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

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Chapter 4

The Prohibition on Formalities in International Copyright Law

The previous chapter has demonstrated that, in several countries, the attitude toward formalities changed around the turn from the nineteenth to the twentieth century. In this period, the idea emerged that the existence of copyright should not be subject to formalities. At the same time, formalities were not completely opposed. They were thought to fulfil important functions in relation to the exercise of copyright.

Despite the acknowledged functionality of copyright formalities, some countries eliminated them in the early twentieth century. The key cause was the introduction of the prohibition on formalities in the Berne Convention in 1908, which forbade contracting states from subjecting copyright in foreign works to formalities. This induced many states to also abolish formalities for all domestic works. The remark made on this point by the Gorell Committee in the UK in 1909 is illustrative:

‘The Committee fail to see what advantage to the public can be expected from systems of registration, which ... if abolished for [foreign authors] ... should equally be abolished for authors of our own country.’⁶⁹⁵

Hence, the abolition of formalities in national copyright law was also caused by the prohibition on formalities at the international level. To understand the reason for the absence of formalities in current copyright law, therefore, the rationales behind the prohibition on formalities in international copyright law must be unravelled.

For this purpose, this chapter examines the development of copyright formalities at the international level. First, it investigates the international situation prior to the adoption of the Berne Convention in 1886, by providing an overview of formalities in the pre-Berne bilateral agreements (para. 4.1) and exploring the discussions in the proceedings of the most important pre-Berne conferences on international copyright (para. 4.2). Subsequently, it studies the legislative history of the Berne Convention, as reflected in the early commentaries and the records of the diplomatic conferences adopting and revising the Berne Convention (para. 4.3). This chapter then looks at rules on formalities in other treaties, including the Universal Copyright Convention

⁶⁹⁵ *Report of the Committee on the Law of Copyright 1909*, at 12.

(para. 4.4), as well as the Film Register Treaty, the TRIPS Agreement and the WIPO Copyright Treaty (para. 4.5). In the conclusion of the chapter, the main reasons for the introduction of the prohibition on formalities in the framework of international copyright law are identified and discussed (para. 4.6).

4.1 International Copyright Prior to the Berne Convention

In the years preceding the adoption of the Berne Convention, international copyright was secured by a patchwork of bilateral agreements. To acquire copyright in foreign countries, these agreements often imposed on authors a variety of formalities. This section explains how countries began to recognize copyright in foreign works on the basis of reciprocity and compliance with formalities (para. 4.1.1). Moreover, it gives an overview of formalities in some of the pre-1886 bilateral copyright treaties (para. 4.1.2). It concludes with illustrating the resistance against the multitude of copyright formalities that must be fulfilled to secure international protection (para. 4.1.3).

4.1.1 THE RECOGNITION OF COPYRIGHT IN FOREIGN WORKS

At the international level, the unauthorized reproduction of works was rampant in the eighteenth and nineteenth centuries.⁶⁹⁶ An effective protection of foreign works did not yet exist. National copyright law was limited to works first published within the national territory or confined to the subjects of the protecting state.⁶⁹⁷ Moreover, some laws granted protection only to works printed by a domestic printer.⁶⁹⁸ Hence, without international agreements to that effect, the protection afforded by national copyright laws did not extend to foreign works.⁶⁹⁹ From a legal viewpoint, therefore, foreign works were '*publici iuris*'. They could be reprinted and turned to the profit of any person without the author's consent.⁷⁰⁰ This also encountered little resistance from an ethical viewpoint. The unauthorized reproduction of foreign works allowed domestic printers and publishers to procure these works at modest expense and, for

⁶⁹⁶ See Briggs 1906, at 44-56, with respect to English, French and German books.

⁶⁹⁷ See, in the US, secs 1 and 5 of the US Federal Copyright Act 1790, secs 1 and 8 of the Copyright Act 1831, sec. 86 of the Copyright Act 1870 and, in the UK, sec. 1 of the Literary Copyright Act (1842). Initially, it was uncertain whether foreign authors could secure British copyright by first publication in the UK. See Seville 2006, at 174 et seq. However, in *Routledge v. Low*, L.R. 3 H.L. 100 (House of Lords, 1868), it was held that foreigners who first published in the UK could obtain British copyright, provided that they temporarily resided in one of the British Dominions. Later, first publication in the UK became the sole condition for acquiring British copyright. See Dubin 1954, at 93-94.

⁶⁹⁸ See art. 6 of the Dutch Copyright Act of 1817, art. 27 of the Dutch Copyright Act of 1881, art. 61 of the German Copyright Act of 1870 and art. 20 of the German Copyright Act of 9 January 1876. US copyright law also knew a domestic manufacturing clause (sec. 3 of the Act of 3 March 1891).

⁶⁹⁹ See Kohler 1896, at 248 and Briggs 1906, at 34-35.

⁷⁰⁰ See Curtis 1847, at 21 et seq. and Burke 1852, at 58.

that reason, was considered to be a perfectly honourable business that contributed to the spread of knowledge and the enlightenment of the domestic population.⁷⁰¹

In the mid-nineteenth century, countries like France and the UK strongly called for international copyright protection. The main reason for this was the protection of the domestic book trade, which lost significant income as a result of the large-scale reprinting of French and English works in foreign countries.⁷⁰² To induce protection of French and English works abroad, these countries decided to grant protection to alien works in return for reciprocal protection of domestic literary and artistic output in foreign countries. In the UK, the International Copyright Act of 1844 empowered the Crown to extend British copyright on a reciprocal basis to works first published abroad.⁷⁰³ As absolute requisites for protection, alien works had to be registered and a copy of the work deposited at Stationers' Hall.⁷⁰⁴ Thus, the existence of copyright in foreign works was fully conditional on compliance with formalities.⁷⁰⁵

In France, the Civil Code contained a general rule granting to foreigners the same '*droits civils*' as granted to French citizens, subject to reciprocity.⁷⁰⁶ Although some commentators argued that '*droits civils*' encompassed all civil rights, thus requiring reciprocity in all cases where foreigners claimed protection in France,⁷⁰⁷ other legal commentators believed that foreigners should enjoy certain civil rights regardless of reciprocity. These were so-called '*droits des gens*', i.e., civil rights such as marriage and property, which originate from natural law and are recognized by the majority of countries.⁷⁰⁸ Copyright was thought to be such a '*droit des gens*'.⁷⁰⁹ This may explain the adoption of the 1852 French decree granting copyright to foreign works without reference to reciprocity. In accordance with the French decree of 1793, the

⁷⁰¹ See Ricketson 1987, at 18 and Ricketson & Ginsburg 2006, I, at 19. See also Darras 1887, at 214, Briggs 1906, at 36-38 and Ladas 1938, I, at 25.

⁷⁰² See Ricketson 1987, at 20-21 and Ricketson & Ginsburg 2006, I, at 22-23. There was an enormous foreign market for French and English literature, because many countries shared a common tongue and the French and English languages were immensely popular in those days.

⁷⁰³ International Copyright Act (1844), 7 & 8 Vict., c. 12, as amended by the International Copyright Act (1852), 15 & 16 Vict., c. 12, the Fine Arts Copyright Act (1862) and the International Copyright Act (1875), 38 & 39 Vict., c. 12. It remained in effect until the adoption of the International copyright Act (1886), 49 & 50 Vict., c. 33, which opened the way for the UK to join the Berne Convention.

⁷⁰⁴ Sec. 6 et seq. of the International Copyright Act (1844). See also sec. 8 of the International Copyright Act (1852) for specific formalities with respect to translations. See Burke 1852, at 62 and 68-70.

⁷⁰⁵ Accordingly, as compared with domestic works (see para. 3.3.1.1 above), copyright formalities in the UK had a more rigorous nature and more far-reaching consequences in relation to foreign works.

⁷⁰⁶ See art. 11 of the French Civil Code, introduced by Law No. 1803-03-08 adopted on 18 March 1803: '*L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra.*'

⁷⁰⁷ See Demolombe 1845-1879, I (1845), §§ 240-246bis, at 285-301.

⁷⁰⁸ See Aubry & Rau 1869-1883, I (1869), § 78, at 288 et seq. See also Demangeat 1844, § 56, at 248-260 and Valette 1859, at 16-18 and 407-416.

⁷⁰⁹ See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc 1855, at 38-39: '*Considérant que la création d'une œuvre littéraire ou artistique constitue au profit de son auteur une propriété dont le fondement se trouve dans le droit naturel et des gens ...*'. See also Blanc 1855, at 139 ('*la propriété littéraire était une création ... du droit naturel et des gens*') and Darras 1887, at 240.

deposit of two copies of the foreign work with the National Library in Paris as a condition to sue for copyright infringement was required.⁷¹⁰ Because, in practice, the 1852 decree was restrictively interpreted,⁷¹¹ the protection of foreign works in France continued relying on the conclusion of reciprocal agreements with foreign countries.

National regulations such as those adopted in the UK and France opened the way for states to secure international copyright protection by concluding bilateral treaties with other countries. From the mid-nineteenth century onward, various countries in Europe, including the UK, France, the Netherlands and some German states, entered into bilateral copyright agreements with each other and with other states in Europe, Latin America and Russia to secure reciprocal protection of their authors.⁷¹²

The US remained an important outsider in this trend. US federal copyright law recognized copyright in foreign works in 1891.⁷¹³ Only foreign citizens of countries that received presidential proclamation were eligible for protection in the US.⁷¹⁴ The protection of foreign works was conditional on compliance with the formalities laid down in US copyright law, including registration, deposit, notice and manufacturing in the US.⁷¹⁵ In 1905, however, an ‘ad interim’ copyright was introduced for books first published abroad. This was intended to facilitate compliance with US formalities,⁷¹⁶ thus alleviating the burden for foreign authors seeking protection in the US.⁷¹⁷ Except for presidential proclamations, the US joined two inter-American

⁷¹⁰ Art. 4 of the French decree of 28-30 March 1852.

⁷¹¹ The 1852 French decree was believed not to grant national treatment, but only to permit foreign right holders to enjoy, in the territory of France, the rights granted by his home country. See Darras 1887, at 221 et seq., Briggs 1906, at 135-136, *Recueil* 1904, at 262-263, Ladas 1938, I, at 27-29, Ricketson 1987, at 22 and Ricketson & Ginsburg 2006, I, at 23-24. See e.g. the decision of the French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado, Dalloz* 1858, I, 161, in which the Court refused to recognize a public performance right in foreign works (the operas of Verdi).

⁷¹² For an overview of the various bilateral agreements prior to the Berne Convention, see Ladas 1938, I, at 44 et seq., Ricketson 1987, at 25 et seq. and Ricketson & Ginsburg 2006, I, at 27 et seq.

⁷¹³ Sec. 13 of the Act of 3 March 1891. Note that unpublished works of foreign origin were sometimes protected at state common law. See Ginsburg 2006, at 667-668.

⁷¹⁴ A country could become a ‘proclaimed’ country, if it granted to US citizens the benefit of copyright on substantially the same basis as to its own citizens or if it adhered to an international agreement that provided for reciprocity in the granting of copyright and that was open for ratification by the US.

⁷¹⁵ Bogsch 1959, at 741. Domestic manufacturing was required by sec. 3 of the Act of 3 March 1891.

⁷¹⁶ Act of 3 March 1905, 58th Cong., 3rd Sess., c. 1432 (in: Copyright Enactments 1963, at 62-63). For books in foreign languages first published abroad, US copyright could be obtained if one copy was deposited with the Library of Congress within thirty days of first publication. This copy should carry a notice of reservation and the correct date of publication. Within one year after first publication, the book should be registered and two copies deposited to obtain protection for the full copyright term. In addition, the book should be manufactured in the US and carry a copyright notice. A similar rule reappeared in secs. 21 and 22 of the US Copyright Act 1909; 17 USC § 22 and 23 (1947). The ‘ad interim’ provisions were finally eliminated by the 1976 US Copyright Act.

