their creations by securing the moral rights of authors to be recognized as the creators of their works and to object to any distortion, mutilation or modification of their works that would prejudice their honour and reputation.<sup>1559</sup> Moreover, it aims to protect authors' material interests by ensuring that they enjoy an adequate standard of living from their works. This may take the form of protecting their economic rights.<sup>1560</sup>

In the system of human rights, Article 27(2) UDHR and Article 15(1)(c) ICESCR do not qualify as 'classic' human rights (i.e. civil and political rights), but as 'social' human rights (i.e. economic, social and cultural rights).<sup>1561</sup> Whereas 'classic' human rights protect individuals against state interference by imposing an obligation on the state to respect these rights, 'social' human rights instruct the state to protect certain human values by providing the means for people to effectively enjoy them.<sup>1562</sup> This implies that Article 27(2) UDHR and Article 15(1)(c) ICESCR are not immediately applicable, but must first be implemented by states.<sup>1563</sup> Although contracting states are obliged to establish a set of measures to secure the protection of the moral and material interests resulting from authors' works, they have a considerable margin of

<sup>1559</sup> UN Committee on Economic, Social and Cultural Rights 2006, paras 2, 12 and 13.

<sup>1560</sup> *Ibid.*, paras 2 and 15. *Ibid.*, para. 10, stating that contracting states are not bound to protect the moral and material interests of authors by a regime of copyright or intellectual property rights protection.

<sup>1561</sup> In general, it can be said that the civil and political rights are laid down in arts 1 to 21 UDHR and the ICCPR and the economic, social and cultural rights in arts. 22 to 28 UDHR and the ICESCR.

<sup>1562</sup> See e.g. Akkermans et al. 2005, at 39 and 149 et seq.

<sup>1563</sup> Because the UDHR is merely a 'declaration' and has no contracting parties, it has no legally binding effect. Therefore its norms must be implemented in national law by definition. The ICESCR provides for progressive realization and, consequently, imposes positive obligations on contracting states. See UN Committee on Economic, Social and Cultural Rights 2006, para. 25 et seq.

discretion in assessing which measures are most suitable to attain this objective.<sup>1564</sup> In fact, they are not obliged to protect the author's moral and material interests by a coherent regime of copyright law.<sup>1565</sup> This shows that statutory copyright is not to be equated with the fundamental right of protection of intellectual creations.<sup>1566</sup>

For copyright law and policy, it does not make much difference that intellectual creations are protected by human rights. When implementing laws to give effect to Article 27(2) UDHR and Article 15(1)(c) ICESCR, contracting states must take due account of other human rights.<sup>1567</sup> This means that states are obliged to strike a fair balance between protecting the moral and material interests resulting from creative works and safeguarding other human rights.<sup>1568</sup> This also corresponds with the spirit of the UDHR and the ICESCR. Along with the protection of the interests of authors, these treaties protect the public's right to enjoy the benefits of cultural and scientific advancements.<sup>1569</sup> Consequently, when implementing copyright law and policy, 'the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration'.<sup>1570</sup>

Formalities may play a significant role in striking the balance between protecting the interests of authors and preserving public access to their creations for the benefit of society at large. By subjecting copyright to an easy and straightforward formality, it can be guaranteed that authors retain an effective protection of their rights, while works for which the formalities have not been fulfilled may become freely available for public use. A formality-based copyright regime can thus promote the full range of rights guaranteed by the UDHR and the ICESCR. These treaties do not seem to prohibit that. Other intellectual property rights, such as patents and trademarks, the subject matter of which might also fall within the ambit of Article 27(2) UDHR and Article 15(1)(c) ICESCR,<sup>1571</sup> are often also conditional on formalities.

However, there is one caveat. The author's moral rights are so intrinsically linked to his personality that subjecting these rights to formalities may be an unjustifiable impediment of the protection of the author's moral interests. As we shall see below, a limitation of moral rights is permitted only in exceptional cases (para. 6.4.3).

<sup>1564</sup> See UN Sub-Commission on Human Rights 2000, para. 4, UN Committee on Economic, Social and Cultural Rights 2006, para. 47, Yu 2007, at 1092-1093, Yu 2008, at 81 and Torremans 2008, at 202.

<sup>1565</sup> UN Committee on Economic, Social and Cultural Rights 2006, para. 10.

<sup>1566</sup> *Ibid.*, paras 1 to 3. See also Yu 2008, at 78-79.

<sup>1567</sup> See art. 5(1) ICESCR. See also UN Committee on Economic, Social and Cultural Rights 2006, paras 11 and 35, emphasizing that the implementation of copyright law or policy should not unjustifiably limit the enjoyment by others of their fundamental rights and freedoms.

<sup>1568</sup> Torremans 2008, at 212-214. See also UN Sub-Commission on Human Rights 2000, para. 1 (stating that the right to protection of intellectual works is 'a human right, subject to limitations in the public interest') and UN Committee on Economic, Social and Cultural Rights 2006, paras 22 to 24.

<sup>1569</sup> See art. 27(1) UDHR and art. 15(1)(b) ICESCR.

<sup>1570</sup> UN Committee on Economic, Social and Cultural Rights 2006, para. 35. *Ibid.*, para. 39 sub e. See also Helfer 2008, at 74 and Torremans 2008, at 201 and 206-207.

<sup>1571</sup> See UN Committee on Economic, Social and Cultural Rights 2006, para. 9, defining the phrase 'any scientific, literary or artistic production' to which the protection of art. 15(1)(c) ICESCR extends.

## 6.4.2 THE FUNDAMENTAL RIGHT OF PROPERTY

Except for the general protection of the author's moral and material interests under Article 27(2) UDHR and Article 15(1)(c) ICESCR, the two components of this right may also receive separate protection within the framework of human rights.

The material interests of authors are also safeguarded by the fundamental right of property. Although this right is not broadly recognized in the framework of human rights,<sup>1572</sup> it is protected by some (inter)national legal instruments, such as Article 1 of Protocol No. 1 of the ECHR and Article 14 of the German Basic Law. It has been consistently held by the European Court of Human Rights and the German Federal Constitutional Court that the peaceful enjoyment of one's possessions is not limited to tangible objects, but also covers intellectual property, such as patents, trademarks and copyright.<sup>1573</sup> Additionally, the Charter of Fundamental Rights of the European Union also explicitly states that intellectual property shall be protected.<sup>1574</sup>

To see whether and to what degree copyright formalities are compatible with the fundamental right of property, this section studies the property rights clauses in the ECHR and the German Basic Law and the corresponding case law of the European Court of Human Rights and the German Federal Constitutional Court. It scrutinizes whether the fundamental right of property permits imposing formalities establishing title conditions (para. 6.4.2.1) or formalities affecting the exercise (para. 6.4.2.2) or the enforcement of rights (para. 6.4.2.3). Moreover, it will analyze whether a regime of formalities is allowed if it affects legitimate expectations resulting from existing rights (para. 6.4.2.4). This section concludes that the fundamental right of property leaves considerable room for subjecting intellectual property to formalities. Because intellectual property is a social product with a social function, there is enough space for public interest considerations when defining or demarcating this right.<sup>1575</sup>

<sup>1572</sup> See Rahmatian 2008, at 345. While art. 17 UDHR recognizes the right of property, it is not included in the other treaties of the International Bill of Human Rights, i.e., the ICESCR and ICCPR.

<sup>1573</sup> See, for patents, European Court of Human Rights, decisions of 4 October 1990, *Smith Kline and French Laboratories Ltd v. Netherlands* (appl. no. 12633/87) and 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97), German Federal Constitutional Court, decision of 15 January 1974, *Patentanmeldungen*, BVerfGE 36, 281, at 290-291; for trademarks, European Court of Human Rights (Grand Chamber), judgment of 11 January 2007, *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 218; and for copyright and related rights, European Court of Human Rights, decisions of 14 January 1998, *Aral v. Turkey* (appl. no. 24563/94) and 5 July 2005, *Melnychuk v. Ukraine* (appl. no. 28743/03), German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 238-239 and 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 283.

<sup>1574</sup> Art. 17(2) of the Charter of Fundamental Rights of the EU, *OJ C* 303/01 of 14 December 2007.

<sup>1575</sup> On the social function of intellectual property, see e.g. UN Sub-Commission on Human Rights 2000, paras 5 and 6 and UN Committee on Economic, Social and Cultural Rights 2006, para. 35.

## 6.4.2.1 FORMALITIES ESTABLISHING TITLE CONDITIONS

Given that copyright falls within the ambit of the fundamental right of property, the question can be raised whether, pursuant to this fundamental right, the acquisition of copyright can be subject to formalities. Because, in most European states, copyright formalities have long been abolished, this question obviously has never been examined by the European Court of Human Rights. Even so, its case law contains interesting observations on the relation between acquisitions of property rights, in general, and the fundamental right of property as recognized in Article 1 of Protocol No. 1.

Article 1 of Protocol No. 1 of the ECHR states that every person is entitled to the peaceful enjoyment of his possessions, without explaining what ‘possessions’ are or under which – substantive or formal – conditions of title they can be acquired. The European Court of Human Rights is not preoccupied with this question either. It has consistently held that the ‘issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1’.<sup>1576</sup>

Consequently, the European Court of Human Rights does not examine whether an applicant ought to have a title to a substantive property interest, but only whether he has legally acquired such title by virtue of the provisions of the applicable domestic law. It makes no difference whether substantive or formal conditions of title are involved. In the *Smith Kline v. Netherlands* case, for example, the Court held that a Dutch patent fell within the ambit of the term ‘possessions’ in Article 1 of Protocol No. 1 of the ECHR, because under Dutch law a patent holder is referred to as the proprietor of a patent and, subject to the provisions of the Patents Act, patents are transferable and assignable.<sup>1577</sup> In the *Anheuser-Busch Inc. v. Portugal* case, the Grand Chamber held that Article 1 of Protocol no. 1 applies not only to registered trademarks, but also to trademark applications. Despite the fact that trademark applications can be revoked, the Court argued that they can possess a substantial financial value, because Portuguese law allows them to be assigned or licensed to third parties.<sup>1578</sup> Conversely, the Court has ruled that ‘a conditional claim which has lapsed as a result of the failure to fulfil the condition’ cannot be a ‘possession’ under Article 1 of Protocol No. 1.<sup>1579</sup>

<sup>1576</sup> See European Court of Human Rights, judgments of 11 October 2005 (Chamber) and 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), § 42 (Chamber) and § 63 (Grand Chamber).

<sup>1577</sup> European Court of Human Rights, decision of 4 October 1990, *Smith Kline and French Laboratories Ltd v. Netherlands* (appl. no. 12633/87).

<sup>1578</sup> European Court of Human Rights, judgment of 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), §§ 66-78.

<sup>1579</sup> European Court of Human Rights, decision of 10 July 2002, *Gratzinger and Gratzingerova v. Czech Republic* (appl. no. 39794/98), § 69.

Thus, Article 1 of Protocol No. 1 of the ECHR does not establish when and under what conditions a property title must be recognized. It merely requires that property that has been legally acquired be enjoyed peacefully. This is in agreement with settled case law of the European Court of Human Rights holding that Article 1 of Protocol No. 1 protects existing property and does not guarantee the right to acquire property.<sup>1580</sup> Accordingly, contracting states enjoy a broad margin of appreciation in establishing whether and under which title conditions they recognize property.<sup>1581</sup> It follows that Article 1 of Protocol No. 1 of the ECHR cannot be said to stand in the way of subjecting property, including copyright, to formal conditions of title.

That the question of the applicable title conditions is a matter for the discretion of the national lawmaker seems to be also confirmed by Article 14(1) of the German Basic Law. While recognizing a fundamental property right, the Basic Law states that the content and limits of property shall be defined by the law.<sup>1582</sup> This suggests that pursuant to German constitutional law, property is not absolute. The lawmaker can establish its content and limits, including the appropriate title conditions.<sup>1583</sup> The German Federal Constitutional Court indeed recognizes constitutional protection for property only in so far as the statutory formalities have been completed.<sup>1584</sup>

#### 6.4.2.2 FORMALITIES AFFECTING THE EXERCISE OF RIGHTS

Another question is whether the fundamental right of property permits lawmakers to limit the exercise of copyright by imposing formalities to that effect. In general, this seems acceptable. The second paragraph of Article 1 of Protocol No. 1 of the ECHR allows contracting states to limit the exercise of property rights in accordance with the general interest. This seems to give them ‘an almost unlimited power to impose restrictions on the use of property’ for public interest considerations.<sup>1585</sup>

To see whether a property limitation is compatible with the ECHR, the European Court of Human Rights examines whether it strikes a reasonable balance ‘between

<sup>1580</sup> European Court of Human Rights, judgment of 13 June 1979, *Marckx v. Belgium* (appl. no. 6833/74), § 50.

<sup>1581</sup> This margin of appreciation may well be explained by the fact that, at the time of adopting Article 1 of Protocol No. 1 ECHR, governments declared that they need sufficient leeway ‘to adopt or modify economic and social policies implicating private property’. See Helfer 2008, at 32 and 35.

