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Formalities in copyright law: an analysis of their history, rationales and possible future

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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.²⁶³ 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.

²⁶³ 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),²⁶⁴ 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,²⁶⁵ 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).²⁶⁶ 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.²⁶⁷ The chapter concludes with a summary and discussion of the main findings of our examination (para. 3.4).

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

²⁶⁵ 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.

²⁶⁶ 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.

²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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.²⁷⁰ 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.²⁷¹ 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.²⁷² Later, the art of printing could be practised only by designated printers.²⁷³ This allowed the state to patronize the book trade and extend the control of the press.²⁷⁴ Systems of preventive censorship were also established. No book was allowed to be published, unless it was screened and approved by the censor.²⁷⁵ In addition, book privileges were issued to printers and booksellers loyal to the Crown.²⁷⁶ These privileges, which were promulgated in the exercise of a royal prerogative, provided them with a temporary exclusivity to print and publish a

²⁶⁸ See Eisenstein 1979, at 3-159 and Eisenstein 2005, at 3-120.

²⁶⁹ 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.

²⁷⁰ 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.

²⁷¹ 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.

²⁷² 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.

²⁷³ 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.

²⁷⁴ See Ransom 1956, at 25.

²⁷⁵ See para. 3.1.1.1 below.

²⁷⁶ 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,²⁷⁷ in the territory where the privilege was issued.²⁷⁸ 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.²⁷⁹ By granting protection against reprints, the sovereign tried to retain control of printers and book publishers and keep them satisfied.²⁸⁰ 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.²⁸¹ 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.²⁸² This right then belonged to the person who first published or first registered the book.²⁸³

The systems of book privileges and stationers' copyright were the first to confer exclusive rights on printed works.²⁸⁴ In this respect, they resemble modern systems of copyright.²⁸⁵ 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

²⁷⁷ 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.

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

²⁷⁹ See e.g. Baelde 1962, at 20 et seq.

²⁸⁰ 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.

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

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

²⁸³ See para. 3.1.2 below.

²⁸⁴ De Beaufort 1909, at 1.

²⁸⁵ See Kawohl 2008a, para. 9.

controlled the book trade.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ 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.²⁸⁹ Thus, the two systems did not protect works *qua abstractum*, but the printed matter as such.²⁹⁰ Lastly, in comparison with the duration of modern copyright, the term of protection of book privileges was fairly short.²⁹¹ Stationers' copyright, on the other hand, was deemed to grant protection in perpetuity.²⁹²

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 1469.²⁹³ Shortly afterwards, privilege systems were established in various European

²⁸⁶ 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.

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

²⁸⁸ De Beaufort 1909, at 7-8.

²⁸⁹ *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.

²⁹⁰ 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.

²⁹¹ 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.

²⁹² 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).

²⁹³ 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 1479,²⁹⁴ in France in 1498,²⁹⁵ in the Netherlands in 1516²⁹⁶ and in England in 1518.²⁹⁷ 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.²⁹⁸

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.²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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.³⁰² 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

²⁹⁴ 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.

²⁹⁵ 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.

²⁹⁶ 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*.

²⁹⁷ 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*.

²⁹⁸ 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.

²⁹⁹ See e.g. Ransom 1956, at 25 and Birn 1971, at 137.

³⁰⁰ 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.

³⁰¹ 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.

³⁰² 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.³⁰³ 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.³⁰⁴ These obligations were recurrently reinforced by the Parisian *Parlement*³⁰⁵ and repeated in subsequent royal edicts.³⁰⁶ 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.³⁰⁷

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.³⁰⁸ Accordingly, ‘the separate identity of the privilege ... was merged in that of a license to print.’³⁰⁹ This rule was reaffirmed by many subsequent edicts and ordinances.³¹⁰ 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.³¹¹

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

³⁰³ 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.

³⁰⁴ See Renouard 1838-1839, I, at 37 and Dock 1962, at 68.

³⁰⁵ 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.

³⁰⁶ 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.

³⁰⁷ Renouard 1838-1839, I, at 47.

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

³⁰⁹ Armstrong 1990, at 100.

³¹⁰ 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.

³¹¹ Armstrong 1990, at 100.

abroad.³¹² 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.³¹³ This marked the beginning of a system of strict censorship that was to last until 1695.³¹⁴ 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.³¹⁵ 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.³¹⁶ The latter Act was renewed a number of times, until it finally expired in May 1695.³¹⁷

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.³¹⁸ 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.³¹⁹ Anyone who disregarded these rules could await severe punishment.³²⁰ Since the local authorities that were held responsible for exercising censorship began to see the duty imposed

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

³¹³ Patterson 1968, at 87.

³¹⁴ *Ibid.*, at 23-24.

³¹⁵ 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).

³¹⁶ 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).

³¹⁷ 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).

³¹⁸ 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.

³¹⁹ 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).

³²⁰ 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,³²¹ many printers applied for a privilege on submitting the book to the censor.³²² Until the eighteenth century, the licence from the censor remained a condition for acquiring a privilege.³²³

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.’³²⁴ 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.³²⁵ 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.³²⁶ In addition, the Edict of 18 December 1544 imposed the death penalty.³²⁷

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.³²⁸ 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.³²⁹ As a rule, the authorities undertook no prior examination of the content of a manuscript before issuing a privilege.³³⁰ The only exception was the Bible, for which the motto remained ‘no book privilege without consent’.³³¹

³²¹ See Eisenhardt 1970, at 9.

³²² See Kohler 1907, at 58 and Esselborn 1907, at 1.

³²³ 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.

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

³²⁵ 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.

³²⁶ 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.