⁷¹⁷ See McCannon 1963, at 1131.

multilateral treaties⁷¹⁸ and concluded a few bilateral agreements in the early twentieth century.⁷¹⁹

4.1.2 THE PLETHORA OF FORMALITIES IN EARLY BILATERAL AGREEMENTS

Although most bilateral agreements subjected the mutual protection of copyright to formalities, the requirements in the various conventions differed to a great extent.⁷²⁰ The treaty concluded in 1851 between the UK and France, for instance, stood out because of its many strict formalities.⁷²¹ Under the terms of this treaty, French works acquired British copyright only if they were registered at Stationers' Hall in London and one copy of the work was deposited with the British Museum. Vice versa, British works obtained copyright protection in France only if they were registered with the *Bureau de la Librairie* of the Ministry of the Interior in Paris and one copy of the work was deposited with the National Library. The formalities had to be fulfilled within three months after first publication in the other country.⁷²² The treaty also prescribed that the laws and regulations of the respective countries were to be duly obeyed.⁷²³ This implied, for example, that French books could be refused registration in the UK if the translation right had not been expressly reserved on the title page.⁷²⁴ The treaties that the UK afterwards concluded with Belgium, Spain and Sardinia were modeled after the Franco-British treaty and contained identical formalities.⁷²⁵

Registration and deposit formalities were also included in other bilateral treaties. The Franco-Spanish Convention of 1853 and the Franco-Belgian Conventions of 1852 and 1861 required both registration and deposit of copies of the work.⁷²⁶ On

⁷¹⁸ These are the Mexico City Convention of 1902 and the Buenos Aires Convention of 1910.

⁷¹⁹ See Bogsch 1959, at 741.

⁷²⁰ For a general overview of the formalities in bilateral copyright agreements prior to 1886, see Ladas 1938, I, at 55-57, Ricketson 1987, at 35 and Ricketson & Ginsburg 2006, I, at 37-38.

⁷²¹ See arts 8 and 9 of the Convention between the UK and France of 3 November 1851 (in: Burke 1852, at 82; Delalain 1866, at 27).

⁷²² Ibid. The modes of registration with respect to specific types of works, as prescribed by the copyright law of one of the countries (e.g. the registration requirements in the British Fine Arts Copyright Act (1862)), equally applied to the same types of works first published in the other country.

⁷²³ Ibid., art. 8.

⁷²⁴ As required by sec. 8 of the International Copyright Act (1852). See Darras 1887, at 651, note 2.

⁷²⁵ Arts 8 and 9 of the Convention between the UK and Belgium of 12 August 1854 (in: 44 British and foreign state papers 30); arts 8 and 9 of the Convention between the UK and Spain of 7 July 1857 (in: Levi 1858, at 181); arts 8 and 9 of the Convention between the UK and Sardinia (Italy) of 30 November 1860 (in: 54 British and foreign state papers 1025). See also the formalities in art. II of the earlier Convention between the UK and Prussia of 13 May 1846 (in: Volkmann 1877, no. X, at 64), to which several other German states later also acceded. See Ladas 1938, I, at 45.

⁷²⁶ Art. 2 of the Convention between France and Belgium of 22 August 1852, art. 7 of the Convention between France and Spain of 15 November 1853 and art. 3 of the Convention between France and Belgium of 1 May 1861 (in: Delalain 1866, at 42, 99 and 188).

the other hand, the treaties that France concluded with Prussia (1862), Switzerland (1864), Saxony (1865), Austria-Hungary (1866) and Portugal (1866), prescribed a registration of works, but no deposit of copies.⁷²⁷ As a rule, authors were compelled to complete the registration with the Ministry for the Interior or the local Embassy of the state where protection was sought.⁷²⁸ The convention concluded between the Netherlands and Spain in 1862 secured reciprocal copyright protection on condition that one copy of the foreign work was delivered to the National Library in Madrid or the Royal Library in The Hague within three months after first publication.⁷²⁹

Other treaties exempted authors from fulfilling the formalities in the foreign state where copyright was claimed. The conventions that the Netherlands concluded with France (1855) and Belgium (1858) secured reciprocal protection if the formalities in the home country had been fulfilled.⁷³⁰ Certificates issued in the country of origin constituted evidence that the formalities were duly completed.⁷³¹

Several bilateral treaties also included situation specific formalities. Treaties concluded by France and the UK often provided for a short-term (e.g., a five-year) translation right in foreign works, on condition that authors reserved the translation right by a notice in the beginning of the work and that an authorized translation was published, in part, within one year and, in its entirety, within three years. Additionally, both the original work and the translation had to be registered and deposited.⁷³² Other treaties required articles in newspapers or periodicals to be marked with an explicit notice of reservation in order to retain a reproduction right in these works.⁷³³

⁷²⁷ See art. 3 of the Convention between France and Prussia of 2 August 1862, art. 3 of the Convention between France and Switzerland of 30 June 1864 and art. 3 of the Convention between France and Saxony of 26 May 1865 (in: Delalain 1866, at 206, 215 and 301); art. 2 of the Convention between France and Austria-Hungary of 11 December 1866 and art. 2 of the Convention between France and Portugal of 11 July 1866 (in: *Recueil* 1904, at 90, 575, 301 and 790).

⁷²⁸ See Delalain 1866, at xxvii and Darras 1887, at 652.

⁷²⁹ Art. 5 of the Convention between the Netherlands and Spain of 31 December 1862 (Stb. 1863, 115). See Van de Kastele 1885, at 164 and De Vries 1990, at 110.

⁷³⁰ Art. 2 of the Convention between France and the Netherlands of 29 March 1855 (in: Delalain 1866, at 130 and 178; *Recueil* 1904, at 295 and 765) and art. 2 of the Convention between Belgium and the Netherlands of 30 August 1858 (in: *Recueil* 1904, at 125 and 759).

⁷³¹ See Van de Kastele 1885, at 163-164.

⁷³² Art. 3 of the Convention between the UK and France of 3 November 1851, art. 3 of the Convention between the UK and Belgium of 12 August 1854, art. 3 of the Convention between the UK and Spain of 7 July 1857, art. 3 of the Convention between the UK and Sardinia (Italy) of 30 November 1860 and art. 6 of the Convention between France and Prussia of 2 August 1862. See also Delalain 1866, at xxvii-xxviii, for similar formalities in the early bilateral copyright treaties concluded by France.

⁷³³ Art. 5 of the Convention between the UK and France of 3 November 1851, art. 4 of the Convention between France and the Netherlands of 29 March 1855, art. 4 of the Convention between Belgium and the Netherlands of 30 August 1858, art. 5 of the Convention between the UK and Belgium of 12 August 1854, art. 5 of the Convention between the UK and Spain of 7 July 1857 and art. 5 of the Convention between the UK and Sardinia (Italy) of 30 November 1860.

4.1.3 THE GROWING RESISTANCE AGAINST THE EXCESS OF FORMALITIES

The many formalities imposed on authors by the various bilateral copyright treaties constituted considerable obstacles for securing international copyright.⁷³⁴ To receive international copyright protection, authors were subject to a vast number of bilateral treaties, where these existed, and were accordingly required to fulfil their often burdensome and sometimes unreasonable formalities. This caused many disadvantages for authors.

The letter of concern addressed by French copyright experts to the organizing committee of the 1858 International Conference on Literary and Artistic Property in Brussels illustrative this well.⁷³⁵ This letter outlined many difficulties that formalities could create. To obtain international protection, authors usually relied on their publishers, who sometimes failed to fulfil a formality within a given timeframe. In addition, not all publishers had foreign agents or other contacts and sent items could accidentally get lost in international transport or postal services. Also, it sometimes occurred that authorities where the formality had to be fulfilled handled foreign applications carelessly or even refused them arbitrarily. Lastly, the simplest procedural error or omission could be a reason for registering or depositing authorities to disregard an application.

Hence, there were numerous occasions that could lead to a defeat of international copyright. While international copyright protection was enforced by the adoption of bilateral treaties, at the same time the various formalities contained in these treaties multiplied the chances of losing copyright. In every country where protection was sought, the relevant formalities had to be completed. This raised questions about the necessity of imposing formalities in general and about the need to subject copyright to formalities in countries other than the home country of the work. These questions were discussed at the various pre-1886 conferences on international copyright.

4.2 The Pre-Berne Debates on International Copyright

In the second half of the nineteenth century, the question of international copyright was extensively debated. The main discussions before the diplomatic conferences in Berne took place at the International Conference on Literary and Artistic Property in Brussels (1858), the International Conference on Artistic Property in Paris (1878)

⁷³⁴ See e.g. Ladas 1938, I, at 55.

⁷³⁵ See *Rapport fait en France au nom de la Commission Mixte chargée d'examiner le programme des questions qui seront soumises à Bruxelles, le 27 septembre 1858, au Congrès de la Propriété Littéraire et Artistique, et présenté au Conseil d'Administration du Cercle de la Librairie, de l'Imprimerie et de la Papeterie, et au Comité de la Commission des Auteurs et Compositeurs Dramatiques, les 14 mai et 1^{er} juin 1858*, in: Romberg 1859, I, 217-238, at 221-223.

and the International Conference on Literary Property in Paris (1878).⁷³⁶ These three conferences addressed questions concerning copyright, in general, and international copyright, in particular. These include the two questions, identified above, about the necessity of imposing copyright formalities (para. 4.2.1) and of subjecting copyright to formalities in countries other than the country of origin (para. 4.2.2). This section summarizes the discussion as recorded in the minutes of the three conferences. This may cast light on how copyright formalities were perceived at the international level in the second half of the nineteenth century and provide a first indication of why the prohibition on formalities was eventually introduced in the Berne Convention.

4.2.1 THE NECESSITY OF FORMALITIES FOR COPYRIGHT PROTECTION

The first question addressed in relation to formalities was the question regarding the necessity of formalities for the protection of literary and artistic property, which was on the agenda of the 1858 Brussels conference (para. 4.2.1.1) and the 1878 artistic conference in Paris (para. 4.2.1.2). By assessing the significance of formalities for the protection of copyright, these conferences reflected much of the discussions that took place at the national level in Europe around the same time.⁷³⁷

As we shall see, the conferences confirm that there was broad consensus that the existence of copyright should not be subject to formalities and that non-compliance with formalities should never be the occasion of a loss of copyright. However, at both conferences, people stressed the utility of formalities with regard to facilitating the exercise of copyright. This corresponds with our findings in Chapter 3.

It should be noted that, while the belief that copyright should exist independent of formalities had a great impact on the elimination of formalities at the national level, it was not the cause for the introduction of the prohibition on formalities at the international level. As will be explained below, this prohibition was mostly inspired by pragmatic reasons. Nonetheless, the discussion that follows is important, because the growing belief that authors should not be subject to any formality to secure their rights added to the idea that formalities were not an essential feature of copyright. As a result, when it came to international copyright protection, the decision to free authors from completing formalities outside their home country was easily reached.

4.2.1.1 *THE 1858 CONFERENCE ON LITERARY AND ARTISTIC PROPERTY*

The 1858 Brussels conference addressed the questions of whether it was necessary, for the good functioning of the law, to make the existence of copyright conditional on formalities, whether failure to comply with formalities should necessarily entail

⁷³⁶ The 1861 Artistic Conference in Antwerp is not discussed here because it did not address the issue of copyright formalities. See the programme of this conference in Gressin Dumoulin 1862, at 5-6.