<sup>1582</sup> See art. 14(1) of the Basic Law (*Grundgesetz*) of Germany: ‘*Das Eigentum ... [wird] gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.*’

<sup>1583</sup> See German Federal Constitutional Court, decisions of 17 November 1966, *Tollwut*, BVerfGE 20, 351, at 355 (‘*Da es keinen “Absoluten” Begriff des Eigentums gibt, ist es Sache des Gesetzgebers, Inhalt und Schranken des Eigentums zu bestimmen*’), and 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 240. See also Niebler 1982, at 230 and Antoni 2003, at 201 (para. 4).

<sup>1584</sup> See German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 218, stating, with regard to trademarks: ‘*Verfassungsmäßigen Eigentumsschutz können nur solche Warenzeichen genießen, die schutzfähig, rechtmäßig eingetragen und aufrechterhalten worden sind.*’

<sup>1585</sup> Van Dijk et al. 2006, at 887.

the general interest of the community and the requirements of the protection of the individual's fundamental rights'.<sup>1586</sup> The Court accepts that legislators enjoy a broad margin of appreciation.<sup>1587</sup> It usually follows their judgment as to what policy aims qualify as being in the public interest.<sup>1588</sup> Furthermore, the standard that it applies to resolve whether a property limitation rule is acceptable in each case is considerably low.<sup>1589</sup> The Court only observes that it does not cause the applicant to bear 'a special and excessive burden' that upsets the reasonable balance.<sup>1590</sup>

This seems to leave sufficient scope for subjecting the exercise of property rights to formalities. This is demonstrated, for example, in the *Yaroslavtsev v. Russia* case, concerning the legitimacy of Russian regulations preventing registration of vehicles the lawfulness of the acquisition of which could not be shown. Although the applicant complained that these regulations violated his right under Article 1 of Protocol No. 1 ECHR, the Court held that they were proportionate to the legitimate aim pursued. The Court recognized the general importance of a registration system ensuring the traceability of the legal owner of a vehicle for the purposes of road traffic regulation, as well as the wide margin of appreciation afforded to states.<sup>1591</sup>

While this case obviously says nothing about imposing formalities on copyright, it does indicate that, within the human rights framework, subjecting the exercise of property rights to formalities is not something that is immediately objectionable. From the viewpoint of the fundamental right of property, the exercise of copyright can be made conditional on formalities to pursue a legitimate 'general interest' aim.

Article 14(2) of the German Basic Law contains a similar balancing test, stating that property entails obligations and that its use shall serve the public good.<sup>1592</sup> This is what in German literature is referred to as 'the social obligation of property' ('*die Sozialbindung des Eigentums*').<sup>1593</sup> It obliges the German lawmaker to take account of the well-being of the general public when regulating the content and limits of property.<sup>1594</sup> Thus, on the one hand, the legislator has a constitutional duty to ensure that property can be lawfully enjoyed; in the case of copyright, this means that there

<sup>1586</sup> European Court of Human Rights, judgment of 25 October 1989, *Allan Jacobsson v. Sweden* (No. 1) (appl. no. 10842/84), § 55.

<sup>1587</sup> *Ibid.*, § 55. See also Van Dijk et al. 2006, at 887-890.

<sup>1588</sup> European Court of Human Rights, judgment of 28 September 1995, *Spadea and Scalabrino v. Italy* (appl. no. 12868/87), § 29.

<sup>1589</sup> Van Dijk et al. 2006, at 888-889.

<sup>1590</sup> See European Court of Human Rights, judgment of 9 June 2005, *Kirilova and Others v. Bulgaria* (appl. nos 42908/98, 44038/98, 44816/98 and 7319/02), § 123.

<sup>1591</sup> European Court of Human Rights, judgment of 2 December 2004, *Yaroslavtsev v. Russia* (appl. no. 42138/02), §§ 30-36.

<sup>1592</sup> Art. 14(2) of the Basic Law (*Grundgesetz*) of Germany reads: '*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*'

<sup>1593</sup> Niebler 1982, at 233 et seq. See also Leinemann 1998.

<sup>1594</sup> See Niebler 1982, at 236-237 and Antoni 2003, at 202-203 (paras 4 and 6). See e.g. German Federal Constitutional Court, decisions of 12 January 1967, *Grundstücksverkehrsgesetz*, BVerfGE 21, 73, at 83 et seq., and 11 October 1988, *Vollzugsanstalten*, BVerfGE 79, 29, at 40 et seq.

should be adequate legal safeguards to ensure that authors can enjoy the economic benefits resulting from their creations and be free to exercise their copyright at their own discretion.<sup>1595</sup> On the other hand, the lawmaker must also define appropriate standards ensuring that the use and exploitation of property corresponds to its nature and social significance.<sup>1596</sup> It should not only protect the rights of authors, but also safeguard the rights of others and the interest of the public well-being.<sup>1597</sup>

Hence, the public interest is an important parameter for the German lawmaker in the creation of copyright laws that satisfy the constitutional standard. It establishes not only the justification for, but also the periphery of copyright limitations. They should be proportionate to the objectives pursued and extend no further than is required for the well-being of the public.<sup>1598</sup> Limitations to copyright that are motivated by public interest considerations must actually be justified by such an interest.<sup>1599</sup> Moreover, the stronger the constitutionally protected core of copyright is affected by a limitation, the higher the public interest should be to actually justify the limitation.<sup>1600</sup>

A balancing test of the kind applied by the German Federal Constitutional Court may be useful for establishing limitations to copyright law, both for now and for the future.<sup>1601</sup> Although the Court has sometimes attached a comparatively great weight to the financial interests of authors, thus favouring proprietary interests over public interests,<sup>1602</sup> the balancing test illustrates that property, in general, and copyright, in particular, can be limited, provided that there is a genuine public interest.<sup>1603</sup> In view

<sup>1595</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 240-241, 7 July 1971, *Schulfunksendungen*, BVerfGE 31, 270, at 274, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392 and 400, considering this to be the constitutionally protected core of copyright ('den grundgesetzlichen geschützten Kern des Urheberrechts').

<sup>1596</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 241, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392.

<sup>1597</sup> German Federal Constitutional Court, decisions of 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 287, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 394.

<sup>1598</sup> German Federal Constitutional Court, decision of 11 October 1988, *Vollzugsanstalten*, BVerfGE 79, 29, at 40 et seq.

<sup>1599</sup> See German Federal Constitutional Court, decision of 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 400, holding that a disproportionate copyright limitation that is not consistent with the social obligation of property cannot be justified by art. 14(2) of the German Basic Law.

<sup>1600</sup> *Ibid.*, at 400. See also Badura 2007, at 51 et seq. and at 57 et seq.

<sup>1601</sup> See Graber 2005, at 108, Geiger 2008, at 129 and Braegelmann 2009, at 141.

<sup>1602</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392.

<sup>1603</sup> An example of a court case in which authors' and users' interests were carefully balanced is German Federal Supreme Court, decision of 11 July 2002, I ZR 255/00 (*Elektronischer Pressespiegel*), GRUR 2002, 963-967, limiting the authors' rights by permitting the scanning and distribution of newspapers in 'electronic press clipping services' on condition that remuneration is paid.

of that, it seems safe to conclude that the German Basic Law raises no constitutional objections to limiting copyright or subjecting its exercise to formalities.<sup>1604</sup>

#### 6.4.2.3 FORMALITIES AFFECTING THE ENFORCEMENT OF RIGHTS

A related question, for which we have to make a detour to the fundamental right of access to court, is whether formalities are compatible with the framework of human rights should the enforcement of copyright in court depend on their compliance. The right of access to court is enshrined, *inter alia*, in Article 6(1) of the ECHR.<sup>1605</sup> This right guarantees to everyone who claims that an interference with the exercise of his civil rights is unlawful, the right to submit that claim to a court or tribunal.<sup>1606</sup>

Because the right of access to court, by its very nature, calls for regulation by the state, it is not absolute but may be subject to limitations.<sup>1607</sup> The European Court of Human Rights has held that a limitation must pursue a legitimate aim and that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>1608</sup> A legitimate aim for restricting the right of access to court can be to guarantee legal certainty,<sup>1609</sup> but also, for example, to ensure the effectiveness of a centralized European patent register.<sup>1610</sup> As a rule, a limitation cannot justify impairing the very essence of the right of access to court.<sup>1611</sup> This is not the case if the law merely requires a plaintiff to take affirmative steps to be able to enforce his right in court. Consequently, as long as the author's right of access to court is not actually taken away by a formality-based regime (e.g., if formalities can be fulfilled at any time during the copyright term), such

<sup>1604</sup> In other areas of law, formalities as to the exercise of rights have been accepted. See German Federal Constitutional Court, decision of 7 August 1962, *Feldmühle-Urteil*, BVerfGE 14, 263, at 277, stating that the requirement to register mergers of business into the Trade Register in order to legally transfer the company capital of the one entity to the other does not infringe on art. 14 Basic Law.

<sup>1605</sup> European Court of Human Rights, judgment of 21 February 1975, *Golder v. UK* (appl. no. 4451/70), § 36. See also Van Dijk et al. 2006, at 557-578.

<sup>1606</sup> See European Court of Human Rights, judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium* (appl. nos 6878/75 and 7238/75), § 44.

<sup>1607</sup> See European Court of Human Rights, judgment of 27 August 1991, *Philis v. Greece* (appl. nos 12750/87, 13780/88 and 14003/88), § 59. See also Van Dijk et al. 2006, at 569 et seq.

<sup>1608</sup> European Court of Human Rights, judgments of 28 May 1985, *Ashingdane v. UK* (appl. no. 8225/78), § 57, and 21 September 1994, *Fayed v. UK* (appl. no. 17101/90), § 65.

<sup>1609</sup> See European Court of Human Rights, judgments of 10 July 2001, *Tricard v. France* (appl. no. 40472/98), § 29 and 11 October 2001, *Rodríguez Valín v. Spain* (appl. no. 47792/99), § 22.

<sup>1610</sup> See European Court of Human Rights, decision of 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97).

<sup>1611</sup> European Court of Human Rights, judgments of 24 October 1979, *Winterwerp v. Netherlands* (appl. no. 6301/73), § 60 and 28 May 1985, *Ashingdane v. UK* (appl. no. 8225/78), § 57.

‘conditional’ right of access to court seems not to be incompatible with Article 6(1) of the ECHR.<sup>1612</sup>

On a different note, access to court must always be granted to enable persons to contest a refusal to register or dispute other negative decisions with which they may be confronted in the process of completing formalities. In the case of *Lenzing AG v. UK*, for example, the European Court of Human Rights held that, in order to prevent arbitrary or discriminatory treatment of patent applications, the law should provide a means of judicial review by an impartial and independent court or tribunal.<sup>1613</sup>

#### 6.4.2.4 FORMALITIES AFFECTING PRE-EXISTING RIGHTS

A last question is whether national lawmakers, pursuant to the fundamental right of property, may retrospectively subject pre-existing rights to formalities. Since Article 1 of Protocol No. 1 of the ECHR protects existing possessions only,<sup>1614</sup> it seems to be permitted to impose formalities on property yet to be created. However, because the protection of Article 1 of Protocol No. 1 of the ECHR extends to existing claims that yield ‘a “legitimate expectation” of obtaining effective enjoyment of a property right’,<sup>1615</sup> it is uncertain whether it is also allowed to subject the enjoyment of pre-existing property to formalities.<sup>1616</sup> This seems to depend on whether the formalities pursue a legitimate aim and strike a reasonable and proportionate balance between protecting the rights of property owners and the broader public interest.<sup>1617</sup>

Accordingly, it depends on the circumstances of the case whether laws that make the protection of pre-existing property rights conditional on formalities constitute a breach of Article 1 of Protocol No. 1 of the ECHR. It appears that, to comply with their obligations under the ECHR, contracting states must as a minimum provide for flexible transitional measures, giving owners of existing property rights sufficient leeway by laying down an acceptable timeframe for fulfilling the formalities.

In general, it seems wrong to assume that laws the effect of which is to deprive persons of a pre-existing property right necessarily violate the fundamental right of property. In 1971, for example, the German Federal Constitutional Court ruled that the 1965 Copyright Act of Germany, which significantly weakened the protection of

<sup>1612</sup> In the US, for example, authors of works of US origin cannot file a copyright infringement suit until registration of the copyright claim is made. See 17 USC § 411. However, registration in the US may be made at any time during the subsistence of the copyright term. See 17 USC § 408.

<sup>1613</sup> See European Court of Human Rights, decision of 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97).

<sup>1614</sup> European Court of Human Rights, judgment of 13 June 1979, *Marckx v. Belgium* (appl. no. 6833/74), § 50.

<sup>1615</sup> European Court of Human Rights, judgment of 28 September 2004, *Kopecký v. Slovakia* (appl. no. 44912/98), § 35 under c.

<sup>1616</sup> See European Court of Human Rights, judgment of 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), § 82.