³²⁷ 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.

³²⁸ See, in general, ‘La Hollande et la liberté de penser et d’écrire aux 17^e et 18^e siècles’, [1884] *Bulletin de l’Association Littéraire et Artistique Internationale*, 1^e 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.

³²⁹ 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.

³³⁰ 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.³³² 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.³³³ 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.³³⁴

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.³³⁵ 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.³³⁶ Similar requirements appeared in the Ordinance of Moulins of 1566, the Declaration of 11 May 1612 and the Orders of 1618, 1649, 1686 and 1723.³³⁷ 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.³³⁸

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.

³³¹ 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.

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

³³³ Clegg 1997, at 10.

³³⁴ Eisenhardt 1970, at 29.

³³⁵ 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.

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

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

³³⁸ 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*’³³⁹ and to include a copy or abstract of the privilege and licence in the book.³⁴⁰ Pursuant to later statutes and decrees, including the 1637 Star Chamber Decree and the 1662 Press Licensing Act,³⁴¹ 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.³⁴² 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.³⁴³ Some decrees also required the text of a book privilege to be imprinted in the copies of the book.³⁴⁴ 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,³⁴⁵ and the Leipzig Books Commission, which controlled the book trade

³³⁹ 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.

³⁴⁰ 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).

³⁴¹ 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.

³⁴² 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.

³⁴³ 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).

³⁴⁴ 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.

³⁴⁵ 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,³⁴⁶ 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.³⁴⁷ Furthermore, the Frankfurt Books Commission also had the power to confiscate all books that were unjustly marked ‘*cum gratia et privilegio*’.³⁴⁸

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.³⁴⁹ 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.³⁵⁰ 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.³⁵¹ 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.³⁵²

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*.³⁵³ In Paris, the *Chambre Syndicalle* of the Guild of Booksellers

³⁴⁶ See Kawohl 2002, at 276, note 59 and Kretschmer & Kawohl 2004, at 24.

³⁴⁷ 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).

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

³⁴⁹ 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.

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

³⁵¹ See Kawohl 2008a, para. 6.

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

³⁵³ 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.³⁵⁴ 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.³⁵⁵ 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.³⁵⁶

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.³⁵⁷ 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.³⁵⁸ 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.³⁵⁹

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.³⁶⁰ 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.³⁶¹

³⁵⁴ 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.

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

³⁵⁶ 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).

³⁵⁷ Renouard 1838-1839, I, at 86.

³⁵⁸ 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).

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

³⁶⁰ 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).

³⁶¹ 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.³⁶² He required anyone who applied for a book privilege to deliver two copies of the book, at no cost, to the Royal Library.³⁶³ Until the copies were deposited, the privilege was invalid and the book could not be put on sale.³⁶⁴ Because, in practice, many books were not delivered,³⁶⁵ the Council of State ordered the revocation of all privileges for which the deposit had not been completed.³⁶⁶ Moreover, printers and booksellers that did not comply with the legal deposit requirement risked the confiscation of the entire edition of the book.³⁶⁷

The system imposed by the Edict of 1617 remained in force until the end of the *Ancien Régime*.³⁶⁸ 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.³⁶⁹ 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.³⁷⁰

³⁶² Lemaitre 1910, at x.

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

³⁶⁴ 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).

³⁶⁵ See Lemaitre 1910, at xv-xxiv and Estivals 1961, at 24-58.

³⁶⁶ 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).

³⁶⁷ 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).

³⁶⁸ Lemaitre 1910, at x-xi.

³⁶⁹ 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).

³⁷⁰ 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.³⁷¹ 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.³⁷² 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.³⁷³ The other two copies were to be deposited with the licensing authority, which used them to control the content of the book.³⁷⁴ 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.³⁷⁵

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.³⁷⁶ As for the licensing authority, the deposit of copies remained the same.³⁷⁷ The 1662 Act did not contain specific penalties for non-compliance with the deposit requirement.³⁷⁸ 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.³⁷⁹ In May

³⁷¹ 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.

³⁷² 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).

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

³⁷⁴ 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).

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

³⁷⁶ 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.

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

³⁷⁸ 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.

³⁷⁹ 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.³⁸⁰ 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.³⁸¹ Initially, the deposit obligation applied to privileged works only,³⁸² but, from 1608 onward, also to non-privileged works.³⁸³ 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.³⁸⁴ This practice was codified in the Imperial Edict of 1746.³⁸⁵ This Edict required the copies to be deposited eight days before the books were first put on sale.³⁸⁶ 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*.³⁸⁷ 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.³⁸⁸

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.³⁸⁹ The copies were to be delivered within six weeks after first publication. Since 1728, the deposit

³⁸⁰ See Barrington Partridge 1938, at 31.

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

³⁸² 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.

³⁸³ 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.

³⁸⁴ 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).

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

³⁸⁶ See Franke 1889, at 23 and Pfeiffer 1913, at 9.

³⁸⁷ Franke 1889, at 85 et seq.

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

³⁸⁹ 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.³⁹⁰ Similar deposit requirements existed in other provinces of the Dutch Republic.³⁹¹

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.³⁹² 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.³⁹³ 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.³⁹⁴ In addition, even though royal privileges granted better protection,³⁹⁵ little by little, the stationers' copyright started to prevail.³⁹⁶ In the period between 1666 and 1775, the courts had gradually delimited the King's prerogative of printing.³⁹⁷ Furthermore, as stationers' copyright was deemed to exist in perpetuity,³⁹⁸ 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.³⁹⁹

³⁹⁰ 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.

³⁹¹ 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.

³⁹² 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.

³⁹³ 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.