⁷³⁷ See para. 3.3.2 above.

the loss of protection⁷³⁸ and whether formalities were needed for protecting the property of artistic works that were not produced by print or other mechanical means.⁷³⁹

Remarkably, neither in the conference report nor during the plenary debates were these questions discussed thoroughly.⁷⁴⁰ The only person who openly questioned the necessity of copyright formalities was Mr Houtekiet, a lawyer in Brussels, who encouraged the abolition of formalities as conditions for the coming into being or the enforcement of copyright.⁷⁴¹ This was immediately contested by Mr Blanc, *avocat* at the Imperial Court in Paris,⁷⁴² who emphasized the importance of formalities for the exercise of rights. While asserting that copyright ought to exist independently from formalities, he argued that formalities were important for guaranteeing the anteriority of works and the authenticity of authorship and for informing the public about the date of first publication and the reservation of the exclusive property by the author.⁷⁴³

Without further elaboration, the assembly accepted this latter view. It agreed that the existence of copyright should not depend on formalities and that failure to fulfil formalities should not result in a loss of protection. However, the assembly did not condemn copyright formalities altogether. There was common agreement that they could be important for facilitating the exercise of rights. This was expressed in two resolutions, which were unanimously adopted at the end of the conference:

‘It is not necessary for the existence of their right to subject authors of literary and artistic works to formalities. Although particular formalities can be useful as administrative or order measures or as means for signalling and proving the property, it should be assured that non-compliance with formalities cannot and will never lead to the loss of rights. It is important that formalities be as simple as possible; registration and deposit of one or more copies of a work with a public authority created for that purpose appears to be most advantageous.’⁷⁴⁴

⁷³⁸ Romberg 1859, I, at 4-6, question no. 14.

⁷³⁹ *Ibid.*, I, at 4-6, question no. 23.

⁷⁴⁰ *Ibid.*, I, at 141, 170 and 205 (question no. 14), and 70, 172 and 210 (question no. 23).

⁷⁴¹ Houtekiet in Romberg 1859, I, at 210.

⁷⁴² Blanc was the delegate of the *Association des artistes peintres, sculpteurs, architectes, graveurs et destinateurs* of Paris and the *Association des inventeurs et artistes industriels* of Paris.

⁷⁴³ Blanc in Romberg 1859, I, at 210. Blanc illustrated this by recalling that deposit performed important functions, not for the vesting of the copyright, but as a condition for instituting legal action and for preserving the collections of libraries and museums. See also the treatise of Mr Warnkönig, Professor at the University of Heidelberg, and Dr O. Wächter, from Stuttgart, in reply to the questions proposed by the organizing committee of the 1858 conference, in: Romberg 1859, I, at 268-274, at 269.

⁷⁴⁴ Resolution 7 of part II, in Romberg 1859, I, at 175-178: ‘*Il n’y a pas lieu d’astreindre les auteurs d’ouvrages de littérature ou d’art à certaines formalités, à raison de leur droit. Si des formalités particulières peuvent être utiles, soit comme mesure d’administration et d’ordre, soit comme moyen de constater et de prouver le droit de propriété; s’il convient d’assurer l’accomplissement de ces formalités par une sanction quelconque, leur inobservation ne peut et ne doit jamais entraîner la déchéance du droit. Il importe de rendre ces formalités aussi simples que possible; l’enregistrement*

‘Special formalities as absolute conditions for the acquisition and maintenance of property are no more required for artistic works than they are for literary productions. However, in one case or the other, formalities can be desirable as order measures and for facilitating the regular exercise of the right. The works could be registered and the certificate of registration issued to the artist would allow him to make the authenticity of the work and, where appropriate, that of the copies recognizable as belonging to him or his assignees.’⁷⁴⁵

Before these resolutions were adopted, Mr Blanc stressed that their contents were ‘of course, without prejudice to the rights and interests of authors as established in accordance with those of the public domain’.⁷⁴⁶ By so stating, he seemingly referred back to earlier debates at the conference, in which a clear appraisal was made of the interests of authors and the public domain.⁷⁴⁷ During the conference, there was quite some agreement that intellectual property rights could not be unconditional. Owners of other property rights, such as landed property, were also obliged to sacrifice their rights if the public interest so required, e.g., for exploitation of (mineral) resources or (rail)road construction.⁷⁴⁸ Consequently, while copyright was believed to emanate from the quality of the author and to exist independently of formalities,⁷⁴⁹ there was a common understanding that, because of its social importance and public utility, the exercise of copyright could always be restricted in the public interest.

4.2.1.2 THE 1878 INTERNATIONAL CONFERENCE ON ARTISTIC PROPERTY

The question of whether authors of artistic works should be subject to formalities to secure copyright protection was also raised at the 1878 International Conference on Artistic Property.⁷⁵⁰ In its preliminary report, the organizing committee proposed the abolition of formalities that were useless, the simplification of formalities that

et le dépôt d'un ou plusieurs exemplaires de l'ouvrage, entre les mains d'une autorité publique constituée à cet effet, paraissent le mode le plus avantageux.’

⁷⁴⁵ Resolution 4 of part IV, in Romberg 1859, I, at 175-178: ‘*Des formalités particulières ne doivent pas être exigées pour les œuvres d'art, pas plus que pour les productions littéraires, comme condition absolue de l'acquisition et de la conservation de la propriété. Cependant, dans un cas comme dans l'autre, des formalités peuvent être désirables comme mesure d'ordre et pour faciliter l'exercice régulier du droit. Les ouvrages pourraient être enregistrés, et le certificat d'enregistrement qui serait délivré à l'artiste permettrait à celui-ci de faire reconnaître, entre ses mains et entre celles de ses cessionnaires, l'authenticité de l'œuvre, et, le cas échéant, celle des copies.*’

⁷⁴⁶ See Blanc in Romberg 1859, I, at 172: ‘*Il est bien entendu que c'est sans préjudice des droits et des intérêts des auteurs tels qu'ils ont été établis conformément avec ceux du domaine public.*’ In the person of the president, the assembly consented with this view. *Ibid.*, I, at 172.

⁷⁴⁷ See, in particular, the debate on copyright duration in Romberg 1859, I, at 69 and 95 et seq.

⁷⁴⁸ *Ibid.*, I, at 69.

⁷⁴⁹ *Ibid.*, I, at 70.

⁷⁵⁰ *Congrès International de la Propriété Artistique 1878*, at 4-5; question no. 3.

appeared essential and the extension of the terms within which formalities should be completed.⁷⁵¹

At the conference, the question of formalities was lively debated. Some participants in the discussion strongly advocated a formality-free copyright regime, while others expressed their support of continuing formalities, arguing that they performed a few important functions for the exercise of (literary and) artistic property rights.

A strong defender of the total abolition of formalities was Mr Dognée, president of the *Institut des Artistes Liègeois* in Belgium. He argued that the existence of artistic property, which he called a 'sacred' right, should not depend on formalities. All artists, even the humblest ones, should be able to reap the fruits of their creative labour without being required to fulfil formalities so as to establish artistic property. He believed that no artist should be denied the advantages to which he is legitimately entitled. If the artist does not want to make use of his rights, so he argued, the rights could simply be renounced.⁷⁵² Dognée asserted that formalities run counter to the very interests that they try to defend. He questioned: if formalities aim to protect the artist's interest by establishing proof of the creation of his work, why should this result in the loss of copyright in case of failure to complete those formalities? He maintained that there were other, equally effective but more equitable means to prove artistic property. Artists should be free to establish the paternity of works by any legal evidence.⁷⁵³

A counterargument was voiced by Mr Pataille, *avocat* at the Court of Appeals in Paris. He acknowledged that copyright should exist independent of formalities, but he nevertheless believed that there were good reasons to subject the exercise of copyright to a particular formality.⁷⁵⁴ In infringement suits he had experienced many difficulties in proving anteriority, especially in relation to works of smaller authors.⁷⁵⁵ He found that it was in the artist's own interest to fulfil some kind of formality so as to be able to provide evidence of his property in court.⁷⁵⁶ Because of practical utility, he believed that legislators should be free to impose formalities as prerequisites to sue. Even so, when proposing a resolution, he advised against subjecting the enforcement of copyright to formalities, but for the establishment of a

⁷⁵¹ See the report of the Committee of Organization, presented by Mr A. Huard, *avocat* at the Court of Appeals in Paris, in: *Congrès International de la Propriété Artistique 1878*, 21-26, at 24.

⁷⁵² Dognée in *Congrès International de la Propriété Artistique 1878*, at 54. Although Dognée did not explain how artists could give up their copyright, it seems evident that it required affirmative steps.

⁷⁵³ *Ibid.*, at 54-55.

⁷⁵⁴ Pataille drew a general comparison with the registers of births, marriages and deaths. He questioned: why should artists not register the birth of their works 'comme un père va déclarer son enfant et le faire inscrire sur le registre des naissances' ('like a father will declare his child and have it registered on the register of births')? See *Congrès International de la Propriété Artistique 1878*, at 54.

⁷⁵⁵ *Ibid.*, at 53: 'Dans les quatre cinquièmes des procès que j'ai eu à plaider, j'ai eu de grandes difficultés à prouver l'antériorité.'

⁷⁵⁶ *Ibid.*, at 53.

purely voluntary registration system. The proposal that Pataille put forward read as follows:

‘The artist’s property right exists independently from deposit. Nevertheless, it would be useful to establish in each country registers in which authors or their successors in title can record their works together with the names of publishers and assignees, if there are any.’⁷⁵⁷

This proposal gained approval from different sides. Mr Laroze, a Parisian lawyer, welcomed Pataille’s distinction between the existence and the exercise of rights. He argued that, while artistic property was ‘sacred’ and inviolable, the great evidentiary benefits for artists would warrant that the exercise of this right be subject to a voluntary registration of some kind. This would provide for many advantages without harming anyone.⁷⁵⁸ For the same reason, Mr Pouillet, *avocat* at the Court of Appeals in Paris, also argued in favour of an optional formality. However, to emphasize the voluntary nature of the proposal and to make it more acceptable to everyone, he suggested including the sentence: ‘In all cases, this registration is optional’.⁷⁵⁹ Also, the idea of requiring a recordation of assignments of copyright received broad support.⁷⁶⁰

Nonetheless, in the end, the assembly voted against Pataille’s proposal. Only the first part of the draft, regarding the absence of formalities in relation to the existence of copyright, received enough support. Thus the following resolution was adopted:

‘The author of an artistic work should not be subject to any formality to secure his right.’⁷⁶¹

The reason why the assembly did not adopt the second part of Pataille’s proposal is unknown. Different circumstances may have contributed to this. First, it is likely that not everyone was certain of the facultative nature of the proposal. Some people seem to have been concerned that accepting voluntary registration would provide an

⁷⁵⁷ Ibid., at 53: ‘*Le droit de propriété de l’artiste existe indépendamment de tout dépôt. Néanmoins, il serait utile d’établir dans chaque pays des registres sur lesquels les auteurs ou leurs ayants cause seraient admis à faire enregistrer leurs œuvres avec les noms des éditeurs et acquéreurs, s’il y en a.*’

⁷⁵⁸ Laroze in *Congrès International de la Propriété Artistique 1878*, at 55-56, stressing that a certificate of deposit or registration would not only provide evidentiary benefits for artists claiming protection in their own country, but definitely also for those claiming international protection of their artistic property.