<sup>1617</sup> *Ibid.*, § 82. See also Helfer 2008, at 71-73.

performers, was in compliance with the property rights clause of Article 14(1) of the German Basic Law. While performers previously enjoyed the stronger protection of copyright, the 1965 Act protected them under the regime of neighbouring rights. As a result, certain exclusive rights were transformed into remuneration rights and the term of protection of the performer's life plus fifty years was shortened to a term of twenty-five years. The Court reasoned that the constitutional property rights clause authorizes the lawmaker not only to establish the content of new rights, but also to recast the content of existing rights, if this is necessary. The legislature thus enjoys a wide discretion. The only duty the constitution imposes on it is to adopt laws that correspond to the nature of the property right and bring the interests of right owners and of the general public into just equation.<sup>1618</sup> This does not mean that substantive changes are inadmissible. The Court has stated that the grant of a certain property right at one time does not imply the inviolability of this right for all times.<sup>1619</sup>

Thus, it seems acceptable to subject the protection of pre-existing property rights to formalities, provided that they serve a legitimate aim and maintain a fair balance between protecting the proprietor and safeguarding the public interest. The German Federal Constitutional Court, for example, held that the German registration system for geographical indications of wine was at odds with Article 14 of the Basic Law, as it excluded estates and vineyards smaller than five hectares from registration. As a result, wines of small enterprises could not be marketed with an indication of the place of origin, thus rendering existing trademarks of small enterprises, to the extent that they included geographical indications, entirely valueless.<sup>1620</sup> On the other hand, the Federal Constitutional Court approved amendments to the German Patents Act, pursuant to which pending patent applications, at a certain point in the registration procedure, are subject to public disclosure. Although this could harm the proprietary interests of the inventor, the Court found that the procedure was proportionate to the aim of simplifying and improving the existing patent registration system and upheld the balance between protecting potential patent owners and safeguarding the public interest. Therefore, it was consistent with Article 14 of the Basic Law.<sup>1621</sup>

#### 6.4.3 THE FUNDAMENTAL RIGHTS RELATED TO PERSONALITY

The other aspect of Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR, namely the protection of the author's moral rights, may also be safeguarded by other

<sup>1618</sup> German Federal Constitutional Court, decision of 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 284-287.

<sup>1619</sup> *Ibid.*, at 284. For an extensive discussion of this case, see Braegelmann 2009, at 131-133.

<sup>1620</sup> See German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 219-220. See also Niebler 1980, at 230-231 and Van der Walt 1998, para. 7.

<sup>1621</sup> German Federal Constitutional Court, decision of 15 January 1974, *Patentanmeldungen*, BVerfGE 36, 281, at 292 et seq. See also Van der Walt 1998, para. 7.

fundamental rights. Although there is no case law yet to support this claim,<sup>1622</sup> some legal commentators have argued that moral rights might fall within the ambit of the right of privacy<sup>1623</sup> or the right to freedom of expression,<sup>1624</sup> depending on whether it aims to protect the author's private sphere (e.g., the right to claim authorship, the right of attribution or the right of integrity) or his freedom of speech (e.g., the right of first publication and the right to withdraw works previously published).

The consequence of considering moral rights to be an intrinsic part of the right of privacy or the right to freedom of speech appears to be that their existence cannot be subject to formalities. The right of privacy and the freedom of speech are rights that everyone enjoys by virtue of the international human rights treaties.<sup>1625</sup> This implies that no formalities may be imposed as a *sine qua non* for their protection. Unlike the author's economic rights, the title conditions of which may be determined by the lawmaker pursuant to the fundamental right of property, the protection of moral rights should commence from the moment of creation of the work. That also fits the nature of these rights. Moral rights are a legal recognition of the personal bond between the author and his work and contribute to the acknowledgment of the author's work 'as having an intrinsic value as an expression of human dignity and creativity'.<sup>1626</sup> To respect the author's dignity, it seems inappropriate and, from a human rights point of view, arguably illegitimate to subject their existence to formalities.

Under the fundamental right of privacy and the freedom of speech, it would be permitted to limit the exercise of moral rights, e.g. by imposing formalities, but only if such limitation is prescribed by law, pursues a legitimate aim, is proportionate to that aim and corresponds to a pressing social need (para. 6.3.3). Although it depends on the circumstances of the case whether a limitation will satisfy these requirements, it seems that, because moral rights aim to protect the personal link between the author and work, the public interest objective for limiting the exercise of moral rights must be relatively high so as to be able to meet the proportionality requirement.<sup>1627</sup>

At the national level, authorial dignity might also be safeguarded by fundamental rights. In the Netherlands, for example, it may perhaps be protected by virtue of the constitutional right to respect for a person's private life.<sup>1628</sup> Similarly, in France, the

<sup>1622</sup> See Drexl 2007, at 174 and Geiger 2008, at 112.

<sup>1623</sup> See e.g. Hugenholtz 2001, at 346 and Drexl 2007, at 167 et seq.

<sup>1624</sup> Vivant 1997, at 106-107. Copyright may also conflict with the freedom of speech, e.g., by impairing the rights of users to hold opinions and to receive and impart information. See Hugenholtz 2001.

<sup>1625</sup> See, with respect to the right of privacy, art. 12 UDHR, art. 17 ICCPR and art. 8(1) ECHR and, with respect to the right to freedom of expression, art. 19 UDHR, art. 19(2) ICCPR and art. 10(1) ECHR.

<sup>1626</sup> Torremans 2008, at 212.

<sup>1627</sup> See Van Dijk et al. 2006, at 747, concluding that 'the more far-reaching the infringement or the more essential the aspect of the right that has been interfered with, the more substantial or compelling the legitimate aims pursued must be'.

<sup>1628</sup> See art. 10(1) of the Dutch Constitution.

author's moral rights may be protected by the principle of human dignity, for which all citizens are equally eligible.<sup>1629</sup> In Germany, the Federal Supreme Court has held that moral rights are a manifestation of the general personality right, as enshrined in Article 2(1) in conjunction with Article 1(1) of the German Basic Law.<sup>1630</sup>

The protection of the author's moral rights by fundamental rights is not limitless. In the Netherlands, the constitutional right to respect for a person's private life may be subject to restrictions laid down by or pursuant to the law.<sup>1631</sup> In France, personal liberties can be exercised only to the extent that they do not harm the liberty of other citizens.<sup>1632</sup> Likewise, the personality right of Article 2(1) of the German Basic Law can be limited if it violates the rights of others or offends against the constitutional order or the moral law.<sup>1633</sup> Consequently, all these limitations are subject to a similar balancing act as that which is applied in fundamental rights regulation in general.

However, because moral rights are directly aimed at protecting authorial dignity and creativity, it seems that there is little room for limiting these rights or subjecting them to formalities. This can be concluded from the case law of the German Federal Constitutional Court. On the basis of Article 1(1) of the Basic Law, which states that human dignity is inviolable,<sup>1634</sup> the Court has consistently held that human dignity is the highest constitutional value, to which all laws and other fundamental rights must conform.<sup>1635</sup> This suggests that human dignity is at the top of the value-order of the German Basic Law.<sup>1636</sup> It follows that the stronger a personality right is linked to the human dignity protected by Article 1(1) of the Basic Law, the more compelling the public interest must be to justify a limitation of this personality right.<sup>1637</sup>

In conclusion, from a human rights viewpoint, moral rights can only be restricted in exceptional cases, since authorial dignity must be duly respected. This implies that moral rights ought to be protected independently from formalities and that their exercise must not be unreasonably limited by way of formalities. It seems advisable,

<sup>1629</sup> See arts I and VI of the French Declaration of the Rights of Man and of the Citizen of 1789.

<sup>1630</sup> German Federal Supreme Court, decision of 5 March 1971, I ZR 94/69 ('*Petite Jacqueline*'), *GRUR* 1971, 525-527, at 526, stating that: '*Auch das Urheberpersönlichkeitsrecht ist nur ein Ausschnitt und eine besondere Erscheinungsform des allgemeinen Persönlichkeitsrechts.*' See also Leinemann 1998, at 52 and Drexl 2007, at 168-169, generally following this interpretation.

<sup>1631</sup> See art. 10(1) of the Dutch Constitution.

<sup>1632</sup> See art. IV of the French Declaration of the Rights of Man and of the Citizen of 1789.

<sup>1633</sup> See art. 2(1) of the Basic Law of Germany. See also German Federal Constitutional Court, decisions of 16 January 1957, *Elfes*, BVerfGE 6, 32, at 37 et seq., and 25 August 2000, 1 BvR 2707/95, no. 10.

<sup>1634</sup> See art. 1(1) of the Basic Law of Germany: '*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*'

<sup>1635</sup> See e.g. German Federal Constitutional Court, decisions of 16 January 1957, *Elfes*, BVerfGE 6, 32, at 36 and 41, and 16 July 1969, *Mikrozensus*, BVerfGE 27, 1, at 6.

<sup>1636</sup> Eberle 2008, at 39.

<sup>1637</sup> See Antoni 2003, at 46. See also German Federal Constitutional Court, decision of 31 January 1973, *Tonband*, BVerfGE 34, 238, at 245, stating that even a predominant public interest cannot justify an interference of 'the absolutely protected core of a person's self-determination of life'.

therefore, if copyright is made dependent on formalities, to confine such conditional protection to the author's economic rights, thus leaving moral rights aside.<sup>1638</sup>

## 6.5 Evaluation and Assessment

The previous sections have demonstrated that, both from a philosophical and legal-theoretical perspective, subjecting copyright to formalities is not inconceivable. The fact that copyright may arise 'naturally' upon the creation of a work does not imply that the lawmaker cannot make the enjoyment or the exercise of copyright conditional on formalities, if there is a legitimate reason for doing so.

This is particularly evident if copyright is perceived as a property right. As a rule, private property, even if it originates in natural law, can be subject to formalities if the public interest so requires. This has been emphasized by Locke, who, in addition to the labour theory of property, carefully described the regulation of property in the civil society, asserting that it can be limited, or subject to formalities, if that is required to attain public interest objectives. Also, this is in agreement with the way in which private property is regulated. The existence or the exercise of various types of property, including landed property, is conditional on formalities. This practice is accepted from the point of view of human rights. The fundamental right of property permits subjecting private property to constitutive formalities (i.e. formal conditions of title) and formalities that limit the scope or the exercise of property rights.

However, to the extent that copyright qualifies as a personality right, there is less room for subjecting it to formalities. The personality rights theory does not accept formalities as a *sine qua non* for protection. It assumes that personality rights derive from the concept of personal freedom, which people 'naturally' enjoy by birth. As a result, these rights ought to be protected without formalities. At most, their exercise can be subject to formalities, so as to avoid a conflict of rights or balance competing interests of private parties. This is consistent with the practice of regulation of other personality-related fundamental rights, such as the right to a name or the right to get married, the exercise of which may be effectuated by civil registration, although it is widely recognized that everyone automatically enjoys these rights by birth.

In view of these findings, it can be concluded that if copyright is made dependent on formalities, a distinction should be made between those aspects of copyright that are akin to property rights, i.e., the author's economic rights, and those that are akin to personality rights, i.e., the author's moral rights. Only the economic rights can be fully subject to formalities. The author's moral rights, on the other hand, ought to be guaranteed without formalities. Given that the fundamental right to human dignity is

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<sup>1638</sup> Note that, at the time of drafting of the UDHR, protecting the author's economic interests was not the central aim. The main concern was to protect the author's moral interests. See UN Committee on Economic, Social and Cultural Rights 2006, para. 12. See also Cassin 1960, at 227, articulating that the original purpose of the drafters of the UDHR '*n'était pas de définir comme droits de l'homme, les droits divers de nature pécuniaire qu'un ... auteur peut tirer de l'exploitation ... de son œuvre*'.

inviolable and that moral rights aim to protect authorial dignity, the human rights framework directs that moral rights come into being independently from formalities and that their exercise should not be unduly restricted by way of formalities.

Admittedly, the distinction here suggested between the economic and moral aspects of copyright may be difficult to adopt in countries that follow a monist approach to copyright. In contrast to countries of the dualist tradition, which make a distinction between the economic and moral rights of authors, countries of the monist tradition perceive copyright as a unitary right that protects both the author's economic and moral interests, on the reasoning that the two are 'so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the right's personality aspect'.<sup>1639</sup>

Nevertheless, it would be going too far to conclude that, because monist countries make no distinction between the economic and moral aspects of copyright, it would be inappropriate to protect moral rights from the moment of creation, while subjecting economic rights to formalities. For one thing, few states have adopted the monist tradition.<sup>1640</sup> More importantly, countries that follow the monist approach, including Germany, do not apply it fully. Following the principle that moral rights are inalienable and may not be severed from the author's economic rights, they do not permit the legal transfer of copyright ownership.<sup>1641</sup> Even so, they accept that authors may grant exclusive licences pertaining to specific exploitation rights (*Nutzungsrechte*).<sup>1642</sup> Consequently, while, *de jure*, the economic and moral rights remain in the same hands, *de facto*, the two rights can be separated. Moreover, from a constitutional point of view, the author's economic and moral rights are clearly divisible. As observed, under the Basic Law of Germany, the economic and moral aspects of copyright are protected by different fundamental rights.<sup>1643</sup> From a principled point of view, therefore, there appear to be no obstacles for subjecting only the author's economic rights to formalities.

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<sup>1639</sup> Guibault & Hugenholtz 2002, at 38 and 77-78. See also Drexl 2007, at 165-166.