³⁹⁴ 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).

³⁹⁵ 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.

³⁹⁶ *Ibid.*, at 113.

³⁹⁷ *Ibid.*, at 87-90.

³⁹⁸ See e.g. Holdsworth 1920, at 844 and Rose 1993, at 12.

³⁹⁹ Patterson 1968, at 92.

In addition to supporting the printing monopoly of the Company of Stationers,⁴⁰⁰ 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'.⁴⁰¹ Accordingly, the system of stationers' copyright was yet another symptom of the 'marriage' between censorship and trade regulation in the early modern days.⁴⁰² Even so, it also provided the members of the Stationers' Company with adequate legal protection against rival printers and publishers.⁴⁰³

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.⁴⁰⁴ 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.⁴⁰⁵ 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.⁴⁰⁶

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.⁴⁰⁷ It appears that copies were entered in the register at the stationers' will and choice.⁴⁰⁸ Moreover, the earlier book entries resemble receipts for registration fees rather than signalling protection.⁴⁰⁹ 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.⁴¹⁰

Around the end of the sixteenth century, registration became a legal obligation.⁴¹¹ 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

⁴⁰⁰ 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.

⁴⁰¹ Patterson 1968, at 6. *Ibid.*, at 36.

⁴⁰² Rose 1993, at 13.

⁴⁰³ Patterson 1968, at 5 and 71.

⁴⁰⁴ *Ibid.*, at 52.

⁴⁰⁵ Clegg 1997, at 16.

⁴⁰⁶ 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.

⁴⁰⁷ Patterson 1968, at 56-58.

⁴⁰⁸ Sisson 1960, at 18.

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

⁴¹⁰ 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.

⁴¹¹ Patterson 1968, at 59-63.

imposed fines upon failure to do so.⁴¹² Later, registration was firmly established as a strict requirement, on pain of forfeiture of the stationers' copyright in case of failure to enter.⁴¹³ 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*'.⁴¹⁴ This remained so in subsequent statutes,⁴¹⁵ 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.⁴¹⁶ To add force to this agreement, a register was created in which the *kopijrecht* could be entered.⁴¹⁷ This seems to have inspired other local publishers' guilds to establish a similar regime of protection.⁴¹⁸

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.⁴¹⁹ 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'.⁴²⁰ 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.⁴²¹ This registration had the same force and effect and enjoyed the same sovereign protection as a book privilege.⁴²² The term of protection of registered books was ten years, but could be

⁴¹² 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).

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

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

⁴¹⁵ 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.

⁴¹⁶ Schriks 2004, at 93-98.

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

⁴¹⁸ See Schriks 2004, at 98.

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

⁴²⁰ 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.

⁴²¹ 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.

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

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

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.⁴²⁵ 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.⁴²⁶ 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,

⁴²³ *Ibid.*, art. IV of regulation A.

⁴²⁴ Gieseke 1995, at 152.

⁴²⁵ See e.g. Wünschmann 1938, at 7-8 and 18.

⁴²⁶ 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 1710,⁴²⁷ which was adopted following the lapse of the licensing system in 1695.⁴²⁸ 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.⁴²⁹ 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.⁴³⁰ Even though, in practice, stationers refused to publish books unless the copyright was assigned to them,⁴³¹ 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).⁴³² 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'.⁴³³ In pursuance of this constitutional power, Congress passed the first Federal Copyright Act in 1790.⁴³⁴ The federal law, which supplanted

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

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

⁴²⁹ 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>>.

⁴³⁰ Sec. I of the Statute of Anne (1710).

⁴³¹ 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.

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

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

⁴³⁴ Act of 31 May 1790, 1st Cong., 2nd 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.⁴³⁵

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.⁴³⁶ In addition, nine copies of new books and reprints with additions were to be deposited with the Stationers’ Company’s warehouse keeper.⁴³⁷ In 1801, the number of copies to be delivered was increased to eleven,⁴³⁸ but, in 1836, was lowered again to five.⁴³⁹

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.⁴⁴⁰ Equally, the Sculpture Copyright Acts of 1798 and 1814 required the name

⁴³⁵ 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.

⁴³⁶ Sec. II of the Statute of Anne (1710).

⁴³⁷ *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.

⁴³⁸ 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).

⁴³⁹ 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.

⁴⁴⁰ 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.⁴⁴¹

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.⁴⁴² The formality of legal deposit was also contained in early Dutch copyright law⁴⁴³ and in the copyright laws of several German states, such as those of Bavaria, Hamburg, Holstein and Lübeck.⁴⁴⁴

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.⁴⁴⁵ 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.⁴⁴⁶ A similar rule was provided for in the state copyright law of Saxe-Weimar-Eisenach.⁴⁴⁷

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.⁴⁴⁸ The Bavarian law also required all works to be marked with the author’s or publisher’s

⁴⁴¹ 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.

⁴⁴² 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.

⁴⁴³ 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.

⁴⁴⁴ 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.

⁴⁴⁵ 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).

⁴⁴⁶ 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.

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

⁴⁴⁸ 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.⁴⁴⁹ Additionally, some copyright laws laid down reservation requirements for retaining specific rights, such as the translation right for literary works.⁴⁵⁰

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.⁴⁵¹ Furthermore, some laws required the author's name or a notice of registration to be affixed to books and other literary works.⁴⁵²

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.⁴⁵³ 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.⁴⁵⁴ Copyright owners were obliged to advertise the registration and renewal in US newspapers.⁴⁵⁵ 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.⁴⁵⁶

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.⁴⁵⁷ The copies were preserved by the Department of State and, since 1831, combined with a

⁴⁴⁹ Art. II of the Bavarian Act of 15 April 1840.