⁷⁵⁹ Pouillet in *Congrès International de la Propriété Artistique 1878*, at 56-57: ‘*La déclaration, dans tous les cas, n’est que facultative.*’

⁷⁶⁰ See Meissonier, president of the conference, in *Congrès International de la Propriété Artistique 1878*, at 57: ‘*Je crois que ce qui pourrait être utile ce serait un enregistrement, non pas au moment où l’œuvre vient d’être faite, mais au moment où l’auteur a cédé son droit. L’acquéreur pourrait être tenu de faire enregistrer cette cession.*’

⁷⁶¹ Resolution 7 in *Congrès International de la Propriété Artistique 1878*, at 115-117: ‘*L’auteur d’une œuvre d’art ne doit être astreint à aucune formalité pour assurer son droit.*’

opportunity for countries to continue imposing compulsory formalities.⁷⁶² Second, a few people referred to the impracticality of registering paintings and other works of art that are not reproducible *ad infinitum*.⁷⁶³ Other people relativized this concern.⁷⁶⁴ Third, the argument that artists could prove their rights by other legal means might have convinced participants of the redundancy of formalities as concerns the good functioning of copyright law.⁷⁶⁵ Fourth, it was questioned whether the registration of a title or a description of artistic works could sufficiently identify artistic property. If no copy, photograph or sketch was deposited, evidentiary difficulties could arise if a similar title or description were registered by a third person.⁷⁶⁶ Finally, Pataille's proposal might have been too specific for adoption at this conference. There appears to have been a broad understanding that the conference should not adopt concrete provisions, but create common principles for a future (international) copyright law.⁷⁶⁷

4.2.2 THE NECESSITY OF SUBJECTING FOREIGN AUTHORS TO FORMALITIES

A second question on the agenda of the various pre-Berne international conferences on literary and artistic property was the question of whether international copyright should necessarily entail compliance with formalities in every state where authors seek protection. At the 1858 Brussels conference, this issue still appeared somewhat controversial. Nevertheless, a resolution was adopted to the effect that international copyright should be secured upon compliance with formalities in the home country (para. 4.2.2.1). At the 1878 conferences on literary and artistic property in Paris, the idea that international copyright should attach upon compliance with formalities in the country of origin seems to have been fully accepted (para. 4.2.2.2).

4.2.2.1 THE 1858 CONFERENCE ON LITERARY AND ARTISTIC PROPERTY

At the 1858 Brussels conference the question was raised whether, for the purpose of securing international copyright, foreign authors should be subject to formalities in all countries where they claim protection or whether completing formalities in their

⁷⁶² See Leighton in *Congrès International de la Propriété Artistique 1878*, at 57: 'Je suis complètement contre l'enregistrement, parce que ceux qui négligent de se faire inscrire perdent leur droit ...'.

⁷⁶³ See Meissonier, president of the conference, in *Congrès International de la Propriété Artistique 1878*, at 56.

⁷⁶⁴ See Pouillet in *Congrès International de la Propriété Artistique 1878*, at 56.

⁷⁶⁵ Leighton in *Congrès International de la Propriété Artistique 1878*, at 57: 'Les experts sont toujours capables de reconnaître l'auteur d'une œuvre, soit d'un écrit, soit d'un dessin, aussi bien que pour la touche, la manière d'un peintre, et cela même après la mort de l'auteur.'

⁷⁶⁶ Beaume, avocat at the Paris Court, in *Congrès International de la Propriété Artistique 1878*, at 58.

⁷⁶⁷ *Ibid.*, at 58: 'Je ne crois pas que ce soit le rôle d'un Congrès de préciser les formalités à prendre; il ne peut que poser les principes d'ordre général.'

home country should suffice.⁷⁶⁸ The organizing committee took the standpoint that, once copyright is secured in accordance with the rules of the country of origin of the work, it should take legal effect in all countries granting international copyright protection without further requiring compliance with formalities abroad.⁷⁶⁹

This topic was discussed already during the preparation of the conference report. Some members argued that it would exceed the scope of international benevolence if foreign authors could enjoy copyright without formalities, while domestic authors were obliged to fulfil formalities and bear the associated costs.⁷⁷⁰ Other members, however, pointed out the maxim *locus regit actum*,⁷⁷¹ i.e., a rule of conflict of laws recognized in civil law and international law stating that the form of a legal act should be governed by the law of the country where the act took place.⁷⁷² They believed that if copyright was established in the country of origin, the quality of the author and the copyright that derived from it could not be denied in the other countries.⁷⁷³

At the plenary session, this discussion was continued. Critical remarks on freeing authors from completing formalities outside their home countries were posed, *inter alia*, by Mr Faider, a lawyer in Brussels. He feared that creators of derivative works (such as translators, lithographers and illustrators) would run the risk of accidentally infringing copyright in foreign works that were imported in their countries without a formality of some kind indicating that these works were protected by copyright. He argued that copyright should respect the public interest by providing adequate legal certainty. Therefore, he found that authors should comply with a simple and modest formality before they become entitled to claim copyright in a foreign country.⁷⁷⁴

This view was shared by the secretary of the *Association Internationale pour les Réformes Douanières*, Mr Jottrand. He believed that authors of literary and artistic works should be able to enjoy copyright across the globe. However, for the benefit of the public at large, this right should at least be publicly announced. He stated:

⁷⁶⁸ Romberg 1859, I, at 4-6, question no. 4.

⁷⁶⁹ Explanatory Circular of the Committee of Organization in Romberg 1859, I, 7-15, at 8.

⁷⁷⁰ Romberg 1859, I, at 62. Interestingly, this argument was sometimes used in national court decisions involving early bilateral copyright treaties in order to decline protection for foreign works for which domestic formalities had not been completed. See e.g. *Cassell v. Stiff* (1856), 2 K. & J. 279, 69 Eng. Rep. 786: 'otherwise authors of foreign works would be placed in a better position than authors in this country, which certainly was not intended. There is a careful and jealous provision that no author of a foreign work shall be in a better position in this country than the authors of works here are.'

⁷⁷¹ The maxim *locus regit actum* and its relationship with formalities was also referred to by a few early commentators of the Berne Convention. See Soldan 1888, at 15-16 and Röthlisberger 1906, at 26-27.

⁷⁷² See Van Eechoud 2003, at 26, on this rule of conflict of laws.

⁷⁷³ See Romberg 1859, I, at 62-63. Here, copyright is once more referred to as a '*droit des gens*'.

⁷⁷⁴ Faider in Romberg 1859, I, at 75 and 77. During the preparation of the report for the first session, one member proposed to subject international copyright to the formality of marking all copies of a work with a special notice, but this suggestion was opposed and rejected. See Romberg 1859, I, at 199.

‘Not requiring formalities, would result in setting a legal trap which people, who in good faith believe they have the right to reproduce a work, could involuntarily fall into.’⁷⁷⁵

To substantiate his position, Jottrand drew a comparison with real property, arguing that the acquisition and transfer of land was also conditional on formalities. Because these formalities fulfilled important publicity functions, he queried why formalities could not fulfil similar publicity functions in the field of copyright law.⁷⁷⁶

Many other participants took an opposite viewpoint. Mr Romberg, the reporter of the first session, found the arguments for maintaining formalities in the international copyright context unconvincing. He called the difficulty of having no formalities at the international level entirely imaginary.⁷⁷⁷ He believed that the conference should leave the old state of affairs behind and head a new direction. His aspiration was that writers and artists who receive copyright in their own countries be secured protection in all other countries. It is incompatible with this principle if they would be required to fulfil formalities in each country where they seek protection.⁷⁷⁸

Mr Celliez, representative of the *Société des gens de lettres* in Paris, asserted that if authors were liberated from fulfilling formalities in foreign countries, this would strengthen the international protection of literary and artistic property. He stated that if literary and artistic property was recognized as an absolute right, it should be put at the author’s complete disposal.⁷⁷⁹ While formalities obviously provided important publicity functions, he found that creators of derivative works, whether or not acting in good faith, should not be granted a favour at the detriment of authors.⁷⁸⁰

The arguments against preserving formalities for securing international copyright found support by the large majority of participants at the conference. This resulted in the following resolution, which was almost unanimously adopted:

‘It is not necessary to impose particular formalities on foreign authors to allow them to invoke and enforce the right of property. In order for their rights to be recognized and protected, it must suffice if they have fulfilled the formalities required by the law of the country where the first publication took place.’⁷⁸¹

⁷⁷⁵ See Jottrand in Romberg 1859, I, at 77: ‘*Si vous n’exigez pas de formalité, vous tendez un piège à la bonne foi des gens qui, croyant avoir le droit de reproduire, pourraient tomber involontairement sous le coup de la loi.*’

⁷⁷⁶ Ibid., I, at 77. But see Celliez in Romberg 1859, I, at 77, stating that the association with real property is misplaced, because copyright cannot be compared with concepts of physical property.

⁷⁷⁷ Romberg in Romberg 1859, I, at 76: ‘*L’inconvénient ...est, je crois, complètement imaginaire*’

⁷⁷⁸ Ibid., I, at 76.

⁷⁷⁹ See Celliez in Romberg 1859, I, at 77: ‘*Nous reconnaissons à l’auteur un droit absolu;*’

⁷⁸⁰ Ibid., I, at 77.

⁷⁸¹ Resolution 4 of part I, in Romberg 1859, I, at 175-178: ‘*Il n’y a pas lieu d’astreindre les auteurs étrangers à des formalités particulières, afin qu’ils soient admis à invoquer et à poursuivre le droit de propriété. Il doit suffire, pour que ce droit leur appartienne, qu’ils aient rempli les formalités requises par la loi du pays où la publication originale a vu le jour.*’

It was predicted that a rule of this kind would be among the principal provisions of a future International Code for the protection of literary and artistic property.⁷⁸² As we shall see below, the 1886 Berne Convention would indeed subject the international protection of copyright to compliance with formalities in the home country.

4.2.2.2 THE 1878 CONFERENCES ON LITERARY AND ARTISTIC PROPERTY

During the two 1878 conferences on literary and artistic property in Paris, there was little discussion on the question of the necessity of subjecting authors to formalities outside their home country to secure international protection. It was believed that authors should be able to exercise their literary and artistic property rights anywhere without difficulty. To obtain protection in foreign countries, the assemblies held the view that it would be sufficient if authors could prove that they enjoyed copyright in the country of origin of the work.⁷⁸³ The 1878 International Conference on Literary Property expressed this, by adopting the following resolution:

‘To secure protection of his rights, it will be sufficient for the author to have fulfilled the formalities in the country where the work was first published.’⁷⁸⁴

A resolution with a similar recommendation was adopted at the 1878 International Conference on Artistic Property. It reads as follows:

‘In order to be allowed to legally assert his right in all countries, the artist will only need to prove his property in the country of origin. This will be the same for the right of representation or public performance of musical works.’⁷⁸⁵

Consequently, on the eve of the establishment of the Berne Convention, there was a strong international consensus about the need to liberate authors from the multitude of formalities that they had to fulfil to secure international protection of their works. A first sign of this consensus can be found in the bilateral copyright agreements that were concluded in the early 1880s. These agreements granted reciprocal protection, provided that authors could prove that they enjoyed copyright under the law of their home country by establishing that they had fulfilled the domestic formalities.⁷⁸⁶

⁷⁸² See Romberg in Romberg 1859, I, at 63.

⁷⁸³ See Pataille in *Congrès International de la Propriété Artistique 1878*, at 54 and Pouillet, *ibid.*, at 102.

⁷⁸⁴ Resolution 5 in *Congrès littéraire international de Paris 1878*, at 369-370: ‘Pour que cette protection lui soit assurée, il suffira à l’auteur d’avoir accompli dans les pays où l’œuvre a été publiée pour la première fois, les formalités d’usage.’

⁷⁸⁵ Resolution 16 in *Congrès International de la Propriété Artistique 1878*, at 115-117: ‘L’artiste, pour être admis à faire valoir son droit en justice dans tous les pays, n’aura qu’à justifier de sa propriété dans le pays d’origine. Il en sera de même pour le droit de représentation ou d’exécution des œuvres musicales.’

⁷⁸⁶ See art. 1 of the Convention between Spain and France of 16 June 1880 (in: *Recueil 1904*, at 220 and 648) and art. 7, last paragraph, of the Convention between Germany and Italy of 20 June 1884 (in: *Recueil 1904*, at 74, 353, 563 and 707). Other treaties only required the author’s name to be duly

4.3 The Berne Convention and the Prohibition on Formalities

The first calls for the constitution of a ‘Union for literary and artistic property’ were expressed at the two 1878 conferences on literary and artistic property in Paris.⁷⁸⁷ In the 1880s, these calls became stronger. The idea grew that the existing patchwork of bilateral treaties should be replaced with a uniform multilateral treaty establishing a Union for the protection of copyright in literary and artistic works.⁷⁸⁸ This would be the 1886 Berne Convention for the Protection of Literary and Artistic Works, which until today has remained the main treaty regulating international copyright law.