<sup>1640</sup> See Guibault & Hugenholtz 2002, at 37-132.

<sup>1641</sup> Drexl 2007, at 165-166.

<sup>1642</sup> See Guibault & Hugenholtz 2002, at 37-43 (for Austria) and 75-86 (for Germany).

<sup>1643</sup> See also Drexl 2007, at 168-169.

## Chapter 7

### Summary and Conclusion

In the past decade, the reintroduction of copyright formalities has been increasingly called for by copyright scholars and practitioners around the world. They assert that formalities can fulfil a number of important functions that may help to address some of the key challenges that copyright is facing in the present digital age. Whereas, in the pre-digital era, all works were locked up in physical information products and the cost of dissemination was high, the digital networked environment has enabled an interactive, simultaneous and decentralized creation, access and consumption of works. Never before have creative works been made available to the public on such a large scale. This has presented new challenges for copyright law. As observed in Chapter 1, the challenges lie in the need to create legal certainty regarding claims of copyright, to facilitate rights clearance and to enhance the free flow of information. Copyright formalities may be able to respond to these challenges, *inter alia*, because of their capacity to enlarge the number of works in the public domain.

This book examines whether reintroducing formalities in copyright law is legally feasible. Its object is not to propose a plan for implementing copyright formalities, but to establish the extent to which the copyright system allows for a reintroduction of formalities with a view to addressing the challenges for copyright in the digital era. It therefore undertakes no economic or procedural analysis, but instead focuses on studying the history of, rationales for and possible future of copyright formalities from a national and international legal and theoretical perspective.

This chapter summarizes the main findings of the study and discusses their implications in light of the possible future of copyright formalities. It first describes the role and functions of formalities, as identified in Chapter 2 (para. 7.1), and then considers the history of formalities and the rationales behind their abolition at the national and international levels, as identified in Chapters 3 and 4 (para. 7.2). Next, it looks at the findings of Chapters 5 and 6 to see whether reintroducing formalities is possible from the point of view of international copyright law (para. 7.3), as well as from a legal-theoretical point of view (para. 7.4). It concludes that, from a legal-theoretical perspective, it is entirely feasible to make the protection of the author's economic rights conditional on formalities, but that, from a practical perspective, the international prohibition on formalities offers little leeway for reintroducing

copyright formalities with a view to addressing the challenges that copyright law is facing today.

Consequently, if policymakers wish to tackle the challenges in current copyright law with a reintroduction of formalities, then the Berne Convention would have to be modified. Drawing upon this conclusion, the chapter considers the feasibility of a possible revision of the Berne prohibition on formalities. It observes that, because formalities can perform important functions in addressing the challenges in current copyright law and because, in today's digital era, the historical rationales for abolishing copyright formalities have largely disappeared, the time for changing the Berne Convention to allow for a reinstatement of formalities in copyright law is not entirely inopportune (para. 7.5). Therefore, the chapter suggests alternative rules which could streamline compliance with formalities at the international level, should the Berne prohibition on formalities ever be revised (para. 7.6). Finally, it also makes some closing remarks on future policy implications relating to the economic and practical impact of a possible reintroduction of copyright formalities (para. 7.7).

## 7.1 Formalities and Their Possible Role in Copyright Law

In studying whether reintroducing copyright formalities is legally feasible, the book starts from the assumption that formalities can play a useful role in addressing the challenges that copyright is facing today. This hypothesis is tested in Chapter 2, which analyzes twentieth-century US copyright formalities and draws a comparison with formalities imposed in patent law, design law and trademark law.

This analysis shows that, in intellectual property law, formalities fulfil important functions. Depending on their type and legal effects, they may help to (1) impose an initial filter separating protected from unprotected subject matter; (2) demarcate and outline the subject matter and scope of protection; (3) identify the intangible subject matter and alert people of its existence; (4) create a link between right owners and their intellectual property, thus identifying them as legal proprietors; and (5) offer a valuable source of information from which third parties, by inquiry, can ascertain the subject matter, scope and term of protection and the identity of right owners.

Thus, depending on the type of formalities and the nature and legal effects that is conferred on them, copyright formalities may be useful in responding to the challenges in modern copyright law. They can contribute to enhancing the free flow of information by enlarging the public domain and enabling third parties to distinguish between protected and unprotected works. In addition, they may help to create legal certainty regarding copyright claims by identifying copyrighted works and assisting in calculating the term of copyright protection. Finally, they can play a key role in facilitating rights clearance by supplying information about copyright ownership and other relevant information.

## 7.2 Copyright Formalities and Their Abolition in Historical Context

Recent proposals for reintroducing copyright formalities are not a legal anomaly without precedent in copyright law and theory. Although, today, most countries protect copyright without formalities, Chapter 3 demonstrates that the laws of many countries, including France, Germany, the Netherlands and the UK, imposed mandatory copyright formalities until the late nineteenth or early twentieth century at least. The US retained copyright formalities as a prerequisite for protection until well into the second part of the twentieth century. At present, the enforcement of copyright in the US is still conditional on mandatory formalities, at least for works of US origin.

The reasons why copyright formalities began to fall out of favour in Europe are both ideological and pragmatic. During the nineteenth century, the belief emerged that the foundation of copyright exists solely in the quality of the author's personal creation. Under the influence of the natural rights theory, copyright was thought to arise automatically with the creation of a work. There was a growing consensus that the *existence* of copyright should not be subject to formalities and that a failure to fulfil formalities should never be the occasion of a loss of copyright. This proved fatal for constitutive formalities. Yet, there was no absolute resistance against formalities in nineteenth-century Europe. They were believed to perform important functions in relation to the *exercise* of copyright. This is consistent with the, at that time, widely accepted and prevalent idea that, while copyright should indeed be secured, this must always be done with due regard for the public interest and societal order.

Other than this ideological reason, there were pragmatic reasons that added to the gradual weakening of the connection between copyright law and formalities. First, formalities did not fit well with the concept of abstract authored works. By means of formalities, it was impossible to capture the essence of the author's expression in order to define the nature and limits of protection. Moreover, formalities could not be fulfilled unless a work was fixed in a tangible medium. This clashed with the idea that copyright exists in a work irrespective of the mode or form of expression. For certain newly protected categories of works, completing formalities also proved difficult or overly costly. In addition, formalities were rendered redundant by the availability of alternative legal means for establishing authorship and calculating the term of protection.

Additionally, in the nineteenth century, securing international copyright proved to be burdensome, as it required that authors fulfil different formalities in different countries. To free authors from this burden, the Berne Convention initially required contracting states to grant copyright to foreign works for which the formalities in the country of origin were completed. In 1908, along with the introduction of the rule of independence of protection, it prohibited contracting states from subjecting the protection of foreign works to formalities (Chapter 4). For most states adhering to the Berne Convention, the introduction of this prohibition on formalities was the

ultimate reason for abolishing national copyright formalities. Thus, while Germany already eliminated formalities in 1907, the UK abolished formalities in 1911, the Netherlands in 1912 and France in 1925. When the US joined the Berne Convention in 1989, it also removed several statutory copyright formalities or limited their application to domestic works.

### 7.3 Reintroducing Formalities: An International Law Perspective

Although formalities can be useful to respond to the challenges in modern copyright law, their reintroduction is likely to encounter difficulties from the perspective of international copyright law. Taking into account the prohibition on formalities that is laid down in the Berne Convention and incorporated by reference into the TRIPS Agreement and the WCT, international copyright law seems to provide little leeway for contracting states to reinstate copyright formalities, at least at first glance.

However, the international copyright framework does not render a reintroduction of copyright formalities completely impossible. As we have seen in Chapter 5, there is some space in international copyright law for reinstating copyright formalities. For one thing, the prohibition on formalities extends to international situations only. This means that contracting states are at liberty to subject the protection of domestic works to formalities. Additionally, the international copyright treaties seem to allow contracting states to adopt particular piecemeal approaches. They arguably permit them to make the protection of rights management information conditional on the registration or deposit of such information in a publicly accessible database. This is because the prohibition on formalities seems to extend only to formalities that affect the protection of *copyright*, not to formalities that relate to the adjunct protection of rights management information. Moreover, the international copyright system does not seem to prohibit formalities that establish the manner of effectuating a transfer of copyright or prove the existence or scope of the relevant transaction. This would permit contracting states to introduce a system that gives legal effect to transfers of copyright only if such transfers are recorded in a publicly accessible register.

Thus, under the current framework of international copyright law, it is factually feasible to introduce specific copyright formalities. This, at least, enables contracting states to address some of the most pressing current rights clearance problems. The clearance of rights would surely be facilitated if reliable publicly accessible databases of rights management information existed. Likewise, if all transfers of copyright were recorded in a public register, the ownership of copyright could more easily be ascertained by consulting the register. If it contains no record of any transfer, the copyright may be assumed to reside with the author. Moreover, countries might also choose to subject the protection of domestic works to copyright formalities, such as registration or the requirement to mark the copies of a work with a copyright notice. Provided that the national register is universally accessible and the copyright notice remains attached to the work, this may have the

effect of facilitating rights clearance even beyond the national borders of the country in which these formalities are imposed.

On the other hand, the current international copyright framework is not geared towards adequately addressing the challenges of creating legal certainty over copyright claims and enhancing the free flow of information, at least at the international level. While it permits contracting states to subject domestic works to formalities, even if a state chooses to make their protection conditional on constitutive formalities, these works would nonetheless be protected independently of formalities outside the country of origin. Failure to complete domestic formalities would thus cause works to enter the public domain in their home country, but not in the rest of the world. Conversely, in countries that adopt a purely domestic regime of formalities, foreign works would not be affected by it, because these works cannot be subject to formalities.

Similarly, outside the country of origin, domestic formalities cannot create legal certainty regarding copyright claims. The copyrightability of a work is determined exclusively on the basis of the substantive criteria of protection (e.g. the standard of originality) in the protecting state. This is irrespective of whether the relevant formalities in the home country have been completed. At most, domestic formalities may provide useful information facilitating the calculation of the copyright terms of works for which these formalities have been fulfilled. If the term is calculated on the basis of the author's life, for instance, copyright registers may contain information about the names of authors of works that bear no signature. This may aid in determining the status of their protection even in countries other than the country of origin.

In conclusion, as things currently stand, states adhering to the Berne Convention, the TRIPS Agreement and the WCT are free to reintroduce copyright formalities, albeit in limited form. There are some models that would enable contracting states to address some of the current rights clearance difficulties. This varies from the registration or deposit of rights management information to the recordation of copyright transfers and the subjection of domestic works to formalities. However, unless the aim is to limit the practical utility of formalities to domestic works in their country of origin only, the existing possibilities for reintroducing formalities are insufficient for universally addressing the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information.

## 7.4 Reintroducing Formalities: A Legal-Theoretical Exposition

Reinstating copyright formalities also hinges on their legal-theoretical acceptability. One of the core arguments against copyright formalities, which has been raised both in historical and contemporary contexts, is that copyright, as a 'natural' property or personality right, ought to arise automatically upon creation and therefore cannot be subject to formalities. This book demonstrates that this argument is based on an

incorrect understanding of the philosophy of natural law (Chapter 6). The Lockean labour theory of property, which lays the groundwork for the idea of copyright as a ‘natural authorial property right’, may explain why copyright vests in the author as creator, but it does not support the idea that copyright is absolute and unconditional. In fact, if this theory is interpreted in the full context of Locke’s *Second Treatise*, then it becomes clear that the Lockean concept of property by labour does not prevent property from being subject to formalities. If there is a legitimate public interest for doing so, natural property rights can always be limited by the law.

The situation is somewhat different when copyright is perceived as a personality right. The personality rights theory of copyright, which originates from the writings of Kant, Fichte and Hegel, suggests that authors merit protection, not because of the intellectual labour that they invest in their creations, but to protect their personality, which is manifested in their works. As the justification for copyright is founded on the author’s natural right of self-expression, a personal freedom that every person enjoys by birth, it is generally accepted that the (coming into) existence of this right cannot be subject to formalities. Only in specific circumstances, namely, when there is a conflict of rights or a competing interest, can the exercise of personality-related rights be statutorily restricted or made conditional on mandatory formalities.

Applying these findings to current copyright law, it can be concluded that, from a legal-theoretical perspective, reintroducing copyright formalities is acceptable, but only if limited to the author’s economic rights. Since moral rights aim to protect authorial dignity, they are akin to personality rights and therefore must be protected without formalities. By contrast, the author’s economic rights are property-related. This implies that there is ample room for subjecting the protection of these rights to formalities. This finds support in the framework of human rights. The fundamental right of property permits subjecting private property to both constitutive formalities and formalities that limit the exercise of property rights. Thus, from the perspective of legal theory and legal philosophy, it is entirely feasible to make the enjoyment or the exercise of the author’s economic rights conditional on formalities.

## 7.5 The Way Forward: Changing the Prohibition on Formalities?

As the previous sections illustrate, while reintroducing formalities is utterly feasible from a legal-theoretical viewpoint, international copyright law currently offers little leeway for reinstating formalities with the object of addressing the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information. While contracting states are allowed to impose formalities on domestic works, the legal consequences would not extend further than to such works inside their country of origin. From an international point of view, therefore, reintroducing copyright formalities along these lines would have a fairly marginal impact.