⁴⁵⁰ 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.

⁴⁵¹ 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).

⁴⁵² 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.

⁴⁵³ 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, 21st Cong., 2nd Sess., c. 16 (in: Copyright Enactments 1963, at 27-31).

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

⁴⁵⁵ 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.

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

⁴⁵⁷ 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.⁴⁵⁸ These records could be used ‘at any future period, should the copyright be contested, or an unfounded claim of authorship asserted’.⁴⁵⁹

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’.⁴⁶⁰

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’.⁴⁶¹ 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’.⁴⁶² 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*,⁴⁶³ 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

⁴⁵⁸ Sec. 4 of the Copyright Act 1831.

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

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

⁴⁶¹ Sec. II of the Statute of Anne (1710).

⁴⁶² *Ibid.*, Sec. III.

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

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

By this ruling, the Court of King's Bench confirmed the principle that statutory copyright was secured by publication independently of registration.⁴⁶⁶ 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.⁴⁶⁷

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.⁴⁶⁸ Although, in 1775, the deposit became a condition for recovering statutory penalties akin to the registration requirement,⁴⁶⁹ the penalty previously laid down by the Statute of Anne was reinstated by the Copyright Act of 1814.⁴⁷⁰

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.⁴⁷¹ 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.⁴⁷² 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

⁴⁶⁴ 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).

⁴⁶⁵ 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).

⁴⁶⁶ 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).

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

⁴⁶⁸ Sec. V of the Statute of Anne (1710).

⁴⁶⁹ 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.

⁴⁷⁰ Sec. 2 of the Copyright Act (1814).

⁴⁷¹ *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.

⁴⁷² *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.⁴⁷³

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.⁴⁷⁴ 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.⁴⁷⁵ In other German states, the coming into being of literary and artistic property depended on registration or deposit.⁴⁷⁶

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.⁴⁷⁷ 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.⁴⁷⁸

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.⁴⁷⁹ However, from the outset, courts repeatedly held the deposit to be constitutive of the literary property.⁴⁸⁰ 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

⁴⁷³ 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.

⁴⁷⁴ 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.

⁴⁷⁵ Art. II of the Bavarian Act of 15 April 1840.

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

⁴⁷⁷ Art. V of the Bavarian Act of 15 April 1840.

⁴⁷⁸ 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.

⁴⁷⁹ Art. 6 of the French Decree of 19 July 1793.

⁴⁸⁰ 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.⁴⁸¹ 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.⁴⁸² 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.⁴⁸³

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.⁴⁸⁴ 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.⁴⁸⁵

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

⁴⁸¹ 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.

⁴⁸² 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, *Escrive v. Bouret, Rosa et autres*, *Dalloz* 1854, 2, 161.

⁴⁸³ 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.

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

⁴⁸⁵ 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).

⁴⁸⁶ See sec. 3 of the US Federal Copyright Act 1790.

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

⁴⁸⁸ 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.⁴⁸⁹ The courts basically assumed that copyright was ‘a government grant’ which authors received in return for completing the statutory prerequisites.⁴⁹⁰

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 1834.⁴⁹¹ 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.⁴⁹² 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.⁴⁹³ 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’.⁴⁹⁴ 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.⁴⁹⁵

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

⁴⁸⁹ 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).

⁴⁹⁰ See Patterson 1968, at 198 et seq.

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

⁴⁹² *Ibid.*, at 658.

⁴⁹³ *Ibid.*, at 660-661.

⁴⁹⁴ *Ibid.*, at 663-664.

⁴⁹⁵ *Ibid.*, at 664 et seq.

⁴⁹⁶ 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,⁴⁹⁷ 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.⁴⁹⁸

Admittedly, the early British copyright formalities were remnants left over from old times as well. However, privileges played no role in their conception.⁴⁹⁹ Instead, it was the stationers' copyright that provided the elements on which the British copyright system was built.⁵⁰⁰ 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.

⁴⁹⁷ 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.

⁴⁹⁸ 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*'.

⁴⁹⁹ 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.

⁵⁰⁰ 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,⁵⁰¹ 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.⁵⁰² 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.⁵⁰³

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.⁵⁰⁴ 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'.⁵⁰⁵ 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

⁵⁰¹ *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.

⁵⁰² 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.

⁵⁰³ 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'.

⁵⁰⁴ See Ginsburg 1994, at 157.

⁵⁰⁵ See Pfister 2005. See also para. 6.2.2.1 below.

a privilege granted by the legislator on behalf of the public.⁵⁰⁶ 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*’.⁵⁰⁷ 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.⁵⁰⁸ The preambles of several of these laws show instances of natural rights rhetoric and references to principles of natural equity and justice.⁵⁰⁹ 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.’⁵¹⁰

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

⁵⁰⁶ 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.

⁵⁰⁷ Romberg 1859, I, at 68.

⁵⁰⁸ See Patterson 1968, at 188.

⁵⁰⁹ 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’.

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

compose and write useful books'.⁵¹¹ Similarly, US federal copyright law was meant 'to promote the progress of science and the useful arts'.⁵¹² 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.⁵¹³

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.⁵¹⁴ 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.⁵¹⁵ 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.⁵¹⁶

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*'.⁵¹⁷ 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.⁵¹⁸ Accordingly, Renouard considered the deposit formality to be declarative rather than constitutive

⁵¹¹ See the preamble of the Statute of Anne (1710).

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

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

⁵¹⁴ Ginsburg 1994, at 143 et seq.

⁵¹⁵ 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.

⁵¹⁶ 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*'.

⁵¹⁷ 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.