The Berne Convention is famous for its prohibition on copyright formalities.⁷⁸⁹ It must be emphasized, however, that this prohibition was not part of the Convention from its early inception. It was introduced only in 1908. The rule that was originally contained in the Berne Convention in 1886 subjected the enjoyment of copyright in the Berne Union to compliance with the formalities in the country of origin.

This section studies the legislative history of the Berne Convention with a view to unravelling the rationale behind the introduction of the prohibition on formalities. To that end, it analyzes the development of successive provisions on formalities in the Berne Convention, starting with the 1886 country of origin rule with respect to formalities (para. 4.3.1) and the Interpretative Declaration concerning this provision that was adopted at the 1896 Paris revision (para. 4.3.2). Next, it examines the introduction of the prohibition on formalities at the 1908 Berlin revision (para. 4.3.3). Subsequent revisions brought no substantive change (para. 4.3.4).

An explanation of the reason for the introduction of the prohibition on formalities in the Berne Convention is part of the conclusion that is provided for at the end of this chapter. Here, it can already be noted that, although it cannot be excluded that, in the background, ideological motives have played a role, it were mostly pragmatic reasons that inspired the introduction of the prohibition on formalities.

4.3.1 THE 1886 BERNE CONVENTION

The adoption of the 1886 Berne Convention was preceded by a series of events. In 1883, the *Association Littéraire et Artistique Internationale* (ALAI) created a draft convention that formed the basis of a programme that could serve as a blueprint for a future multilateral treaty. The draft was based on the rule of national treatment and provided that protection should be granted on the sole condition that the formalities

indicated on the work, without imposing any further formality. See art. 7 of the Convention between Germany and France of 19 April 1883 (in: *Recueil* 1904, at 70, 271 and 559) and art. 7 of the Convention between Germany and Belgium of 12 December 1883 (in: *Recueil* 1904, at 61 and 549).

⁷⁸⁷ See the last recommendation in *Congrès littéraire international de Paris 1878*, at 370 and resolutions 20 and 21 in *Congrès International de la Propriété Artistique 1878*, at 115-117.

⁷⁸⁸ See Ladas 1938, I, at 75, Ricketson 1987, at 48 and Ricketson & Ginsburg 2006, I, at 51.

⁷⁸⁹ At present, this prohibition is contained in art. 5(2) of the Berne Convention (1971).

of the country of origin were completed.⁷⁹⁰ It was proposed to the Swiss Federal Council, which organized three diplomatic conferences in Berne (in 1884, 1885 and 1886), in which the possibility of a universal convention was examined and discussed.

During the three diplomatic conferences in Berne, agreement was established on the text of an international copyright treaty. This treaty, the Berne Convention, was adopted in 1886. In accordance with the 1883 ALAI draft, the Convention granted protection on the basis of national treatment (para. 4.3.1.1), although it made an exception with respect to the fulfilment of formalities. Protection was granted if the formalities of the country of origin were completed (para. 4.3.1.2). The Berne Convention was supplemented with a few auxiliary provisions to compensate for the loss of legal certainty caused by the country of origin rule with respect to formalities (para. 4.3.1.3).

4.3.1.1 THE CHOICE FOR A TREATY BASED ON NATIONAL TREATMENT

For the first meeting in Berne in 1884, the Swiss Federal Council proposed a work programme, which contained one provision relevant to copyright formalities:

‘The subjects or citizens of any of the Contracting States shall enjoy in all the other States of the Union, with respect to the protection of the rights of authors in their literary and artistic works, such advantages as the laws concerned do now or may hereafter grant to their own nationals. Consequently they shall have the same protection as the latter and the same legal remedies against any violation of their rights, subject to compliance with the formalities and conditions prescribed by law in the country of origin of the work.’⁷⁹¹

This provision treated the question of formalities in direct relation with the rule of national treatment. Although some people called for the creation of a Convention containing a ‘uniform regulation ... of all provisions concerning the protection of copyright’ instead of the establishment of a Union based on the principle of national treatment,⁷⁹² this was considered highly impracticable and premature. The assembly feared that, given the differences in existing laws and conventions, the drafting of a universal law would delay for a long time the conclusion of a general agreement.⁷⁹³

⁷⁹⁰ Art. 1 of the Draft Convention prepared by the ALAI during its 1883 conference in Berne, in: *Actes 1884*, at 7-8; Berne Centenary 1986, at 83-84.

⁷⁹¹ Art. 2 of the programme adopted by the Swiss Federal Council for the International Conference of 8 September 1884 in Berne, in *Actes 1884*, at 11-13; Berne Centenary 1986, at 85-86.

⁷⁹² See Reichardt (Germany) in *Actes 1884*, at 24; Berne Centenary 1986, at 88.

⁷⁹³ See d’Orelli (Switzerland), Ulbach (France) and Lagerheim (Sweden) in *Actes 1884*, at 28; Berne Centenary 1986, at 90 and the circular letter of the Swiss Federal Council of 28 June 1884 in *Actes 1884*, at 10; Berne Centenary 1986, at 84-85, indicating that it was not the intention to ‘[encroach] too seriously on the domestic legislation of specific States, or on existing international conventions’.

Because the aim was to lay the foundations of an International Convention to which the greatest possible number of states could accede instantly,⁷⁹⁴ the assembly opted for a Convention that was founded on the principle of national treatment.⁷⁹⁵

With respect to copyright formalities, the choice for an International Union based on national treatment had important consequences.⁷⁹⁶ Because the idea of creating a uniform law was abandoned, the assembly did not have to decide on the necessity of including or excluding copyright formalities in a future treaty. Rather, the question was whether to follow a strict application of national treatment, by requiring authors to fulfil formalities in all the countries in which they seek protection, or to make an exception to national treatment, by stipulating that, under a future treaty, protection was established if the formalities in the country of origin were completed.

A system based on a strict application of national treatment was introduced a few years earlier in the 1883 Paris Convention for the Protection of Industrial Property. It granted national treatment for nationals of countries of the Paris Union 'subject to the formalities and conditions imposed by the national domestic legislation of each State'.⁷⁹⁷ By offering them the same protection under the same conditions, the Paris Convention fully assimilated foreign right holders to national right holders.

As observed, the system that would make an exception to national treatment with respect to the fulfilment of formalities was proposed at the various conferences prior to the Berne Convention. It was considered too burdensome for authors to complete formalities in each and every country where they seek protection, inter alia, because of the distance, the unfamiliarity with foreign laws and the risk of losing protection due to international transport problems. Moreover, for fulfilling formalities, authors often relied on publishers, who pursued purely commercial goals and therefore were less inclined to complete formalities for unsuccessful works in foreign countries. It was deemed unfair for authors to lose protection as a result of these international obstacles or commercial considerations. Therefore, it was argued that international copyright should be secured if the formalities in the home country were fulfilled.⁷⁹⁸ This was also the model that would be adopted in the Berne Convention.

⁷⁹⁴ Resolution proposed by Ruchonnet (Switzerland) in *Actes 1884*, at 29; Berne Centenary 1986, at 90.

⁷⁹⁵ The rule of national treatment implies that Union states should grant to foreign works that are eligible to protection under the Convention the same protection as they accord to domestic works.

⁷⁹⁶ See Röthlisberger 1906, at 22-27.

⁷⁹⁷ See art. 2 of the Paris Convention for the Protection of Industrial Property of 20 March 1883, in *Actes de la Conférence de la propriété industrielle 1883*, at 32-37: 'Les sujets ou citoyens de chacun des États contractants jouiront, dans tous les autres États de l'Union, en ce qui concerne les brevets d'invention, les dessins ou modèles industriels, les marques de fabrique ou de commerce et le nom commercial, des avantages que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux. En conséquence, ils auront la même protection que ceux-ci et le même recours légal contre toute atteinte portée à leurs droits, sous réserve de l'accomplissement des formalités et des conditions imposées aux nationaux par la législation intérieure de chaque État.'

⁷⁹⁸ Illustrative is the opening speech of Mr Droz, in *Actes 1884*, at 21; Berne Centenary 1986, at 88: 'A second question is that of the formalities to be complied with for the recognition of rights. Writers and artists are demanding the utmost simplification in this connection. A country recently concluded 25 conventions on literary and artistic property; if its nationals have to comply 25 times with the

4.3.1.2 THE COUNTRY OF ORIGIN RULE WITH RESPECT TO FORMALITIES

The consensus that was established at the international level on the needlessness of subjecting authors to formalities in each country in which they sought protection was noticeable at the 1884-1886 Berne conferences. This becomes particularly clear from the opening speech of Mr Droz, the president of the 1885 conference:

‘The constitution of a General Union for the Protection of Authors’ Rights, based on the assimilation of foreigners to nationals and on the removal of the multitude of formalities now imposed, does not seem to have any detractors. Where there are differences of opinion, they relate to other, more or less important elements of the draft ...’⁷⁹⁹

This may explain why there was little discussion on this topic during the various Berne meetings and why the principle laid down in the Federal Council programme (see para. 4.3.1.1) was accepted without opposition.⁸⁰⁰ Accordingly, the conference adopted the principle of national treatment, while making an exception with respect to the formalities which had to be completed to obtain international protection.⁸⁰¹ These would be governed by the law of the country of first publication or, in case of unpublished works, by the law of the country to which the author belonged.⁸⁰² The only things that were discussed in detail were the exact wording and scope of the regulation (see para. 5.2.1). In the end, the rule of national treatment was laid down in Article 2(1) of the Berne Convention (1886), whereas Article 2(2) stated that:

‘The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work’

This country of origin rule with respect to formalities put authors of Union states that granted unconditional copyright in a better position than authors of Union states that subjected copyright to formalities.⁸⁰³ The former would enjoy protection in the entire Berne Union without completing any formalities,⁸⁰⁴ while the latter could lose copyright in the entire Berne Union if they failed to comply with the formalities laid

formalities of registration and deposit, the whole operation becomes overly intricate and costly. And yet that is not essential from the point of view of the recognition of rights which, once duly secured in the country of origin, can without any difficulty be accepted as being valid in all the other countries.’

⁷⁹⁹ *Actes 1885*, at 13; Berne Centenary 1986, at 109.

⁸⁰⁰ *Actes 1884*, at 30; Berne Centenary 1986, at 90. See also the statement by Mr Bergne, on behalf of the British Delegation, in: *Actes 1885*, at 26; Berne Centenary 1986, at 113: ‘The delegates are no doubt aware that present English law imposes the conditions of deposit and registration with respect to foreign works in England, but we do realize that the only means of arriving at an understanding in the interest of an International Union is to relieve authors of those formalities.’

⁸⁰¹ See Baum 1932, at 924.

⁸⁰² Art. 2(3) and (4) of the Berne Convention (1886). *Actes 1884*, at 30; Berne Centenary 1986, at 90.

⁸⁰³ See Schönherr 1981, at 296.

⁸⁰⁴ See Court of Cassation of Rome, 7 June 1900, *May fils v. Istituto di arti grafiche, Le Droit d’Auteur* 1900, at 145-147. See also *Le Droit d’Auteur* 1900, at 122-123 and Allfeld 1902, at 308.

down in their home country.⁸⁰⁵ Although states could always voluntarily extend the protection in their territory to authors who had failed to fulfil the formalities in their home country,⁸⁰⁶ the Berne Convention did not oblige them to do so.⁸⁰⁷

4.3.1.3 SUPPLEMENTARY PROVISIONS

Because the country of origin rule that the Berne Convention laid down with respect to formalities implied that works could be protected in the Berne Union without any formalities being fulfilled, it was feared that problems could arise with respect to the functioning of copyright law as a whole. As observed, formalities performed several key functions for the exercise of copyright.⁸⁰⁸ To address these concerns, the Berne Convention of 1886 was supplemented with a few auxiliary provisions.