The challenges that formalities are supposed to address, however, have important international dimensions and thus require an international approach. In the online

environment, where content distribution is international by nature, a solution that is limited to domestic works in their home country cannot be truly effective. The free flow of information is not really enhanced if a work enters the public domain in the country of origin but not in the rest of the world. Likewise, legal certainty regarding copyright claims is impossible to create for works outside the home country. Inside the home country, an omission of domestic formalities to determine the validity of a copyright claim cannot always be relied upon either, because it is not always easy to ascertain which country qualifies as the country of origin of the work.

It follows that, if the object is to establish legal certainty over copyright claims or to advance the free flow of information, then the Berne prohibition on formalities would need to be altered or perhaps even be abolished altogether. This is easier said than done. A substantive revision of the Berne Convention requires the unanimous support of all contracting states. Moreover, because the prohibition on formalities is incorporated by reference in the TRIPS Agreement and the WCT, consensus about modifying the existing international legal framework would also have to be reached in the context of these two treaties. This may well prove to be very difficult.

However, the suggestion of changing or perhaps abolishing the Berne prohibition on formalities is not merely academic and theoretical. Sooner or later, policymakers might realize that the situation in current copyright law is no longer sustainable and thus warrants a solution. If so, the option of reintroducing copyright formalities may be amongst the models to be explored. As observed, formalities can fulfil important functions, which may help to address the challenges that copyright is facing today. If policymakers sought to address these challenges, then changing or abolishing the Berne prohibition on formalities to enable contracting states to subject copyright to formalities at full scale could perhaps be an option worthy of consideration.

This is particularly so now that the historical rationales behind the elimination of formalities at the national and international levels seem to have largely disappeared. As already concluded, the claim that copyright as a 'natural right' cannot be subject to formalities can easily be refuted. Moreover, the pragmatic arguments that inspired the abolition of formalities from national and international copyright law have also largely evaporated in the digital age. Nowadays, registration and deposit can be organized much more efficiently and made applicable to virtually any type of work. Due to modern technologies for digital recording and reproduction, such as digital photo and video cameras, copyrighted works can be easily and cost-effectively reproduced verbatim so as to capture their distinctive – i.e. subjective and original – features.

Furthermore, in the digital era, it no longer appears to be absolutely necessary to prohibit contracting states from subjecting copyright to formalities to guarantee an efficient protection of copyright at the international level. The success and ubiquity of the world wide web has enabled the creation of online registers, which allow anyone with a computer and internet access to register copyright or to digitally deposit works even at a distance. It would thus be possible to create an international registration system. Alternatively, international copyright protection could be made

conditional on a uniform formality, akin to the copyright notice under the Universal Copyright Convention. These and other legal instruments to ease compliance with formalities in the international context are discussed in the next section, which presents alternative rules for the prohibition on formalities.

## 7.6 Alternative Rules for Formalities at the International Level

If international policymakers ever decide to change or abolish the Berne prohibition on formalities to allow the challenges in current copyright law to be addressed, then the question remains with what rule it can be replaced. To prevent a fall-back to the situation before the Berne Convention, in which authors had to complete different and sometimes incompatible formalities in various countries to secure international protection, an international rule is indispensable. Two types of rules, both of which have been described, albeit in a different context, in Chapter 4 of the book, seem fit to adequately substitute the Berne prohibition on formalities.

One possibility is to revert to the country of origin rule that was laid down in the Berne Convention until 1908. That would imply that the enjoyment of copyright at the international level is subject to compliance with the domestic formalities in the home country. The country of origin rule essentially makes an exception to the rules of national treatment and independence of protection with respect to the application and legal effects of domestic formalities in international copyright law.

Materially, the country of origin rule would not bring much change to the way in which contracting states can apply formalities at the international level. Akin to the current prohibition on formalities, formalities cannot be imposed on foreign works and subjecting domestic works to formalities is purely a matter at the discretion of contracting states. The legal consequences of the country of origin rule, on the other hand, are more far-reaching. In contrast to the present situation, in which domestic formalities have legal effect at the national level only, under the country of origin rule, the legal effects of domestic formalities extend to the international level.

Consequently, a country of origin rule would allow the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information to be addressed more efficiently. Even so, it is the willingness of contracting states to subject national works to formalities that eventually determines the degree to which these issues can actually be resolved on a global scale. This may perhaps be seen as a weakness of the model. However, if consensus can be reached about changing the Berne Convention to enable a reintroduction of formalities, then countries are likely to also approach the idea of reinstating copyright formalities more positively.

A known disadvantage of the country of origin rule, however, is that it requires knowledge of foreign law and, depending on the type of formality, access to foreign registries to establish whether authors of foreign works have duly complied with the

domestic formalities. As observed, this was one of the main reasons for abandoning the country of origin rule and introducing the prohibition on formalities in 1908.

At present, however, due to international private law and contractual choice of law provisions, foreign law is fairly often applied to international cases. The exigence of knowing foreign law, therefore, cannot be used as an argument against adopting a country of origin rule. On the other hand, for a successful operation of the country of origin rule, anyone should be able to ascertain whether the domestic formalities have been fulfilled. To this end, the application of the rule could be limited to registers that are publicly accessible online and to formalities that do not require access to registries, such as copyright notices. It would also be possible to adopt a variant of the country of origin rule, pursuant to which the formalities that contracting states may impose on domestic works must have a specific form and satisfy prescribed criteria. Such a regime that standardizes domestic formalities would have an important harmonizing effect, thus bypassing the adverse effects that a hodgepodge of domestic formalities at the national level would have on international copyright protection.

An alternative would be to adopt a uniform formality that is universally applicable. This would mean that international copyright protection would be conditional on one formality established at the international level. One example of such a regime can be found in the Universal Copyright Convention, which exempts foreign works that are eligible for protection under this Convention from completing the domestic formalities of a contracting state, provided that all copies are marked with a prescribed copyright notice. A variant would be to subject the enjoyment or the exercise of international protection to a universal formality directly, rather than to confer on such a formality the effect of exempting foreign works from compliance with domestic formalities. This would give it a broader and more general application internationally.

In comparison to the country of origin rule, the uniform formality would have an advantage in that reintroducing copyright formalities may not be left to the discretion of contracting states, but would be a matter of international policymaking. Although this also complicates things, as each contracting state will ultimately have a say in deciding on the matter, it would give the opportunity to develop a coherent international policy regarding copyright formalities. Policy decisions that would have to be taken would include, *inter alia*, the type of formality to be imposed and the legal effects to be conferred on it. It would be possible, for example, to introduce a universal copyright notice, akin to the notice under the Universal Copyright Convention, or to create a central register at the international level. Moreover, it would have to be decided whether the formality would have a constitutive or merely a declaratory effect. Although constitutive formalities have the capacity of more effectively addressing some of the challenges discussed in this book, an adequate system of declaratory formalities certainly can also provide relief (para. 2.3.1). Whatever formality would be most suitable depends on the objectives

pursued and, of course, on the consensus that can be reached between contracting states.

## 7.7 Closing Remarks

The idea of reintroducing copyright formalities has been voiced only fairly recently. Even though the topic is not yet high on the agenda of policymakers, it has received increased attention in (inter)national political and academic circles. Since 2005, for example, WIPO has conducted two surveys into national legislation on (voluntary) copyright registration and deposit systems.<sup>1644</sup> In 2009, the UK Intellectual Property Office also discussed formalities in its report on a copyright strategy for the digital age<sup>1645</sup> and the ALAI devoted an entire afternoon session to formalities at its 2009 conference in London.<sup>1646</sup> Lastly, in 2011, the Comité des Sages, a Reflection group on bringing Europe's cultural heritage online, recommended that, to avoid future orphan works, some form of registration should be considered as a prerequisite for a full exercise of copyrights. To this end, it called upon the European Commission to prompt a debate at WIPO on adapting the Berne Convention on this point to make it fit for the digital age.<sup>1647</sup> These examples show that the debate is shifting, both at the national level and at the international level. This is particularly due to the awareness that formalities may play an increasingly important role in the digital era.

Studying the legal feasibility and legal-theoretical implications of a reinstatement of copyright formalities, this book seeks to contribute to the current debate. Legal questions, however, constitute only one dimension of the complexities surrounding a possible reintroduction of formalities. Before a new regime of copyright formalities can be implemented, the economic impact on authors, users and society at large must also be examined. Additionally, there are practical and organizational issues that require scrutiny. Yet, the practical feasibility and economic viability of a reintroduction of copyright formalities cannot be assessed generally, but depends entirely on the kind of formalities that will be imposed and the legal consequences that are conferred on it. Therefore, these questions arise only at the stage of implementation, which in this book has been deliberately ignored, given that the

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<sup>1644</sup> WIPO, 'Survey of national legislation on voluntary registration systems for copyright and related rights', WIPO document (SCCR/13/2), 9 November 2005. The final report of the 'Second Survey on Voluntary Registration and Deposit Systems' has not yet been published, but the replies received to the questionnaire, including some additional background information, can already be obtained from: <[http://www.wipo.int/copyright/en/registration/registration\\_and\\_deposit\\_system\\_03\\_10.html](http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html)>.

<sup>1645</sup> Intellectual Property Office, '© the way ahead: A Copyright Strategy for the Digital Age' (2009), <<http://www.ipo.gov.uk/c-strategy-digitalage.pdf>>, at 41-42.

<sup>1646</sup> See the papers presented at this conference in Bently et al. 2010, at 367-477.

<sup>1647</sup> Report of the Comité des Sages, 'The New Renaissance', Brussels, 10 January 2011, <[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reflection\\_group/final-report-cdS3.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf)>, at 5, 18-19 (paras 5.3.3 to 5.3.5) and 20-21 (Key recommendation no. 2).

actual reintroduction of copyright formalities is subject to policy decisions and objectives to be achieved.

Another question that this book leaves open is whether it is desirable or 'fair' to impose formalities on authors, given the practical problems and costs inflicted upon them by formalities. This question requires a qualitative judgment, which can better be made by national or international policymakers. Ultimately, however, the desirability of formalities will hinge again on the type of formalities imposed and their nature and legal consequences. To mitigate the adverse effects and lower the risk of innocent mistakes in the process of fulfilling them, copyright formalities should be relatively easy to complete. This may be a reason for policymakers not to take as an example the pre-1989 US copyright system, which contained various formalities and was the occasion of a loss of protection in many instances.<sup>1648</sup> To prevent a future regime of copyright formalities from unnecessarily encroaching on the rights and interests of authors, it should ideally consist of one simple formality that is universally applicable and easy to complete at very low cost.

Regardless of the outcome of an economic and practical assessment, from a legal perspective, formalities may help to address the current challenges in copyright law. Provided that they are unambiguous and easy to fulfil, formalities may contribute to creating a fair balance between protecting the rights of authors and safeguarding the interests of users to the advantage of the public at large. Even though reintroducing copyright formalities requires a significant change of approach and may well arouse controversy, the idea is worthy of further exploring. This is something that national and international policymakers should keep in mind when devising a plan, adopting new policies or implementing measures to make copyright law fit for the digital age.

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<sup>1648</sup> See Ginsburg 2010a and Ginsburg 2010b, presenting a 'reality check' in reply to the recent calls for a reintroduction of copyright formalities, by drawing a comparison with the old US copyright system.

## Samenvatting en conclusie

In het afgelopen decennium is in toenemende mate gepleit voor herinvoering van formaliteiten in het auteursrecht. Aan formaliteiten wordt een aantal belangrijke functies toegeschreven die zouden kunnen helpen bij het aanpakken van enkele van de voornaamste uitdagingen waarmee het auteursrecht in het digitale tijdperk wordt geconfronteerd. In het pre-digitale tijdperk waren de meeste voor auteursrechtelijke bescherming in aanmerking komende werken neergelegd in fysieke informatie-producten en waren de distributiekosten hoog. De digitale netwerkomgeving heeft het echter mogelijk gemaakt om werken op een interactieve, gelijktijdige en gedecentraliseerde manier te creëren, toegankelijk te maken en te consumeren. Nooit eerder zijn creatieve werken op zo'n grote schaal beschikbaar gesteld voor het publiek dan nu. Dit heeft het auteursrecht voor nieuwe uitdagingen gesteld. Zoals toegelicht in Hoofdstuk 1, liggen deze uitdagingen in het creëren van rechtszekerheid omtrent auteursrechtelijke claims, het faciliteren van het regelen van toestemming en het verbeteren van de informatievrijheid. Formaliteiten zouden hierop kunnen inspelen, onder meer vanwege hun capaciteit om het publieke domein te verrijken met werken waarvoor de formaliteiten niet zijn vervuld.

Dit boek onderzoekt of herinvoering van formaliteiten in het auteursrecht juridisch haalbaar is. Het doel is niet om een concreet plan voor te stellen voor de implementatie ervan, maar om te bepalen in welke mate het auteursrecht een introductie van formaliteiten toelaat met als doel het aanpakken van de uitdagingen waar het auteursrecht in het digitale tijdperk voor staat. Dit onderzoek bevat daarom geen economische of procedurele analyse, maar is gericht op het bestuderen van de geschiedenis, ratio en mogelijke toekomst van formaliteiten in het auteursrecht vanuit een nationaal en internationaal juridisch en theoretisch perspectief.