⁵¹⁸ *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.⁵¹⁹ 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.⁵²⁰ 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

⁵¹⁹ 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).

⁵²⁰ 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’.⁵²¹ 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.⁵²² 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.⁵²³ 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’.⁵²⁴ 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.⁵²⁵

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.⁵²⁶ A copyright owner could not legally assert his public performance rights, if such notice was omitted from the copies.⁵²⁷

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

⁵²¹ *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).

⁵²² 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.

⁵²³ Sec. 11 of the Literary Copyright Act (1842).

⁵²⁴ 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.

⁵²⁵ *Tuck v. Priester*, 19 *Q.B.D.* 629 (Court of Appeal, 1887).

⁵²⁶ Sec. 1 of the British Copyright (Musical Compositions) Act (1882), 45 and 46 Vict., c. 40.

⁵²⁷ 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.⁵²⁸ 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.⁵²⁹ Today, the deposit requirement is laid down in the Legal Deposit Libraries Act of 2003.⁵³⁰

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.⁵³¹ 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.⁵³² 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.⁵³³ The courts regarded legal deposit as being merely declaratory of the copyright. This opinion also became prevalent in French legal doctrine.⁵³⁴

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 1876,⁵³⁵ which were adopted after the unification of Germany,⁵³⁶ were based on the

⁵²⁸ UK Copyright Act (1911), 1 and 2 Geo. V, c. 46.

⁵²⁹ *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.

⁵³⁰ Legal Deposit Libraries Act (2003), c. 28.

⁵³¹ See Pouillet 1908, at 473-474 (no. 433).

⁵³² Civil Tribunal of the Seine, 21 November 1866, *Franck, Pataille* 1866, 394.

⁵³³ 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.

⁵³⁴ See e.g. Delalande 1880, at 123, Garraud 1888-1894, V, at 554-555 (no. 530), Poinsard 1894, at 491, Huard 1903, I, at 94-95 and Pouillet 1908, at 471-473 (no. 432).

⁵³⁵ 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.⁵³⁷ 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.⁵³⁸ 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.⁵³⁹

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,⁵⁴⁰ 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,⁵⁴¹ failure to deposit within one month after publication would forfeit the right.⁵⁴² 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.⁵⁴³

Several continental European countries also introduced situation specific formalities. In order to retain a translation right in literary works,⁵⁴⁴ a public performance right in musical compositions or dramatic musical works⁵⁴⁵ or a

(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.

⁵³⁶ 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.

⁵³⁷ See Fischer 1870, at 33-34; Dambach 1871, at 205-207.

⁵³⁸ 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.

⁵³⁹ 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.

⁵⁴⁰ Art. 10 of the Dutch Copyright Act of 1881.

⁵⁴¹ See the Explanatory Memorandum and Memorandum in Reply, in *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 94 and 95-96.

⁵⁴² 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.

⁵⁴³ See Veegens 1895, at 119-120 and Van de Kastele 1885, at 160.

⁵⁴⁴ See art. 6(c) of the German Copyright Act of 1870 and art. 5(b) of the Dutch Copyright Act of 1881.

⁵⁴⁵ 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,⁵⁴⁶ 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.⁵⁴⁷ 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 1912.⁵⁴⁸ 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 1925.⁵⁴⁹

Since then, copyright in Europe has been protected without formalities. The only formalities that have been continued are certain situation specific formalities.⁵⁵⁰ Moreover, many countries maintain a legal deposit system outside the copyright framework.⁵⁵¹ 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.⁵⁵²

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.⁵⁵³ Failure to comply with these formalities would cast the work in the public domain.⁵⁵⁴ In addition, all copies

⁵⁴⁶ See art. 7(b) of the German Copyright Act of 1870 and art. 7 of the Dutch Copyright Act of 1881.

⁵⁴⁷ 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).

⁵⁴⁸ Dutch Copyright Act of 23 September 1912, *Stb.* 1912, 308.

⁵⁴⁹ French Act of 19 May 1925, in *Journal Officiel* of 27 May 1925. See Lepaulle 1927, at 210 et seq.

⁵⁵⁰ See para. 2.2.4 above.

⁵⁵¹ See e.g. Book I, Title III of the French Code of Heritage (*Code du Patrimoine*) which regulates legal deposit in France.

⁵⁵² 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.

⁵⁵³ See sec. 90 et seq. of the Copyright Act of 8 July 1870, 41st Cong., 2nd 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, 43rd Cong., 1st Sess. (in: Copyright Enactments 1963, at 43-47), as revised by sec. 3 of the Act of 3 March 1891, 51st Cong., 2nd Sess., c. 565 (in: Copyright Enactments 1963, at 49-54).

⁵⁵⁴ 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.⁵⁵⁵ 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,⁵⁵⁶ in practice, some courts held the notice to be a prerequisite for protection.⁵⁵⁷ Furthermore, the law continued the obligation that assignments of copyright had to be recorded to take legal effect against subsequent purchasers or mortgagees.⁵⁵⁸ 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.⁵⁵⁹

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 1870,⁵⁶⁰ 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 1897.⁵⁶¹

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.⁵⁶² 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.⁵⁶³ 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, 38th Cong., 2nd 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, 39th Cong., 2nd 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.

⁵⁵⁵ See sec. 97 of the Copyright Act 1870, sec. 4962 of the Revised Statutes 1873, sec. 1 of the Act of 18 June 1874, 43rd Cong., 1st Sess., c. 301 (in: Copyright Enactments 1963, at 47-48) and the Act of 1 August 1882, 47th Cong., 1st Sess., c. 366 (in: Copyright Enactments 1963, at 49).