First, a legal presumption of authorship was introduced in Article 11 of the Berne Convention (1886) to compensate for the legal uncertainty that authors could face in proving the authorship of their works in the absence of formalities. It stated that, unless proven otherwise, the person whose name appeared on the work was deemed the author of the work.⁸⁰⁹ In addition, since the protection of foreign works relied on compliance with the formalities in the country of origin of the work,⁸¹⁰ Article 11(3) of the Berne Convention (1886) provided that national courts could:

‘if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article 2.’

It was a matter for the civil procedural law of the Union states to decide whether this certificate would establish conclusive evidence of the existence of copyright in the work.⁸¹¹ In most countries, it seems that the certificate constituted prima facie proof only and for that reason could always be rebutted by other facts.⁸¹²

Moreover, situation specific formalities were laid down in Article 7(1) and Article 9(3) Berne Convention. They stated that, in other Union states, authors could invoke no reproduction right in newspaper articles or periodicals and no

⁸⁰⁵ Obviously, authors could still be protected in another Union state pursuant to that country’s internal legislation, namely, if they, instead of in the work’s country of origin, complied with the formalities in the foreign country. See e.g. Kohler 1896, at 340, 342-343, 345 and 347.

⁸⁰⁶ See Kohler 1907, at 405.

⁸⁰⁷ See Civil Court of Justice of Geneva, 20 May 1905, *Bonnard v. Lithographie parisienne, Le Droit d’Auteur* 1905, at 144-145, denying protection in Switzerland to a French work for which the French deposit formality had not been fulfilled. See also Allfeld 1902, at 308 and Allfeld 1908, at 244.

⁸⁰⁸ See, in general, para. 2.3 and, for the situation in the nineteenth century, para. 3.3.2.2.

⁸⁰⁹ See art. 11(1) and (2) of the Berne Convention (1886).

⁸¹⁰ *Actes 1885*, at 50-51; *Berne Centenary 1986*, at 122-123.

⁸¹¹ See Ricketson 1987, at 203 and Ricketson & Ginsburg 2006, I, at 308.

⁸¹² See Röthlisberger 1906, at 110-111. An example is France, where the facts stated in the certificate of deposit were always subject to contrary proof. See para. 3.3.2.2 above.

performance right in published musical works, unless they had explicitly reserved these rights on all copies of these works. The justification was found in public interest considerations, which dictated that certain borrowings from authors should be allowed.⁸¹³

4.3.2 THE 1896 PARIS REVISION

The first conference aiming to revise the Berne Convention to perfect the system of the Berne Union was held in Paris in 1896. This conference also dealt with Article 2(2) of the Berne Convention (1886), which, in practice, had raised some problems of interpretation.⁸¹⁴ Although most Union states followed the common interpretation that this provision liberated authors from compliance with formalities outside their home country,⁸¹⁵ some Union states maintained that the Berne Convention pursued strict national treatment and that it allowed foreign works to be exposed to the same formalities that were imposed on domestic works. They argued that Article 2(2) had only dispensed with the additional formalities that countries previously imposed on foreign works (e.g. pursuant to domestic international copyright law).⁸¹⁶

In the UK, in particular, courts required foreign works for which protection was claimed under the Berne Convention to comply with the domestic formalities.⁸¹⁷ In the 1891 case of *Fishburn v. Hollingshead*, it was ruled that no infringement action could be maintained in respect of the copyright in a German painting, unless it was registered in accordance with the UK Fine Arts Copyright Act of 1862.⁸¹⁸ In return, the Germans maintained an earlier requirement, according to which English works should be registered in Leipzig to obtain protection. However, this requirement was declared to be ‘insignificant’ in 1892 and abandoned completely in 1898.⁸¹⁹

⁸¹³ See *Actes 1884*, at 50-52 and 68; *Berne Centenary 1986*, at 98-99 and 105: ‘The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.’

⁸¹⁴ Schönherr 1981, at 296.

⁸¹⁵ Reichardt of the German delegation (in *Actes 1896*, at 111) believed this to be ‘the starting point and principal goal of the Berne Convention’ (*‘le point de départ et le but principal de la Convention de Berne’*). See also *Actes 1896*, at 161; *Berne Centenary 1986*, at 137. See also Darras 1887, at 651 and 654, Soldan 1888, at 15 and *Le Droit d’Auteur* 1889, at 25-27, 35-38 and 47-51.

⁸¹⁶ See *Actes 1896*, at 161; *Berne Centenary 1986*, at 137. See also Röthlisberger 1906, at 102 and 105-106, Briggs 1906, at 311-313, Ricketson 1987, at 201-202 and Ricketson & Ginsburg 2006, I, at 306.

⁸¹⁷ See, in general, ‘Application en Grande-Bretagne de l’Article 2 de la Convention de Berne’, *Le Droit d’Auteur* 1893, at 82-83. See also Huard 1897, at 13.

⁸¹⁸ *Fishburn v. Hollingshead*, [1891] 2 Ch. 371 (Chancery Division, 14 March 1891). See also *Moul v. Groenings*, [1891] 2 Q.B. 443 (Court of Appeal, 3 July 1891), where a similar question was raised but not answered, and *Moul v. Devonshire Park Co.* (District Court of Brighton, 7 August 1891), *Le Droit d’Auteur* 1892, at 52-55, in which the *Fishburn* ruling was not followed.

⁸¹⁹ See the declarations of the Council of Leipzig of 9 May 1892, in: *Le Droit d’Auteur* 1896, at 33-34, and of 31 January 1898, in: *Le Droit d’Auteur* 1898, at 30. See also Röthlisberger 1906, at 105.

To remove these interpretation obstacles and to secure optimal legal certainty for authors of foreign works claiming protection in the Berne Union, the authorities of France proposed to amend Article 2(2) of the Berne Convention as follows:

‘The enjoyment of these rights is assured to authors without any other conditions or formalities than those prescribed by the legislation of the country of origin of the work.’⁸²⁰

This proposal was supported by the German, Belgian and Swiss delegations,⁸²¹ but not by the British delegation. Even though the British Crown did not oppose the proposal on substance, as the most recent interpretations by the courts had verified the conformity of British law with the French reading of Article 2(2),⁸²² it could not accept the amendment for reasons connected with British colonial affairs.⁸²³

Because the UK was considered to be ‘of paramount importance to the success of the Union’,⁸²⁴ the French proposal was finally abandoned. Instead of changing the wording of Article 2(2), it was suggested to clarify the meaning of the provision in a separate Declaration representing an ‘authentic interpretation of the Convention.’⁸²⁵ Paragraph 1 of the Interpretative Declaration of 1896 was formulated as follows:

‘In accordance with the provisions of Article 2, paragraph 2, of the Convention, the protection granted ... shall depend solely on the accomplishment of the conditions and formalities in the country of origin of the work which may be required by the legislation of that country.’

This declaration clarified that, once the conditions and formalities in the country of origin were fulfilled, the work should be protected in the entire Berne Union.

⁸²⁰ *Actes 1896*, at 36-37. This was in full conformity with the standpoint of the International Bureau. See in particular *Le Droit d'Auteur* 1889, at 25-27, 35-38 and 47-51.

⁸²¹ See *Actes 1896*, at 111-112 and 121.

⁸²² The *Fishburn* ruling was overruled in *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1 (Queen's Bench Division, 1893) and *Hanfstaengl v. The American Tobacco Company*, [1895] 1 Q.B. 347 (Court of Appeal, 1894). See Copinger 1904, at 479. These rulings were followed in Canada. See Superior Court of Montréal, 23 March 1906, *Mary v. Hubert, Le Droit d'Auteur* 1906, at 57-59 and Court of King's Bench of Montréal, 28 June 1906, *Hubert v. Mary, Le Droit d'Auteur* 1907, at 8-9. A few years later, however, another British court ruled that French musical works should carry a notice required under British law in order to be able to exercise copyright in the UK. See *Sarpy v. Holland and Savage*, [1908] 1 Ch. 443 (Chancery Division, 18-21 December 1907). Later, this ruling was reversed by *Sarpy v. Holland and Savage*, [1908] 2 Ch. 198 (Court of Appeal, 5-7 May 1908).

⁸²³ The changes in copyright law that British colonies had been forced to implement because of the UK's adherence to the Berne Convention had already provoked the resentment of some colonies. Canada in particular, had long endeavoured to subject all non-Canadian works to rigorous formalities, including registration and domestic manufacturing. See Briggs 1906, at 313 (note 2). Therefore, it was very much opposed to any further change. Since Canada began to use the copyright debate to fight self-governance and to liberate itself from the British Empire, it is no surprise that the British Crown was extremely cautious in adopting the French proposal. See Seville 2006, at 69 et seq. and 112-118.

⁸²⁴ See *Actes 1886*, at 13; Berne Centenary 1986, at 131: ‘[it] brought us not only the accession of Great Britain but also that of its colonies, representing a total population of more than 300 million souls’.

⁸²⁵ *Actes 1896*, at 161; Berne Centenary 1986, at 137. The UK abstained from signing this Declaration.

Authors of Union countries that granted unconditional copyright were sometimes confronted with another difficulty when claiming protection in another Union state. They were unable to submit a certificate indicating that the formalities in the home country were fulfilled if a court of another Union state were to request so on the basis of Article 11(3) of the Berne Convention (1886).⁸²⁶ It was questioned whether this problem should be fixed bilaterally, through a general declaration by which the one state would announce to the other that it granted protection without formalities,⁸²⁷ or by the International Bureau of the Berne Union that could issue certificates for this purpose. The latter option was considered impracticable, because it would place too much of an administrative burden on the Bureau.⁸²⁸ The Bureau could at most give information about the formalities imposed by the various Union states.⁸²⁹ Hence, the question was not resolved, but referred to examination at a next conference.

For the same reason of administrative burden, the Bureau countered a proposal to create an international copyright register in Berne that should render ‘great services’ by providing adequate information about the copyright status of works to authors, scholars, libraries, etc. Although initially suggested by the French authorities,⁸³⁰ the Norwegian delegation adopted the idea and proposed the following resolution:

‘It is desirable that the various States of the Union take measures to facilitate communication to the Berne Bureau of the acts of registration or deposit of literary and artistic works, where such formalities exist. It shall be for the Berne Bureau to coordinate the information which it is thus furnished, by adding all the documents that it is able to procure in relation to publication of literary and artistic works, in all its forms, in the various Union States.’⁸³¹

The Bureau deemed itself unfit to embark on this task. It recalled that a few years earlier, in 1895, the International Bibliography Institute in Brussels was founded,⁸³² which had created an enormous database of information about literary works called the ‘Universal Bibliographical Repertory’.⁸³³ According to the Bureau, this database

⁸²⁶ See the statement of Mr Descamps, delegate of Belgium, in: *Actes 1896*, at 129-130.

⁸²⁷ *Ibid.*, at 130. See also the declaration of Mr Renault, delegate of France, in: *Actes 1896*, at 131.

⁸²⁸ *Actes 1896*, at 130-131. At the 1885 conference, an identical proposal made by the Italian delegation was refused for the same reason. See *Actes 1885*, at 37; Berne Centenary 1986, at 117.

⁸²⁹ See the response of Mr Morel, director of the International Bureau, in: *Actes 1896*, at 130-131. See also *Le Droit d’Auteur 1897*, at 37-40, about the information supplied by the Bureau.

⁸³⁰ See the second recommendation of the French authorities, drawn up in cooperation with the International Bureau, in: *Actes 1896*, at 49-50.