Dit hoofdstuk vat de bevindingen van dit onderzoek samen en bespreekt wat de implicaties daarvan zijn in het licht van de mogelijke toekomst van formaliteiten in het auteursrecht. Allereerst beschrijft het de rol en functies van formaliteiten, zoals geïdentificeerd in Hoofdstuk 2, en de geschiedenis van formaliteiten en de motieven voor de afschaffing daarvan op nationaal en internationaal niveau, zoals besproken in de Hoofdstukken 3 en 4. Vervolgens wordt ingegaan op de bevindingen van de Hoofdstukken 5 en 6 om te zien of een herinvoering van formaliteiten mogelijk is vanuit het perspectief van het internationale auteursrecht en vanuit juridisch-theoretisch perspectief. Hoewel het vanuit juridisch-theoretisch oogpunt heel goed mogelijk is om de bescherming van de economische rechten van auteurs (mede) afhankelijk te stellen van formaliteiten, concludeert dit boek dat het internationale

verbod op het stellen van formaliteiten in het auteursrecht weinig ruimte biedt voor een herinvoering ervan met als doel de uitdagingen waarmee het auteursrecht wordt geconfronteerd in het digitale tijdperk aan te pakken.

Hieruit volgt dat, als beleidsmakers de uitdagingen in het auteursrecht van vandaag willen aanpakken door herinvoering van formaliteiten, dit alleen kan geschieden als de Berner Conventie op dit punt wordt gewijzigd. Voortbouwend op deze conclusie test dit hoofdstuk de haalbaarheid van een mogelijke herziening van het formaliteitenverbod in de Berner Conventie. Overwegende dat formaliteiten belangrijke functies kunnen vervullen bij het aanpakken van de uitdagingen in het huidige auteursrecht en dat, in het digitale tijdperk, de historische redenen voor de afschaffing van auteursrechtformaliteiten grotendeels zijn verdwenen, concludeert dit boek dat een herziening van de Berner Conventie niet geheel inopportuun is. Tegen deze achtergrond presenteert dit hoofdstuk een paar alternatieve regels om de naleving van formaliteiten op internationaal niveau in goede banen te leiden, mocht het verbod op formaliteiten in de Berner Conventie ooit worden verzacht of zelfs geschrapt. Het hoofdstuk sluit af met een aantal opmerkingen over toekomstige beleidsimplicaties in verband met de economische en praktische impact die een herintroductie van formaliteiten in het auteursrecht met zich mee kan brengen.

#### *De rol en functies van formaliteiten in het auteursrecht*

Bij het bestuderen van de vraag of een herinvoering van auteursrechtformaliteiten juridisch haalbaar is, is uitgegaan van de veronderstelling dat formaliteiten een nuttige rol kunnen spelen bij het aanpakken van de uitdagingen waarmee het auteursrecht thans wordt geconfronteerd. Hoofdstuk 2 test deze hypothese door het analyseren van formaliteiten in het twintigste-eeuwse Amerikaanse auteursrecht en door het maken van een vergelijking met bestaande formaliteiten in het octrooirecht, het tekeningen- en modellenrecht en het merkenrecht.

Deze analyse toont aan dat formaliteiten een aantal belangrijke functies vervullen in het intellectuele eigendomsrecht. Afhankelijk van het type formaliteiten en de juridische gevolgen die daaraan zijn gekoppeld, kunnen formaliteiten helpen om (1) bij voorbaat beschermde van onbeschermde objecten te filteren; (2) het object van bescherming te definiëren en de reikwijdte van bescherming af te bakenen; (3) het immateriële object van bescherming te identificeren en mensen te attenderen op het bestaan ervan; (4) de rechthebbenden met hun intellectuele eigendom te verbinden, waardoor ze als juridisch eigenaar/rechthebbende zijn te identificeren; en (5) adequate informatie te geven waarmee derden, door onderzoek, (beter) in staat zijn het object, de reikwijdte en de duur van bescherming alsmede de identiteit van rechthebbenden vast te stellen.

Afhankelijk van het type formaliteiten en de aard en rechtsgevolgen die daaraan worden toegekend, kunnen auteursrechtformaliteiten dus helpen bij het aanpakken van de uitdagingen in het hedendaagse auteursrecht. Zij kunnen bijdragen aan de

verbetering van de informatievrijheid door het publieke domein te vergroten en door derden in staat te stellen om onderscheid te maken tussen beschermde en onbeschermde werken. Ook kunnen zij helpen om rechtszekerheid te creëren met betrekking tot auteursrechtelijke claims door beschermde werken te identificeren en te assisteren bij de berekening van de beschermingsduur van het auteursrecht. Ten slotte kunnen ze een sleutelrol spelen bij het vergemakkelijken van het regelen van toestemming door adequate informatie te verstrekken over de rechtensituatie.

### *Auteursrechtformaliteiten en de afschaffing ervan in historisch perspectief*

De recente voorstellen voor een herinvoering van auteursrechtformaliteiten vormen geen juridische anomalie zonder precedent in de rechtspraak en theorie van het auteursrecht. Hoewel, in de meeste landen, het auteursrecht thans onafhankelijk is van formaliteiten, heeft Hoofdstuk 3 aangetoond dat verschillende landen, waaronder Frankrijk, Duitsland, Nederland en het Verenigd Koninkrijk, in ieder geval tot in de late negentiende of vroege twintigste eeuw auteursrechtformaliteiten hebben gekend. In Amerika was tot het eind van de twintigste eeuw het vervullen van formaliteiten een voorwaarde voor het verkrijgen van auteursrechtelijke bescherming. Op dit moment is het in Amerika nog steeds verplicht om bepaalde formaliteiten te vervullen om het auteursrecht in rechte te handhaven bij de rechter, althans voor wat betreft werken van Amerikaanse oorsprong.

De redenen waarom in Europa auteursrechtformaliteiten in de negentiende eeuw uit de gratie begonnen te raken zijn ideologisch en pragmatisch. De overtuiging ontstond dat de grondslag van het auteursrecht uitsluitend ligt in de kwaliteit van de persoonlijke schepping van de auteur. Uit de natuurrechtstheorie kwam de gedachte voort dat het auteursrecht automatisch, dus zonder enige formaliteit, ontstaat met de creatie van een werk. Er was een groeiende consensus dat de originele *verkrijging* van het auteursrecht niet aan formaliteiten mag worden onderworpen en dat het niet vervullen van formaliteiten niet (automatisch) mag leiden tot het verval van het auteursrecht. Dit bleek fataal voor constitutieve formaliteiten. Toch was er geen absolute weerstand tegen formaliteiten in Europa in de negentiende eeuw. Er werden belangrijke functies betreffende de *uitoefening* van het auteursrecht aan formaliteiten toegeschreven. Dit is in overeenstemming met het op dat moment algemeen aanvaarde en gangbare idee dat, hoewel een effectieve auteursrechtelijke bescherming gewenst is, het bieden van goede bescherming altijd moet geschieden met inachtneming van het publieke belang en de maatschappelijke orde.

Naast deze ideologische redenen hebben ook enkele pragmatische beweegredenen bijgedragen aan de geleidelijke verzwakking van de koppeling van het auteursrecht aan formaliteiten. In de eerste plaats pasten formaliteiten niet goed bij het abstracte werkbegrip. Het was niet mogelijk om middels formaliteiten de karakteristieke (i.e., subjectieve en originele) kenmerken van werken te registreren en aldus de aard en grenzen van bescherming af te bakenen. Ook kon aan formaliteiten (zoals een depot

of inschrijving) niet worden voldaan als een werk niet was vastgelegd in een tastbare vorm. Dit botste met het idee dat het auteursrecht werken moet beschermen, ongeacht de wijze of de vorm van uitdrukking waarin zij zijn vastgelegd. Voor bepaalde nieuwe categorieën van werken bleek het vervullen van formaliteiten ook uitermate moeilijk of kostbaar te zijn. Daarnaast werden formaliteiten steeds vaker overbodig dankzij het bestaan van alternatieve juridische middelen voor het bewijzen van het makerschap en voor de berekening van de beschermingsduur.

Daarenboven was het voor auteurs in de negentiende eeuw erg lastig om zich van internationale bescherming te verzekeren. Vaak moesten zij daarvoor in allerlei landen (van elkaar verschillende) formaliteiten vervullen. Om auteurs van deze last te bevrijden, bepaalde de Berner Conventie in eerste instantie dat alle verdragsluitende staten gehouden waren bescherming te bieden aan buitenlandse werken ten aanzien waarvan in het land van oorsprong de formaliteiten waren vervuld. In 1908 werd deze bepaling omgezet in een verbod voor verdragsluitende staten om de bescherming van buitenlandse werken aan formaliteiten te onderwerpen. Dit gebeurde gelijktijdig met de invoering van de regel volgens welke het bestaan van bescherming in het land van oorsprong geen voorwaarde was voor het kunnen genieten en uitoefenen van het auteursrecht in andere landen (Hoofdstuk 4). Voor de meeste landen die partij waren bij de Berner Conventie (of zich daar later bij aansloten) was de invoering van het formaliteitenverbod de uiteindelijke reden om dan ook maar de eigen nationale auteursrechtformaliteiten af te schaffen. Terwijl in Duitsland formaliteiten reeds in 1907 waren afgeschaft, gebeurde dat in het Verenigd Koninkrijk in 1911, in Nederland in 1912 en in Frankrijk in 1925. Ook werden de meeste Amerikaanse auteursrechtformaliteiten afgeschaft of werd de toepassing ervan beperkt tot binnenlandse werken toen Amerika in 1989 toetrad tot de Berner Conventie.

#### *De herinvoering van formaliteiten vanuit internationaalrechtelijk perspectief*

Hoezeer formaliteiten ook kunnen helpen bij de aanpak van de uitdagingen in het hedendaagse auteursrecht, vanuit het perspectief van het internationale auteursrecht lijkt de herinvoering ervan op moeilijkheden te stuiten. Uitgaande van het verbod op formaliteiten, dat is neergelegd in de Berner Conventie (art. 5 lid 2) en door verwijzingsbepalingen is meegenomen in het TRIPS-Verdrag (art. 9 lid 1) en de WCT (art. 1 lid 4), lijkt het internationale auteursrecht, althans op het eerste gezicht, erg weinig speelruimte te bieden aan verdragsluitende staten om over te gaan tot een herinvoering van auteursrechtformaliteiten.

Toch is herinvoering van formaliteiten binnen het bestaande internationaal auteursrechtelijke kader niet volstrekt onmogelijk. Zoals we gezien hebben in Hoofdstuk 5, laat het internationale kader daarvoor ruimte. Zo strekt het formaliteitenverbod zich louter uit tot internationale situaties. Dit betekent dat alle

verdragsluitende staten vrij zijn om het genot en de uitoefening van het auteursrecht, zolang het daarbij gaat om de bescherming van binnenlandse werken, aan formaliteiten te onderwerpen. Daarnaast lijken de internationale auteursrechtverdragen het toe te staan dat verdragsluitende staten, op specifieke deelgebieden, formaliteiten invoeren. Zo is het ogenschijnlijk toegestaan om de bescherming van informatie over het beheer van rechten afhankelijk te maken van de registratie of het depot van dergelijke informatie in een openbaar toegankelijke databank. Het formaliteitenverbod lijkt zich namelijk alleen uit te strekken tot formaliteiten die zien op het ontstaan, de uitoefening en het behoud van het *auteursrecht* en niet tot formaliteiten betreffende de aanvullende bescherming van informatie over het beheer van rechten. Ook lijkt het internationale formaliteitenverbod zich niet uit te strekken tot formaliteiten die de wijze van effectueren van een overdracht van het auteursrecht vaststellen of die het bestaan of de omvang van de relevante transactie aantonen. Verdragsluitende staten zouden dus een systeem kunnen invoeren waarbij de overdracht van het auteursrecht alleen juridisch effect zou sorteren wanneer (een uittreksel van) de relevante transactie wordt geregistreerd in een openbaar toegankelijk register.

Binnen het bestaande internationaal auteursrechtelijke kader is het dus mogelijk om bepaalde formaliteiten in te voeren. Dit stelt verdragsluitende staten in staat om in elk geval een deel van de huidige problematiek omtrent het verkrijgen en nader regelen van toestemming van de auteursrechthebbenden aan te pakken. Het vragen en regelen van toestemming zou enorm veel baat hebben bij de beschikbaarheid van voldoende publiek toegankelijke databanken met betrouwbare informatie over het beheer van rechten. Ook zouden auteursrechthebbenden makkelijker kunnen worden opgespoord indien elke overdracht van het auteursrecht in een openbaar register zou worden geregistreerd. Het opsporen en vinden van de betrokken rechthebbenden kan door raadpleging van zo'n register. Als daarin geen gegevens over overdracht van het auteursrecht zijn opgenomen, kan worden aangenomen dat het auteursrecht bij de auteur berust. Landen kunnen er, ten slotte, ook voor kiezen om de bescherming in hun land van de eigen, binnenlandse werken te onderwerpen aan formaliteiten. Te denken valt aan het invoeren van een registratieplicht of aan de verplichting om de exemplaren van een binnenlands werk te voorzien van een copyright notice. Op voorwaarde dat de registers wereldwijd toegankelijk zijn en copyright notices aan alle exemplaren van het werk verbonden blijven, kan dit bijdragen aan het vereenvoudigen van het vragen en regelen van toestemming, zelfs buiten de grenzen van het land dat bedoelde formaliteiten oplegt.