⁵⁵⁶ *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.

⁵⁵⁷ 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.

⁵⁵⁸ Sec. 89 of the Copyright Act 1870 and sec. 4955 of the Revised Statutes 1873.

⁵⁵⁹ 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.

⁵⁶⁰ Secs 85, 109 and 110 of the Copyright Act 1870 and secs 4948 to 4951 of the Revised Statutes 1873.

⁵⁶¹ Act of 19 February 1897, 54th Cong., 2nd Sess., c. 265 (in: Copyright Enactments 1963, at 57-58).

⁵⁶² 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.

⁵⁶³ 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.⁵⁶⁴ Lastly, the 1909 US Copyright Act ordered that unrecorded assignments of copyright were void as against subsequent assignments that were recorded in good faith.⁵⁶⁵

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,⁵⁶⁶ it was not passed, because the idea of an ‘automatic’ copyright raised considerable opposition.⁵⁶⁷

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 created⁵⁶⁸ 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.⁵⁶⁹ Furthermore, while the law continued the formalities of deposit and registration, copyright did not depend on them.⁵⁷⁰ 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.⁵⁷¹ 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.⁵⁷²

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.⁵⁷³ 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.⁵⁷⁴ Moreover, it limited the requirement of registration as a prerequisite to infringement

⁵⁶⁴ Sec. 23 of the US Copyright Act 1909; 17 USC § 24 (1947).

⁵⁶⁵ Secs 44 and 45 of the US Copyright Act 1909; 17 USC §§ 30 and 31 (1947).

⁵⁶⁶ Perkins Bill, H.R. 11258, 68th Cong., 2nd 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.

⁵⁶⁷ See Ginsburg 2010a, at 332-333 and Ginsburg 2010b, at 447-448.

⁵⁶⁸ 17 USC § 302 (1976). See also para. 2.1.2 above.

⁵⁶⁹ 17 USC § 405(a)(2) (1976). See also para. 2.1.5 above.

⁵⁷⁰ 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.

⁵⁷¹ 17 USC §§ 411 and 412 (1976). See also para. 2.1.1 above.

⁵⁷² 17 USC § 205 (1976). See also para. 2.1.3 above.

⁵⁷³ See Rep. No. 609, 100th Cong., 2nd Sess. (1988), at 6.

⁵⁷⁴ Sec 7 of the Berne Convention Implementation Act 1988.

suits to works of US origin⁵⁷⁵ and eliminated the requirement to record assignments before instituting a copyright infringement action.⁵⁷⁶ The remainder of formalities, it left basically unaltered.⁵⁷⁷ 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.⁵⁷⁸

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.⁵⁷⁹ 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

⁵⁷⁵ Ibid., sec. 9.

⁵⁷⁶ Ibid., sec. 5.

⁵⁷⁷ 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.

⁵⁷⁸ 17 USC §§ 205 and 401 to 412. See para. 2.1 above.

⁵⁷⁹ 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,⁵⁸⁰ 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,⁵⁸¹ 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',⁵⁸² they believed that authors' rights emanate directly from the quality of the authors' own intellectual creations.⁵⁸³ The law was seen as merely recognizing the existence and regulating the exercise of authors' rights.⁵⁸⁴ This idea also became widespread among German intellectuals. As in France, copyright was progressively regarded as a right of intellectual property,⁵⁸⁵ the foundation of which was seen to reside in the very nature of things.⁵⁸⁶ Thus, it was not the laws that created authors' rights. These rights were believed to have always existed in the legal conscience of men.⁵⁸⁷

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.⁵⁸⁸ 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

⁵⁸⁰ 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.

⁵⁸¹ 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.

⁵⁸² 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.

⁵⁸³ See Blanc 1855, at 138: '*La propriété, c'est-à-dire la qualité d'auteur, ...*'.

⁵⁸⁴ See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc 1855, at 38-39.

⁵⁸⁵ 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.

⁵⁸⁶ *Ibid.*, at 125: '*Der Mensch hat ... ein aus seinem "Urrecht" entspringendes "ursprüngliche(s) Recht auf die Erzeugnisse seiner Geistes- und Körperkräfte"*'.

⁵⁸⁷ 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'.

⁵⁸⁸ Fichte 1793, at 447 et seq.

linked everything done to the work back to the personality of the author.⁵⁸⁹ 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 legitimization 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).⁵⁹⁰ 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.⁵⁹¹ 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.⁵⁹² 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.⁵⁹³ Thus, copyright was believed to appear directly, automatically and exclusively with the creation of a work.⁵⁹⁴ This also became the general opinion in Germany and other continental European states.⁵⁹⁵ 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

⁵⁸⁹ Kawohl & Kretschmer 2009, at 210-216.

⁵⁹⁰ See e.g. De Beaufort 1909, at 263.

⁵⁹¹ See Blanc 1855, at 137: '*Le dépôt ne constitue pas la propriété, et n'en est pas le point de départ*'.

⁵⁹² See e.g. Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger* in Blanc 1855, at 35-36.

⁵⁹³ See e.g. Court of Paris, 12 June 1863, *Mayer et Pierson, Pataille* 1863, 225.

⁵⁹⁴ See Blanc 1855, at 138-139. See also Nion 1846, at 129.

⁵⁹⁵ 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.⁵⁹⁶ This was equally the case for other property rights.⁵⁹⁷ 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.⁵⁹⁸ 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.⁵⁹⁹ 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.⁶⁰⁰

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.⁶⁰¹ 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.⁶⁰² In the UK and elsewhere, this prompted a great interest in registries, those for land, deeds and mortgages,⁶⁰³ and patents, designs and trademarks,⁶⁰⁴ probably being the most

⁵⁹⁶ 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*’.