⁸³¹ *Actes 1896*, at 118. See also the amended proposal by Mr Descamps, member of the Royal Academy of Belgium, and the report of Louis Renault presented on behalf of the Committee by the French delegation, in: *Actes 1896*, at 177; Berne Centenary 1986, at 142.

⁸³² See Keenan 2003, at 198. After its foundation, the *Institut International de Bibliographie* (IIB) was renamed in 1932 to *Fédération Internationale de Documentation* (FID) and in 1986 to *Fédération Internationale d’Information et de Documentation*. In 2002, it effectively ceased to exist.

⁸³³ See La Fontaine & Otlet 1895-1896.

rendered an invaluable service with which it could not possibly compete.⁸³⁴ However, the Bureau accredited the Universal Bibliographical Repertory with a broader utility than it had in practice. It was a library documentation and information system, not a database of copyright information.⁸³⁵ Therefore, it would never receive the position of an international copyright register. Nonetheless, the Norwegian delegation agreed with the view of the Bureau and withdrew its proposal. Hence, the idea of creating a 'Universal Directory' of copyright information was never discussed by the plenary, although at the time this idea was put forward at various conferences.⁸³⁶

4.3.3 THE 1908 BERLIN REVISION

Despite the fact that the 1886 Berne Convention had released authors of the obligation to comply with formalities in other Union states where protection was sought, the country of origin rule relating to formalities continued to raise obstacles.⁸³⁷ This was a prelude to the introduction of the prohibition on formalities in the Berne Convention at the 1908 Berlin revision conference. This section describes the different problems with formalities at the eve of the Berlin conference (para. 4.3.3.1) and examines how this eventually led to the adoption of the prohibition on formalities (para. 4.3.3.2).

4.3.3.1 THE CONTINUING PROBLEMS CAUSED BY FORMALITIES

Although the country of origin rule with respect to formalities was seemingly easy to apply, it often caused difficulties. It was uncertain, for example, the formalities of which country should be complied with, if a work was published simultaneously in multiple Union states. Some legal scholars followed the rule of Article 2(3) of the Berne Convention (1886) which stated that, in case of simultaneous publication, the country with the shortest term of protection should be regarded as the country of origin. Hence, the formalities of this country should be completed.⁸³⁸ Other scholars believed that Article 2(3) only aimed to ensure that a work would fall into the public domain in all Union states simultaneously, not to designate the country whose

⁸³⁴ *Actes 1896*, at 178; *Berne Centenary 1986*, at 142. See also the statement by Mr Morel, director of the International Bureau: 'There is no question whatsoever of creating a *Universal Directory* or a structure which could be compared to such a considerable undertaking.'

⁸³⁵ Boyd Rayward 1975, at 186.

⁸³⁶ A 'Universal Directory of Literary and Artistic Works' was called for, e.g., at the ALAI conferences in Neuchâtel (1891), Milan (1892), Barcelona (1893) and Antwerp (1894) and at the Conference of German authors in Vienna (1893). See the resolutions quoted in the second recommendation of the French authorities, drawn up in cooperation with the International Bureau, in: *Actes 1896*, at 49-50.

⁸³⁷ See Röthlisberger 1906, at 100-113 (at 105-111, in particular).

⁸³⁸ See Allfeld 1902, at 310 and Allfeld 1908, at 245. See also Röthlisberger 1906, at 110.

formalities must be fulfilled. They argued that authors could choose to comply with the formalities of any of the Union states in which they had published their work.⁸³⁹

Another problem was that several courts experienced difficulties interpreting the national law of the various Union states in order to ascertain whether the formalities in the country of origin were fulfilled.⁸⁴⁰ Estimates showed that, until 1910, of some 100 court cases involving the Berne Convention, almost one out of seven concerned disputes regarding formalities.⁸⁴¹ Even if the author presented a certificate attesting that the formalities in the home country were fulfilled, some courts were reluctant to accept this as conclusive evidence that copyright existed in the work. Instead, they checked whether the formalities in the country of origin were applied correctly.⁸⁴² In practice it occurred that, on this basis, foreign works were denied protection in other Union states,⁸⁴³ even though they received protection in their home country.

This ran counter to the object and spirit of the Berne Convention. What the Berne Convention had aimed to achieve was that once a work was protected in the country of origin it was protected in the entire Union.⁸⁴⁴ Therefore, a literary or artistic work would ideally be protected in all Union states or it would not be protected at all.⁸⁴⁵ It greatly interfered with this objective if protection was denied in one Union state as a result of a different interpretation about the correctness of the application of domestic provisions on formalities in the country of origin of the work.

For these reasons, there was a growing resistance against copyright formalities at the international level. This was manifested in two ways. First, various conferences adopted resolutions directed at national legislators, urging them to abolish domestic copyright formalities.⁸⁴⁶ As observed, most countries in Europe answered these calls and eliminated formalities in the early twentieth century. Second, it was argued that, if all domestic formalities were to gradually disappear, then Article 2(2) of the Berne Convention (1886) could be withdrawn and replaced by a provision that guaranteed protection under the Berne Convention without compliance with

⁸³⁹ See Kohler 1896, at 340 and 345-347 and Kohler 1907, at 406.

⁸⁴⁰ See Ladas 1938, I, at 269-270, Ricketson 1987, at 203 and Ricketson & Ginsburg 2006, I, at 308.

⁸⁴¹ Estimate provided for by the International Bureau, in: *Le Droit d'Auteur*, 1910, at 5. For an overview of case law involving the Berne Convention, see Röthlisberger 1906, at 60 et seq.

⁸⁴² See Röthlisberger 1906, at 110-111.

⁸⁴³ See German Supreme Court, 26 September 1902, *Juven v. Schönau*, [1902] 35 *Entscheidungen des Reichsgericht in Strafsachen* 360, *Le Droit d'Auteur* 1903, at 5, denying protection in Germany to a French photograph, because only two copies had been deposited, whereas the French law – as it was interpreted by the German Supreme Court – required a deposit of three copies.

⁸⁴⁴ See Soldan 1888, at 15-16 and Kohler 1896, at 339.

⁸⁴⁵ Kohler 1896, at 340.

⁸⁴⁶ Art. 2 of the *Projet de Loi-Type*, adopted by the ALAI conference in Paris in 1900 (in: *Actes 1908*, at 102-104; De Beaufort 1909, at 481-484) induced national lawmakers to provide that the enjoyment of copyright should not be subject to the fulfilment of formalities. See also the overview of resolutions on domestic formalities expressed at various international conferences, in: *Actes 1908*, at 104-105.

formalities.⁸⁴⁷ This idea was put on the agenda of the 1908 revision conference in Berlin.

4.3.3.2 THE PROHIBITION ON FORMALITIES

The programme drawn up by the German government for the 1908 Berlin revision conference included the proposal of substituting the country of origin rule relating to formalities with a general rule of independence of protection. This rule stated that the enjoyment and the exercise of copyright should be independent of the existence of protection in the country of origin of the work and should not be subject to any formality or condition.⁸⁴⁸ The idea behind this change was to grant to Union authors a more effective protection of international copyright. If they did not have to prove that the work enjoyed copyright in the country of origin, the problems they faced in producing the required evidence would be circumvented.⁸⁴⁹ The independence of protection and prohibition on formalities would thus remove one of the most salient problems that had been encountered in the working of the Berne Convention.⁸⁵⁰

The proposed rule of independence of protection was said to be easier to apply than the rule according to which the protection of the country of origin extended into other Union states.⁸⁵¹ It implied that Union states no longer had to apply foreign law to ascertain whether a work for which protection was sought under the Berne Convention was protected in the country of origin and thus should be granted national treatment.

The prohibition on formalities was both a particularization of and a complement to the general rule of independence of protection. As compared with the 1886 Berne Convention, it ensured that authors no longer had to show that copyright existed in the country of origin of the work by proving that the formalities in this country had been fulfilled.⁸⁵² It was thought that this would be a great simplification in the process through which authors secured protection in other Union states.⁸⁵³ At the

⁸⁴⁷ See Röthlisberger 1906, at 111-112. See also the resolutions of the 1896 ALAI conference in Berne (in: *Le Droit d'Auteur* 1896, at 126) and of other international conferences (in: *Actes 1908*, at 82-83). Briggs, however, argued that a complete abolition of formalities in the Berne Convention would, for the time being, be a too drastic measure of reform. As long as most national laws continued imposing formalities, he found such proposal impracticable and useless. See Briggs 1906, at 462-463.

⁸⁴⁸ Propositions of the German authorities, drawn up in cooperation with the International Bureau, in: *Actes 1908*, at 35-52 (at 37-39 and 40, in particular).

⁸⁴⁹ See the speech given by Dr Osterrieth, member of the German delegation, in: *Actes 1908*, at 169.

⁸⁵⁰ See e.g. 'Report of the British Delegates to the International Copyright Conference at Berlin to Sir Edward Grey', in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 2, 4-21, at 5 and 7.

⁸⁵¹ *Actes 1908*, at 237-240; Berne Centenary 1986, at 148-149.

⁸⁵² This did not mean that authors could not be asked to produce a certificate in court in order to provide evidence of a particular fact. See *Actes 1908*, at 237; Berne Centenary 1986, at 148.

⁸⁵³ See Wauwermans 1910, at 69-70 and Baum 1932, at 927.

same time, it made clear that the rule that authors were liberated from compliance with formalities outside their home country was not abandoned with the Berlin revision of the Berne Convention.

During the conference meetings in Berlin, the German proposal encountered little resistance.⁸⁵⁴ The rule of independence of protection and prohibition on formalities were considered not to be a true revolution, but rather a further development of the basic principle underlying the Berne Convention, namely, that authors should enjoy in the entire Berne Union the same protection that Union states granted to national authors, with some minimum guarantees laid down by the Convention.⁸⁵⁵ Except for the Swedish delegation, which suggested maintaining the rule that the enjoyment of copyright should be subject to the fulfilment of the conditions and formalities prescribed by the country of origin of the work,⁸⁵⁶ none of the delegations opposed.

Hence, with reasonable unanimity,⁸⁵⁷ including the express consent of the British government,⁸⁵⁸ the Berlin conference adopted the following provision, which was incorporated in Article 4(2) of the Berne Convention (1908):

‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the state where protection is claimed.’

As a result of the prohibition on formalities and independence of protection, there no longer was need to authorize national courts to require a certificate from foreign authorities showing that the formalities of the country of origin had been fulfilled. Article 11(3) of the Berne Convention (1886) was therefore withdrawn.⁸⁵⁹

Another rule that did not reappear after the Berlin conference was the reservation requirement for the retention of a public performance right in published musical works. The deletion of this requirement was proposed, because performance rights were deemed ‘just as worthy of respect’ as rights of translation and representation,

⁸⁵⁴ The amendments proposed by France, Italy and Monaco all followed the German proposal to prohibit formalities in the Berne Convention. See *Actes 1908*, at 284.

⁸⁵⁵ See the *Mémoire* presented by the Belgian delegation, in: *Actes 1908*, 192-197, at 193. See also the explanation accompanying the German proposition, in: *Actes 1908*, at 38.

⁸⁵⁶ *Actes 1908*, at 239 and 284; Berne Centenary 1986, at 149. The Swedish delegation found it odd that Union countries should be required to protect foreign works that were not protected in their country of origin due to a failure to fulfil the domestic formalities. For this reason, it proposed to maintain the country of origin rule. See *Le Droit d’Auteur* 1910, 2-7, at 4 and Potu 1914, at 48-49.

⁸⁵⁷ Ricketson 1987, at 203; Ricketson & Ginsburg 2006, I, at 308.

⁸⁵⁸ See, in particular, the letter of ‘Sir Edward Grey to Sir H. Bergne, Mr. Askwith, and Count de Salis’, in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 1, 1-3, at 2: ‘To the amendment in [Article 2(2) of the Berne Convention (1886)] His Majesty’s Government see no objection in principle.’