Anderzijds biedt het bestaande internationaal auteursrechtelijke kader geen ruimte om formaliteiten in te voeren met als doel op een adequate manier (meer) rechtszekerheid te creëren omtrent auteursrechtelijke claims of om de informatievrijheid te verbeteren, althans op het internationale niveau. Verdragsluitende staten zijn weliswaar vrij om binnenlandse werken aan nationale formaliteiten te onderwerpen, maar zelfs indien zij de bescherming afhankelijk maken van constitutieve formaliteiten, zouden de werken buiten het land van

oorsprong toch beschermd zijn zonder enige formaliteit. Het niet vervullen van nationale formaliteiten zou dus tot gevolg hebben dat werken alleen in het land van oorsprong in het publiek domein vallen, dus niet in de rest van de wereld. Omgekeerd worden buitenlandse werken niet geraakt door een puur binnenlandse regeling van auteursrechtformaliteiten, om de eenvoudige reden dat buitenlandse werken niet aan zulke formaliteiten mogen worden onderworpen.

Buiten het land van oorsprong kunnen nationale formaliteiten evenmin rechtszekerheid scheppen omtrent auteursrechtelijke claims. De bescherming van een werk wordt uitsluitend bepaald door de inhoudelijke criteria van bescherming (e.g., de originaliteitsstandaard) in het land waar de bescherming wordt ingeroepen. Buitenlands werk dient te worden beschermd ongeacht het al dan niet vervuld zijn van de formaliteiten in het land van oorsprong. Hooguit kunnen formaliteiten in het land van oorsprong helpen bij het berekenen van de beschermingstermijn van werken ten aanzien waarvan de formaliteiten zijn vervuld. Als de termijn wordt berekend op basis van het leven van de maker, zou met behulp van openbare registers bijvoorbeeld de identiteit van de maker kunnen worden bepaald indien hij of zij niet is aangeduid op het werk. Dit kan helpen bij het bepalen van de status van bescherming van deze werken, zelfs buiten het land van oorsprong.

Geconcludeerd kan worden dat landen die partij zijn bij de Berner Conventie, het TRIPS-Verdrag en de WCT op dit moment vrij zijn om auteursrechtformaliteiten te herintroduceren, zij het in beperkte vorm. Een aantal modellen maakt het mogelijk om het vragen en regelen van toestemming te vergemakkelijken. Dit varieert van de registratie van informatie over het beheer van rechten tot de registratie van gegevens omtrent de overdracht van rechten en het invoeren van formaliteiten met betrekking tot binnenlandse werken. Tenzij het doel is om slechts in het land van oorsprong de juridische gevolgen van auteursrechtformaliteiten te verbinden aan binnenlandse werken, zijn de bestaande mogelijkheden voor het herintroduceren van formaliteiten echter niet geschikt voor het op wereldwijde schaal aanpakken van de uitdagingen van het creëren van rechtszekerheid omtrent auteursrechtelijke claims enerzijds en het verbeteren van de informatievrijheid anderzijds.

#### *De herinvoering van formaliteiten vanuit juridisch-theoretisch perspectief*

De mogelijkheid om auteursrechtformaliteiten te herintroduceren is ook afhankelijk van de juridisch-theoretische aanvaardbaarheid van die formaliteiten. Een der hoofdargumenten tegen formaliteiten, dat zowel in historische als in hedendaagse context naar voren wordt gebracht, is dat het auteursrecht een natuurlijk eigendoms- of persoonlijkheidsrecht is dat automatisch zou moeten ontstaan bij de creatie van een werk en om die reden niet aan formaliteiten mag worden onderworpen. Zoals aangetoond in dit boek is dit argument gebaseerd op een onjuiste interpretatie van de leer van het natuurrecht (Hoofdstuk 6). Locke's arbeidstheorie van de eigendomsverwerving, die de basis legt voor het idee dat het auteursrecht een

‘natuurlijk eigendomsrecht’ van de auteur is, kan verklaren waarom het auteursrecht toekomt aan de auteur als de schepper van het werk. Deze theorie onderschrijft evenwel niet het idee dat het auteursrecht een absoluut en onvoorwaardelijk recht is. Als de theorie in de volledige context van Locke’s *Second Treatise* wordt gelezen, dan wordt duidelijk dat het idee dat eigendom door arbeid kan worden verworven op zichzelf nog geen reden is om het eigendomsrecht niet aan formaliteiten te kunnen onderwerpen. Zolang er maar een legitiem publiek belang is om dit te doen, kunnen natuurlijke eigendomsrechten altijd door de wet worden beperkt of afhankelijk worden gemaakt van formaliteiten.

De situatie is enigszins anders indien het auteursrecht wordt beschouwd als een persoonlijkheidsrecht. De persoonlijkheidstheorie van het auteursrecht, die afgeleid kan worden uit de geschriften van Kant, Fichte en Hegel, suggereert dat auteurs bescherming verdienen, niet omwille van de intellectuele arbeid die zij steken in het maken van hun creaties, maar om de in hun werken tot uitdrukking gebrachte persoonlijkheid te beschermen. Omdat deze theorie de rechtvaardiging van het auteursrecht vindt in het natuurlijke recht op zelfexpressie, een persoonlijke vrijheid die ieder mens geniet vanaf zijn geboorte, wordt het algemeen geaccepteerd dat het bestaan van dit recht niet kan worden onderworpen aan formaliteiten. Enkel in specifieke gevallen, zoals bij een conflict van rechten of bij een concurrerend belang, kan de uitoefening van een persoonlijkheidsgerelateerd recht door de wet worden beperkt of afhankelijk worden gemaakt van voorgeschreven formaliteiten.

Deze bevindingen toepassend op het huidige auteursrecht heeft dit onderzoek tot de conclusie geleid dat, vanuit een juridisch-theoretisch perspectief, een herinvoering van formaliteiten in het auteursrecht acceptabel is, mits een en ander beperkt blijft tot de economische rechten van de auteur. Omdat morele rechten tot doel hebben de waardigheid van auteurs te beschermen, zijn ze verwant aan persoonlijkheidsrechten en dienen ze om die reden beschermd te zijn zonder formaliteiten. De economische rechten van de auteur zijn daarentegen eigendomsgerelateerd. Dit impliceert dat er voldoende ruimte is om de bescherming van deze economische rechten wel aan formaliteiten te onderwerpen. Dit vindt steun in het juridische kader van de mensenrechten. Het fundamentele recht van eigendom maakt het mogelijk om eigendomsrechten te onderwerpen aan zowel constitutieve formaliteiten als aan formaliteiten die een beperking vormen op de uitoefening van het eigendomsrecht. Vanuit het oogpunt van de juridische theorie en rechtsfilosofie is het dus heel goed mogelijk om het genot of de uitoefening van de economische rechten van de auteur afhankelijk te maken van formaliteiten.

*De toekomst van formaliteiten: een herziening van het formaliteitenverbod?*

Zoals de voorgaande paragrafen aantonen, is een herintroductie van formaliteiten volstrekt haalbaar vanuit juridisch-theoretisch perspectief. Desondanks biedt het internationale auteursrecht op dit moment weinig speelruimte voor het invoeren van

formaliteiten met als doel de uitdagingen van het creëren van rechtszekerheid omtrent auteursrechtelijke claims en het verbeteren van de informatievrijheid aan te pakken. In het land van oorsprong mogen binnenlandse werken weliswaar worden onderworpen aan formaliteiten, maar de juridische gevolgen daarvan strekken zich niet verder uit dan tot binnenlandse werken in het land van oorsprong. Vanuit een internationaal perspectief zou een herintroductie van auteursrechtformaliteiten langs deze lijnen dus een vrij marginaal effect hebben.

De uitdagingen die door formaliteiten moeten worden aangepakt hebben evenwel belangrijke internationale dimensies en vereisen dus een internationale benadering. In de online omgeving, waar de distributie van content van nature een internationaal karakter heeft, kan een oplossing die beperkt is tot binnenlandse werken in het land van oorsprong niet echt doeltreffend zijn. De informatievrijheid wordt feitelijk niet veel groter als een werk slechts in het land van oorsprong in het publieke domein valt, maar niet in de rest van de wereld. Ook is het onmogelijk om rechtszekerheid te creëren omtrent auteursrechtelijke claims buiten het land van oorsprong. Aangezien het niet altijd helder is welk land als het land van oorsprong van het werk is te kwalificeren, kan ook in het land van oorsprong niet altijd worden afgegaan op binnenlandse formaliteiten aan de hand waarvan de geldigheid van auteursrechtelijke claims zou kunnen worden bepaald.

Hieruit volgt dat, als de doelstelling is het creëren van rechtszekerheid omtrent auteursrechtelijke claims of het verbeteren van de informatievrijheid, het verbod op formaliteiten in de Berner Conventie zou moeten worden gewijzigd of misschien zelfs helemaal worden afgeschaft. Dit is makkelijker gezegd dan gedaan, omdat een substantiële herziening van de Berner Conventie de unanieme steun vereist van alle verdragsluitende staten. Bovendien moet er in de context van het TRIPS-Verdrag en de WCT consensus worden bereikt over wijziging van het bestaande internationale juridische kader, omdat het formaliteitenverbod door verwijzingsbepalingen ook in deze twee verdragen is opgenomen. Het bereiken van die consensus kan wel eens behoorlijk lastig blijken te zijn.

Het idee om het formaliteitenverbod in de Berner Conventie te wijzigen of af te schaffen is echter niet alleen maar academisch en theoretisch. Met name omdat het hedendaagse auteursrecht in de online omgeving niet effectief te handhaven valt, zouden beleidsmakers zich vroeg of laat kunnen realiseren dat de uitdagingen in het huidige auteursrecht moeten worden aangepakt. In dat geval zou een introductie van auteursrechtformaliteiten tot een van de mogelijke modellen kunnen behoren. Zoals opgemerkt kunnen formaliteiten belangrijke functies vervullen, die helpen bij het aanpakken van de uitdagingen waarmee het auteursrecht thans geconfronteerd wordt. Mochten beleidsmakers deze uitdagingen willen aanpakken, dan is de optie om het formaliteitenverbod in de Berner Conventie te wijzigen of af te schaffen om verdragsluitende staten in staat te stellen auteursrechtformaliteiten op volle schaal te herintroduceren wellicht het overwegen waard.

Dit is met name het geval nu de historische beweegredenen achter de afschaffing van formaliteiten op het nationale en internationale niveau grotendeels lijken te zijn

verdwenen. Zoals reeds werd geconcludeerd, kan de claim dat het auteursrecht als ‘natuurrecht’ niet aan formaliteiten mag worden onderworpen gemakkelijk worden weerlegd. In het digitale tijdperk zijn ook de praktische overwegingen die ooit hebben bijgedragen aan het afschaffen van formaliteiten in het nationale en internationale auteursrecht niet meer geldig. Tegenwoordig kan registratie en depot efficiënter worden georganiseerd en op vrijwel elk soort werk van toepassing zijn. Dankzij moderne (digitale) opname- en reproductietechnologieën is het maken van exacte kopieën van auteursrechtelijk beschermde werken, waardoor ook de karakteristieke (i.e., subjectieve en originele) kenmerken van deze werken kunnen worden geregistreerd, erg eenvoudig en naar verhouding kosteneffectief.

In het digitale tijdperk lijkt het verbod op formaliteiten bovendien niet langer een *conditio sine qua non* te zijn om een efficiënte internationale auteursrechtelijke bescherming te (kunnen) garanderen. Het succes en de alomtegenwoordigheid van het wereldwijde web heeft het mogelijk gemaakt om online databanken te creëren, waarin iedereen met een computer en internettoegang op afstand zijn auteursrecht kan laten registreren of een werk digitaal kan deponeren. Er zou derhalve een internationaal registratiesysteem kunnen worden geïntroduceerd. Als alternatief zou de internationale bescherming afhankelijk kunnen worden gemaakt van een uniforme formaliteit, te vergelijken met de copyright notice onder de Universele Auteursrecht Conventie. Deze en andere juridische instrumenten om de naleving van auteursrechtformaliteiten in de internationale context te vergemakkelijken worden besproken in de volgende paragraaf, die alternatieve regels presenteert voor het formaliteitenverbod.