⁵⁹⁷ 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 ...’.

⁵⁹⁸ See Pfister 2005, at 166-167 and 176-179.

⁵⁹⁹ 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.

⁶⁰⁰ Bluntschli 1853-1854, I (1853), at 193, Gierke 1895-1917, I (1895), at 755 and Klippel 1993, at 135.

⁶⁰¹ 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; ...’.

⁶⁰² See Bently 1997, at 35.

⁶⁰³ See Simpson 1986, at 280-283.

⁶⁰⁴ 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.⁶⁰⁵ 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.⁶⁰⁶ Although always subject to rebuttal by other evidence,⁶⁰⁷ legal deposit was an important means of proving the anteriority of authorship and the priority of a property claim.⁶⁰⁸ 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.⁶⁰⁹ Equally, in the UK, the facts stated in an entry of registration gave a legal presumption in favour of the registered person.⁶¹⁰ In general, the registers could serve as prima facie evidence of the ownership, assignment or licensing of the right.⁶¹¹ Therefore, formalities were capable of assisting in providing low-cost and quick resolution of disputes.⁶¹²

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.⁶¹³ This was intended to create legal certainty and facilitate the regular exercise of rights.⁶¹⁴ By enabling anyone to inspect the registers,⁶¹⁵ 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

⁶⁰⁵ See Bently 1997, at 34 and 35 (note 38).

⁶⁰⁶ See art. 9 of the French Ordinance of 24 October 1814.

⁶⁰⁷ 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.

⁶⁰⁸ See Blanc 1855, at 137-138, who speaks of a ‘presumption of paternity’ in favour of the depositor.

⁶⁰⁹ 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.

⁶¹⁰ See Sherman & Bently 1999, at 184.

⁶¹¹ 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).

⁶¹² 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.

⁶¹³ 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’.

⁶¹⁴ See Seville 1999, at 237, note 38.

⁶¹⁵ 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).⁶¹⁶ 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’.⁶¹⁷ 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.⁶¹⁸

Third, formalities were considered important instruments for establishing the duration of copyright in those cases where the law laid down a fixed term.⁶¹⁹ In the UK, fixed terms, to be calculated from the date of first publication, were prescribed in respect of literary and artistic works.⁶²⁰ 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.⁶²¹ 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.⁶²² In 1881, the Dutch legislator also established a relation between formalities and the duration of copyright when, instead of a term of

⁶¹⁶ 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.

⁶¹⁷ *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (at 760), 4 *Bing.* 234 (at 236-237).

⁶¹⁸ 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.

⁶¹⁹ See De Beaufort 1909, at 257-258 and Snijder van Wissenkerke 1913, at 59.

⁶²⁰ 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.

⁶²¹ *Report of the Royal Commission on Copyright* 1878, at xxiii (para. 134).

⁶²² 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.⁶²³

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.⁶²⁴ Because legal presumptions could achieve the same outcome, while being less onerous for authors, they started to prevail over formalities.⁶²⁵ This was clearly manifested in the Berne Convention, which contained presumptions of authorship from its early inception.⁶²⁶ Formalities also lost their significance for the calculation of copyright terms, which were increasingly linked to the author's lifespan.⁶²⁷ While in France, the term was measured from the author's death already since the decrees of 1791 and 1793,⁶²⁸ the German legislator adopted a *post mortem auctoris* term in 1870.⁶²⁹ In the early twentieth century, a 'life plus fifty years' term was introduced in the Berne Convention⁶³⁰ and, later, also in the UK and the Netherlands.⁶³¹

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.⁶³² 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'

⁶²³ 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.

⁶²⁴ See e.g. art. 28 of the German Copyright Act of 1870.

⁶²⁵ 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.

⁶²⁶ See art. 11 Berne Convention (1886). Nowadays, presumptions of authorship are contained in art. 15 Berne Convention (1971).

⁶²⁷ See the discussion in *Congrès International de la Propriété Artistique 1878*, at 52-53.

⁶²⁸ 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.

⁶²⁹ 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.

⁶³⁰ 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).

⁶³¹ See the UK Copyright Act (1911) and the Dutch Copyright Act of 1912.

⁶³² 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.⁶³³ 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.⁶³⁴ 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.⁶³⁵ 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.⁶³⁶ He demanded that every publisher deposit five copies of each printed work,⁶³⁷ one of which was meant for censorship control.⁶³⁸ This lasted until 1829, when Martignac, the French Minister of the Interior, abandoned the idea of deposit as a measure of administrative monitoring.⁶³⁹ 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

⁶³³ *Congrès International de la Propriété Artistique 1878*, at 53 et seq.

⁶³⁴ Lemaitre 1910, at xxxvii-xxxviii.

⁶³⁵ 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.

⁶³⁶ Art. 48 of the Imperial Decree of 5 February 1810 containing regulations for the printing and the book trade.

⁶³⁷ 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.

⁶³⁸ Art. 4 of the Ordinance of 24 October 1814. See Lemaitre 1910, at xxxvi-xxxvii.

⁶³⁹ Art. 1 of the Ordinance of 9 January 1828.

small fee.⁶⁴⁰ 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 1847.⁶⁴¹

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.⁶⁴² 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.⁶⁴³ 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.⁶⁴⁴ 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

⁶⁴⁰ 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.

⁶⁴¹ 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).

⁶⁴² 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.

⁶⁴³ 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*'.