#### *Alternatieve regels voor de naleving van formaliteiten op internationaal niveau*

Mochten internationale beleidsmakers ooit besluiten om het formaliteitenverbod in de Berner Conventie te wijzigen of af te schaffen om de uitdagingen in het huidige auteursrecht tegemoet te treden, dan rest de vraag met wat voor regel dit verbod kan worden vervangen. Ter voorkoming van een teruggang naar de situatie zoals die was vóór de Berner Conventie, waarin auteurs in verschillende landen uiteenlopende en soms onverenigbare formaliteiten moesten vervullen om internationale bescherming te verzekeren, is een internationale regel onontbeerlijk. Er bestaan twee regels, die beide zijn beschreven – zij het in een andere context – in Hoofdstuk 4 van dit boek, die het formaliteitenverbod in principe zouden kunnen vervangen.

Een mogelijkheid zou zijn om terug te keren naar de land-van-oorsprong regel die tot 1908 was neergelegd in de Berner Conventie. Daarmee zou de bescherming van het internationale auteursrecht afhankelijk worden gemaakt van de naleving van binnenlandse formaliteiten in het land van oorsprong van het werk, i.e., het land van eerste publicatie van het werk of het land waarvan de auteur onderdaan is.

Materieel zou de land-van-oorsprong regel weinig verandering brengen in de manier waarop verdragsluitende staten in internationale situaties met formaliteiten kunnen en mogen omgaan. Net als onder het huidige formaliteitenverbod mogen buitenlandse werken niet aan formaliteiten worden onderworpen en wordt het overgelaten aan de discretie van verdragsluitende staten om de bescherming van binnenlandse werken te onderwerpen aan formaliteiten. Aan de andere kant zijn de juridische gevolgen van de land-van-oorsprong regel ingrijpender. Anders dan in de huidige situatie, waarin binnenlandse formaliteiten alleen rechtsgevolgen sorteren op het nationale niveau, zouden de juridische gevolgen van binnenlandse formaliteiten onder de land-van-oorsprong regel zich gaan uitstrekken tot het internationale niveau.

Een land-van-oorsprong regel zou dus doeltreffender zijn in de aanpak van de uitdagingen van het creëren van rechtszekerheid omtrent auteursrechtelijke claims en het verbeteren van de informatievrijheid. Uiteindelijk is het echter de bereidheid van verdragsluitende staten om althans nationale werken aan formaliteiten te gaan onderwerpen die de mate bepaalt waarin deze uitdagingen daadwerkelijk op wereldwijde schaal kunnen worden aangepakt. Dit kan wellicht worden beschouwd als een zwakte van het model. Indien er consensus kan worden bereikt over het veranderen van de Berner Conventie om een herinvoering van formaliteiten mogelijk te maken, dan lijkt het echter waarschijnlijk dat landen ook positiever zullen aankijken tegen het idee van een herinvoering van auteursrechtformaliteiten op nationaal niveau.

Een bekend nadeel van de land-van-oorsprong regel is echter dat het kennis van buitenlands recht vereist en, afhankelijk van het type formaliteit, noodzaakt tot het verkrijgen van toegang tot buitenlandse registers om te kunnen vaststellen of de auteursrechtformaliteiten in het land van oorsprong naar behoren zijn vervuld. Zoals opgemerkt in Hoofdstuk 4, was dit een van de belangrijkste redenen achter de vervanging in 1908 van de land-van-oorsprong regel door het verbod op auteursrechtformaliteiten.

Als gevolg van internationaal privaatrecht en contractuele rechtskeuzes wordt op dit moment nogal eens buitenlands recht toegepast op internationale gevallen. Het zou dus vreemd zijn om de vereiste kennis van buitenlands recht aan te dragen als argument tegen het opnemen van een land-van-oorsprong regel. Voor een succesvolle toepassing van de land-van-oorsprong regel moet echter wel door een ieder zijn na te gaan of de binnenlandse formaliteiten zijn vervuld. Om hieraan tegemoet te komen zou de toepassing van de regel kunnen worden beperkt tot online registers die openbaar toegankelijk zijn en tot formaliteiten waaraan geen registers te pas komen, zoals het aanbrenge van copyright notices. Ook zou het mogelijk zijn om een variant van de land-van-oorsprong regel te introduceren, op grond waarvan formaliteiten waaraan binnenlandse werken in het land van oorsprong kunnen worden onderworpen, een specifieke vorm dienen te hebben of aan een aantal voorgeschreven criteria moeten voldoen. Een dergelijke variant zou kunnen leiden tot standaardisering van nationale formaliteiten en zou aldus een

belangrijke harmoniserende werking hebben. Op deze wijze zouden de nadelige effecten, die een mengelmoes van nationale formaliteiten heeft op de bescherming van het internationale auteursrecht, kunnen worden vermeden.

Een ander alternatief zou zijn om een uniforme, universeel toepasbare formaliteit te introduceren. Dit betekent dat de bescherming van het internationale auteursrecht afhankelijk zou zijn van één op internationaal niveau vastgestelde formaliteit. Een voorbeeld van zo'n regeling is te vinden in de Universele Auteursrecht Conventie. Volgens die regeling (in art. III) worden buitenlandse werken die in aanmerking komen voor bescherming vrijgesteld van het vervullen van formaliteiten van een verdragsluitende staat, op voorwaarde dat alle exemplaren van het werk zijn gemarkeerd met een voorgeschreven copyright notice. In plaats dat het vervullen van zo'n universele formaliteit het effect heeft dat werken zijn vrijgesteld van het vervullen van formaliteiten buiten het eigen land van oorsprong, kan er ook voor gekozen worden om het internationale auteursrecht rechtstreeks aan één universele formaliteit te onderwerpen. Dat zou deze formaliteit een bredere en meer algemene toepassing geven op het internationale niveau.

Vergeleken met de land-van-oorsprong regel heeft een uniforme formaliteit het voordeel dat de introductie van formaliteiten niet is overgelaten aan de discretie van verdragsluitende staten, maar een kwestie is van internationale beleidsvorming. Dit maakt het wellicht niet eenvoudiger om formaliteiten te herintroduceren, aangezien elke verdragsluitende staat een stem heeft in de besluitvorming. Maar er kan zo wel een coherent internationaal beleid ten aanzien van auteursrechtformaliteiten worden ontwikkeld. Er moet onder meer beslist worden over het type formaliteit dat wordt ingevoerd en de juridische gevolgen die daaraan toegekend worden. Mogelijkheden zijn bijvoorbeeld het introduceren van een universele copyright notice, zoals geregeld in de Universele Auteursrecht Conventie, of het creëren van een centraal register op internationaal niveau. Daarnaast moet worden beslist of de uniforme formaliteit een constitutief of een declaratoire werking heeft. Hoewel constitutieve formaliteiten de uitdagingen die in dit onderzoek zijn besproken wellicht op een meer effectieve manier kunnen aanpakken, kan een adequaat systeem van declaratoire formaliteiten zeker ook verlichting geven (zie par. 2.3.1). Welke formaliteit het meest geschikt is hangt af van de doelstellingen die worden nagestreefd en uiteraard van de consensus die kan worden bereikt tussen de verschillende verdragsluitende staten.

#### *Afsluitende opmerkingen*

Het idee om auteursrechtformaliteiten te herintroduceren is van vrij recente datum. Hoewel het onderwerp nog niet hoog op de agenda van beleidsmakers staat, groeit de aandacht in (inter)nationale politieke en academische kringen. Sinds 2005 heeft WIPO twee onderzoeken uitgevoerd naar nationale wetgeving op het gebied van

(vrijwillige) registratie en depotvereisten in het auteursrecht.<sup>1649</sup> In 2009 heeft het *Intellectual Property Office* in het Verenigd Koninkrijk formaliteiten besproken in het rapport over een auteursrechtstrategie voor het digitale tijdperk<sup>1650</sup> en is tijdens het ALAI congres ‘From 1710 to Cyberspace’ in Londen een hele middagsessie gewijd aan formaliteiten.<sup>1651</sup> Tot slot heeft het Comité des Sages, een reflectiegroep inzake de digitalisering van het Europese culturele erfgoed, in 2011 aanbevolen een registratieplicht als voorwaarde voor een volledige uitoefening van auteursrechten in overweging te nemen, om in de toekomst de problematiek van verweesde werken te voorkomen. De groep riep de Europese Commissie daarom op een discussie te starten bij WIPO om de Berner Conventie op dit punt aan te passen en aldus klaar te maken voor het digitale tijdperk.<sup>1652</sup> Deze voorbeelden tonen aan dat de discussie langzaam maar zeker verschuift, zowel op nationaal als op internationaal niveau. Het besef is gegroeid dat formaliteiten een steeds belangrijker rol kunnen vervullen in het digitale tijdperk.

Dit boek wil bijdragen aan het huidige debat door de juridische haalbaarheid en juridisch-theoretische implicaties van invoering van auteursrechtformaliteiten te bestuderen. De complexiteit van een herinstructie van formaliteiten wordt echter niet alleen door juridische vragen gekenschetst. Alvorens een nieuwe regeling van auteursrechtformaliteiten te kunnen invoeren moeten de economische gevolgen ervan voor auteurs, gebruikers en de samenleving als geheel worden onderzocht. Ook zijn er praktische en organisatorische problemen die onderzoek vereisen. De praktische en economische haalbaarheid van een herinstructie van formaliteiten in het auteursrecht is echter niet in het algemeen te bepalen, maar is volledig afhankelijk van het type formaliteiten dat wordt ingevoerd en de juridische gevolgen die daaraan verbonden zullen zijn. Daarom rijzen deze vragen alleen in het stadium van implementatie, dat in dit onderzoek niet is behandeld, omdat de herinstructie van formaliteiten uiteindelijk afhangt van beleidsbeslissingen en te bereiken doelstellingen.

Een andere vraag die in dit onderzoek bewust onbeantwoord is gebleven is of het wenselijk of ‘billijk’ is om auteurs formaliteiten op te leggen, gezien de praktische problemen en kosten die daarmee gepaard gaan. Deze vraag vereist een kwalitatieve beoordeling van nationale of internationale beleidsmakers. Uiteindelijk zal de wenselijkheid van een regeling wederom afhangen van het type formaliteiten en

<sup>1649</sup> WIPO, ‘Survey of national legislation on voluntary registration systems for copyright and related rights’, WIPO document (SCCR/13/2), 9 November 2005. Het eindrapport van de ‘Second Survey on Voluntary Registration and Deposit Systems’ is nog niet gepubliceerd, maar de reacties op de questionnaire, alsmede de nodige achtergrondinformatie, is reeds beschikbaar via de volgende link: <[http://www.wipo.int/copyright/en/registration/registration\\_and\\_deposit\\_system\\_03\\_10.html](http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html)>.

<sup>1650</sup> Intellectual Property Office, ‘© the way ahead: A Copyright Strategy for the Digital Age’ (2009), <<http://www.ipo.gov.uk/c-strategy-digitalage.pdf>>, p. 41-42.

<sup>1651</sup> De op dit congres gepresenteerde papers zijn gepubliceerd in Bently et al. 2010, p. 367-477.

<sup>1652</sup> Report of the Comité des Sages, ‘The New Renaissance’, Brussels, 10 January 2011, <[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reflection\\_group/final-report-cdS3.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf)>, p. 5, 18-19 (para. 5.3.3 tot 5.3.5) en 20-21 (Key recommendation no. 2).

van de juridische gevolgen die daaraan gekoppeld worden. Om de negatieve effecten en het risico van per ongeluk gemaakte fouten bij de nakoming van formaliteiten te verminderen moeten de formaliteiten relatief eenvoudig te vervullen zijn. Dit kan een reden zijn om het Amerikaanse auteursrechtelijke systeem van vóór 1989 niet als voorbeeld te nemen, omdat dit systeem een groot aantal formaliteiten kende die in veel gevallen leidden tot een verlies van bescherming.<sup>1653</sup> Om te voorkomen dat een toekomstige regeling van auteursrechtformaliteiten de rechten en belangen van auteurs onnodig zal schaden, zou zij idealiter uit één enkele formaliteit moeten bestaan die universeel toepasbaar is en die eenvoudig en tegen lage kosten is te vervullen.

Ongeacht de uitkomst van een economische en praktische analyse kan vanuit een juridisch perspectief worden geconcludeerd dat formaliteiten een belangrijk aandeel kunnen hebben bij het aanpakken van de huidige problemen in het auteursrecht. Op voorwaarde dat zij duidelijk en eenvoudig te vervullen zijn, kunnen formaliteiten in belangrijke mate bijdragen aan het creëren van evenwicht tussen de bescherming van de rechten van auteurs en de bescherming van de belangen van gebruikers van beschermde werken. Dit is in het voordeel van de samenleving als geheel. Hoewel herinvoering van auteursrechtformaliteiten een ingrijpende verandering van aanpak meebrengt en zeker niet oncontroversieel is, is het de moeite waard het idee verder te verkennen. Nationale en internationale beleidsmakers dienen hiermee rekening te houden bij het uitwerken van plannen, bij de vaststelling van nieuw beleid of bij de uitvoering van maatregelen die erop zien het auteursrecht klaar te stomen voor het digitale tijdperk.

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<sup>1653</sup> Zie Ginsburg 2010a en Ginsburg 2010b, die in antwoord op de voorstellen voor een herinvoering van auteursrechtformaliteiten een 'realiteits-check' uitvoert, door een vergelijking te maken met het voormalige systeem van formaliteiten in het Amerikaanse auteursrecht.

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