⁶⁴⁴ An example is the 'Universal Bibliographic Repertory' set up in 1895. See para. 4.3.2 below.

or ideas.⁶⁴⁵ 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.⁶⁴⁶ 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,⁶⁴⁷ it had raised many concerns. Most prominently, it was believed to be difficult to manage and shape the limits of intangible property.⁶⁴⁸ 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’.⁶⁴⁹ 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.⁶⁵⁰

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’.⁶⁵¹ 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).⁶⁵² Hence, there was some tension between abstraction and existing formalities.

⁶⁴⁵ Kawohl & Kretschmer 2003, at 214 et seq.

⁶⁴⁶ 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).

⁶⁴⁷ 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’.

⁶⁴⁸ See Sherman & Bently 1999, at 19-42, for a comprehensive account of the various concerns raised.

⁶⁴⁹ Bently 1997, at 35-36. See also Sherman & Bently 1999, at 182-183.

⁶⁵⁰ 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’.

⁶⁵¹ Kawohl & Kretschmer 2003, at 221.

⁶⁵² 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’.⁶⁵³ 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.⁶⁵⁴

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,⁶⁵⁵ 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).⁶⁵⁶ Even so, also for these latter types of works, complaints were raised that the registration and accompanying deposit often appeared too costly and impracticable.⁶⁵⁷

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,⁶⁵⁸ 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*.⁶⁵⁹ 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.⁶⁶⁰

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.

⁶⁵³ Sherman & Bently 1999, at 183.

⁶⁵⁴ *Ibid.*, at 183-184.

⁶⁵⁵ 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).

⁶⁵⁶ 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).

⁶⁵⁷ 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).

⁶⁵⁸ Sherman & Bently 1999, at 191-193.

⁶⁵⁹ *Ibid.*, at 192.

⁶⁶⁰ 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’,⁶⁶¹ 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,⁶⁶² 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.⁶⁶³ 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.⁶⁶⁴

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.⁶⁶⁵ Copyright law was considered necessary for reasons of public interest: it should ensure that authors continued creating works.⁶⁶⁶ Dutch copyright law thus appears to be one of opportunity rather than of deliberate, principled choices.⁶⁶⁷ 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

⁶⁶¹ 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’.

⁶⁶² Kawohl & Kretschmer 2003, at 214 et seq.

⁶⁶³ 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’.

⁶⁶⁴ See para. 2.2.4 above.

⁶⁶⁵ See the preliminary report of Mr. J. Fresemann 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’.

⁶⁶⁶ *Handelingen NJV* 1877, II, 69-71, at 71. See also para. 6.2.2.2 below.

⁶⁶⁷ See Cohen Jehoram 1993.

free trade in inventions should prevail.⁶⁶⁸ This ‘patent controversy’ led to the abolition of the Dutch patent system for over forty years (1869-1910).⁶⁶⁹ This may explain why, in the Netherlands, the time was not yet ripe for a major liberal reform of the copyright system.⁶⁷⁰

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.⁶⁷¹ 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.⁶⁷² 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).⁶⁷³ While a number of recommendations found way into bills,⁶⁷⁴ these attempts to revise British copyright law proved unsuccessful.⁶⁷⁵

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.⁶⁷⁶ 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’.⁶⁷⁷ Also, it appears that formalities were poorly fulfilled. In the Netherlands, few books were actually deposited,⁶⁷⁸ and in the UK, entries were

⁶⁶⁸ Schiff 1971.

⁶⁶⁹ Machlup & Penrose 1950.

⁶⁷⁰ 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.

⁶⁷¹ Bently 1997, at 3.

⁶⁷² See Sherman & Bently 1999, at 136-137.

⁶⁷³ *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.

⁶⁷⁴ See Sherman & Bently 1999, at 136 (note 32).

⁶⁷⁵ See Kaplan 1958, at 333.

⁶⁷⁶ See para. 5.1.1 below, for some obvious reasons for why they decided to do so.

⁶⁷⁷ *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).

⁶⁷⁸ 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.⁶⁷⁹ This was not uncommon in the late nineteenth and early twentieth centuries, as other examples show.⁶⁸⁰ 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.⁶⁸¹

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.’⁶⁸²

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.⁶⁸³ While seeking to establish a balance between the interests of authors and those of the public,⁶⁸⁴ US copyright law

⁶⁷⁹ 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 ...’.

⁶⁸⁰ 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.

⁶⁸¹ 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.

⁶⁸² See H.R. Rep. No. 2222, S.Rep. 1108, 60th Cong., 2d Sess. (1909), at 7.

⁶⁸³ *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.’

⁶⁸⁴ 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’.⁶⁸⁵

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.⁶⁸⁶ These functions of copyright formalities were repeatedly articulated in both US case law and congressional reports during the nineteenth and twentieth centuries.⁶⁸⁷

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’.⁶⁸⁸ 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’.⁶⁸⁹ 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.⁶⁹⁰

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.⁶⁹¹ However, it never intended to do away with copyright formalities altogether. It simply deemed them of great value for the functioning of copyright.⁶⁹² 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.⁶⁹³

⁶⁸⁵ Report of the Register of Copyrights 1961, at 1206.

⁶⁸⁶ *Ibid.*, at 1262-1263, discussing the value of the copyright notice.

⁶⁸⁷ 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.

⁶⁸⁸ Katz 1953, at 87.

⁶⁸⁹ Solberg 1904, at 25.

⁶⁹⁰ See Report of the Register of Copyrights 1961, at 1263.

⁶⁹¹ 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.

⁶⁹² *Ibid.*, at 143. See also the overview of the functions of formalities in para. 2.3 above.

⁶⁹³ 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'.⁶⁹⁴ 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

⁶⁹⁴ 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.