⁸⁵⁹ See *Actes 1908*, at 47-48 (German proposition) and 266; Berne Centenary 1986, at 157-158.

which could be enjoyed without conditions.⁸⁶⁰ Moreover, the abolition of this rule would eliminate the earlier distinction between published and unpublished musical works and avoid conflicts between authors who had an interest in affixing a notice of reservation and publishers who had an interest in removing this notice to facilitate the sale of the work.⁸⁶¹ Even though the proposal was initially opposed by the British, Swedish and Swiss delegations,⁸⁶² it eventually was adopted. As a result, authors enjoyed a public performance right in musical works without making an explicit reservation.⁸⁶³

The Berne Convention retained the notice of reservation with respect to the right of reproduction for newspaper articles or periodicals. Because of the public benefits that resulted from a free reproduction of newspaper items, it was considered fair that authors be able to exercise their reproduction right only if they had marked their articles with a notice indicating that reproduction was prohibited.⁸⁶⁴ This was considered not to be a formality prohibited by Article 4(2) of the Berne Convention (1908).⁸⁶⁵

4.3.4 SUBSEQUENT REVISIONS

The Berne prohibition on copyright formalities was not changed in substance during the revision conferences in Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971. However, in 1967 it was renumbered from Article 4(2) to Article 5(2) of the Berne Convention. Today, this provision still provides that: ‘The enjoyment and the exercise of these rights shall not be subject to any formality; ...’.

4.4 The Universal Copyright Convention

A completely different approach towards formalities can be found in the Universal Copyright Convention (UCC), which was created in 1952 to close the then existing

⁸⁶⁰ See *Actes 1908*, at 46 (German proposition) and 255-256; Berne Centenary 1986, at 154. In 1896, an identical proposal was made by France, but this met with opposition from Germany and the UK, who asserted that public opinion would not accept that, without an express reservation, the performance of musical works could be prevented. See *Actes 1896*, at 171-172; Berne Centenary 1986, at 140.

⁸⁶¹ See *Actes 1908*, at 46 (German proposition) and 255-256; Berne Centenary 1986, at 154.

⁸⁶² See *Actes 1908*, at 255-256; Berne Centenary 1986, at 154. See also, with respect to the UK position, ‘Report of the British Delegates to the International Copyright Conference at Berlin to Sir Edward Grey’, in: *Correspondence respecting the Revised Convention of Berne 1908*, no. 2, 4-21, at 12-13.

⁸⁶³ Art. 11(3) of the Berne Convention (1908). In 1967, the paragraph was deleted, as it was considered superfluous. See *Actes 1967*, II, at 1167 (English version); Berne Centenary 1986, at 204.

⁸⁶⁴ *Actes 1908*, at 44-45 (German proposition) and 249-254; Berne Centenary 1986, at 152-153.

⁸⁶⁵ *Actes 1908*, at 240; Berne Centenary 1986, at 149.

gap in copyright protection at the international level.⁸⁶⁶ Although several countries had joined the Berne Convention, other countries refrained from doing so for internal reasons, e.g., because the standard of protection that they were obliged to grant to foreign works under the Berne Convention was higher than the protection that they then granted pursuant to their domestic copyright law. The US, for example, had not adhered to the Berne Convention, inter alia, because its minimum term of protection of fifty years after the author's death, its moral rights protection and its prohibition on formalities did not correspond with the existing US copyright system.⁸⁶⁷

One of the key obstacles in establishing the UCC was to bridge the differences of opinion between the US and states adhering to the Berne Convention with respect to the question of the formalities that needed to be completed to secure protection. Although there was mutual agreement about the need to eliminate the obstacle of having to comply with formalities in each foreign country in which protection was claimed,⁸⁶⁸ the US did not have the intention to entirely abandon formalities as a condition to copyright in foreign works.⁸⁶⁹ Therefore, it proposed subjecting the protection under the UCC to the condition of marking all copies of published works with a uniform notice. It argued that this condition served an important purpose and could relatively easily be fulfilled.⁸⁷⁰ The notice could be attached 'on the spot' in the home country, required no knowledge of foreign law or procedure and incurred no significant cost.⁸⁷¹

The US proposal was accepted by the other countries and laid down in Article III of the UCC.⁸⁷² This provision, which was believed to be 'the heart of the convention from a mechanical and operational standpoint',⁸⁷³ exempts foreign works for which

⁸⁶⁶ Von Lewinski 2006, at 1. The UCC was adopted in Geneva on 6 September 1952 and revised at Paris on 24 July 1971. Because the Paris revision did not bring any change in relation to the UCC rule on formalities, this book makes no distinction between the 1952 and the 1971 texts of the UCC.

⁸⁶⁷ US Senate report on the Universal Copyright Convention 1952, Executive Rep. no. 5 accompanying Executive M, 83rd Cong., 2nd Sess. (1954), at para. 6. See also Sherman 1955, at 1146-1147.

⁸⁶⁸ See Bogsch 1964, at 25, indicating that it was the purpose of the UCC to eliminate the difficulties in securing international protection as a result of the imposition of formalities at national level. At this time, many countries subjected the acquisition, maintenance and transfer of copyright to formalities. See the overview in *World Copyright: An Encyclopedia* 1953-1960, II (1954), at 672-703.

⁸⁶⁹ Kaminstein 1955, at 25. See also Dinwoodie 2001, at 740 (note 25).

⁸⁷⁰ *Ibid.*, at 26. The US had experience with a uniform formality in international copyright relations. Art. 3 of the Buenos Aires Convention of 1910, a multilateral treaty regulating the international protection of copyright between the US and some countries in Latin America, required all contracting states to recognize copyright acquired in another contracting state, provided that the work was marked with an 'all rights reserved' notice or a similar statement indicating the reservation of copyright.

⁸⁷¹ Bogsch 1964, at 25.

⁸⁷² See the Report of Sir John Blake, the Rapporteur-General of the Conference at Geneva, 6 September 1952, in *Universal Copyright Convention Analyzed* 1955, 214-248, at 224-226, for an account of the discussions between the countries about the issue of formalities. See also Kaminstein 1955, at 26-28.

⁸⁷³ US Senate report on the Universal Copyright Convention 1952, Executive Rep. no. 5 accompanying Executive M, 83rd Cong., 2nd Sess. (1954), at para. 9 under a.

protection is claimed under the UCC from compliance with the domestic formalities of a contracting state, on condition that all the copies of the work bear the symbol © accompanied by the name of the copyright owner and the year of first publication.⁸⁷⁴ Unpublished works that qualify for protection under the UCC must be protected by legal means without formalities.⁸⁷⁵ Article III of the UCC is thus an exception to the rule of national treatment under the UCC,⁸⁷⁶ akin to the exception in the 1886 Berne Convention (para. 4.3.1). In contrast with the latter convention, however, it does not subject international protection to compliance with the formalities in the country of origin, but it makes it conditional on a uniform and standardized formality.⁸⁷⁷

The notice requirement of the UCC is seemingly unequivocal. The notice should (i) consist of the ©-sign, the name of the copyright proprietor and the year of first publication, (ii) be placed in such manner and location as to give reasonable notice of the copyright claim and (iii) appear on all the copies of the work from the time of its first publication. The copies must have been published with the authority of the author or other copyright proprietor.⁸⁷⁸ However, in practice, several difficulties can arise as to the validity of the notice. This includes difficulties of interpretation with regard to the form and placement of the notice.⁸⁷⁹ Also, it is uncertain whose name should appear in the notice in case the copyright after first publication is transferred, in total or in part, to a third party.⁸⁸⁰ In the absence of guidance in the UCC, it seems that this must be determined according to the circumstances of each case.

The UCC copyright notice introduced a great simplification in securing copyright protection at the international level, although it did not provide complete relief. The UCC only exempts authors of foreign works from compliance with formalities that serve as 'as a condition of copyright'.⁸⁸¹ These include all constitutive formalities and situation specific formalities relating to the protection of a specific right (e.g., the right of translation).⁸⁸² In this respect, the UCC assumes a broad concept of 'formalities', including not only traditional formalities such as deposit, registration and notice, but also requirements such as domestic manufacture or first publication

⁸⁷⁴ Art. III paragraph 1 of the UCC.

⁸⁷⁵ Art. III paragraph 4 of the UCC.

⁸⁷⁶ Bogisch 1964, at 25. The rule of national treatment is laid down in art. II of the UCC.

⁸⁷⁷ Accordingly, the UCC did not permit a country to apply material reciprocity with respect to copyright formalities. If a work was not protected in its home country due to a failure to complete the domestic formalities, it should still be granted protection by other contracting states of the UCC if it was duly marked with the copyright notice laid down in art. III of the UCC. See Kaminstein 1955, at 29.

⁸⁷⁸ See art. III paragraph 1 of the UCC.

⁸⁷⁹ See Bogisch 1964, at 26 et seq. It was held by US courts that, in order to be valid, the requirements of the UCC notice with respect to its form should be accurately followed. See e.g. *Ross Products, Inc. v. New York Merchandise Co.*, 233 F.Supp. 260 (US District Court of New York, 1964), at 262.

⁸⁸⁰ See Bogisch 1964, at 26-28. See also the Report of G.H.C. Bodenhausen, the Rapporteur-General of the Conference at Paris, 1951, in *Universal Copyright Convention Analyzed* 1955, 281-300, at 288, suggesting that 'the name of the present proprietor ... should be affixed to a new publication'.

⁸⁸¹ See art. III paragraph 1 of the UCC.

⁸⁸² See Bogisch 1964, at 34.

in a contracting state.⁸⁸³ The UCC obliges contracting states to waive all these formalities in respect of foreign works for which protection is sought under the UCC, provided that they are duly marked with the prescribed copyright notice. However, it does not prevent them from requiring the same formalities in respect of domestic works.⁸⁸⁴

The UCC does not exempt right owners seeking judicial relief in a UCC country from compliance with procedural requirements, including the requirement to appear through domestic counsel or to deposit a copy of the work involved in the litigation, provided that such requirements do not affect the validity of the copyright and are non-discriminatory.⁸⁸⁵ Therefore, the US could preserve registration and deposit as conditions to sue for copyright infringement in respect of foreign works qualifying for protection under the UCC.⁸⁸⁶ Moreover, the UCC explicitly permits contracting states granting multiple copyright terms to subject the second or subsequent term to formalities even in respect of foreign works, provided that the first term exceeds the minimum term of protection under the UCC.⁸⁸⁷ This allowed the US to also retain its formalities with respect to copyright renewal for non-domestic works.⁸⁸⁸

4.5 Formalities in Subsequent Treaties

In the last part of the twentieth century, other multilateral treaties were adopted. In these treaties, the question of copyright formalities played a marginal role. First, the Film Register Treaty of 1989 established an International Film Registry, but this did not touch upon copyright whatsoever. The Registry had merely evidentiary effects. The International Film Registry would never become a success (para. 4.5.1).

Treaties that dealt with international copyright in a comprehensive way were the TRIPS Agreement (para. 4.5.2) and the WIPO Copyright Treaty (para. 4.5.3). These treaties contain no specific provision on formalities, but incorporated by reference the provisions of substantive law of the Berne Convention, including the prohibition on formalities. This Berne prohibition on formalities was even applied in a *mutatis mutandis* manner to the protection granted under the WIPO Copyright Treaty.

⁸⁸³ See art. III paragraph 1 of the UCC, containing an illustrative and not exhaustive list of 'formalities'.

⁸⁸⁴ Art. III paragraph 2 of the UCC. This paragraph was criticized for being superfluous, as the same result follows from paragraph 1 of the same provision. See Bogsch 1964, at 36.

⁸⁸⁵ Art. III paragraph 3 of the UCC.

⁸⁸⁶ See Kaminstein 1955, at 34 and Bogsch 1964, at 37.

⁸⁸⁷ Art. III paragraph 5 of the UCC.

⁸⁸⁸ See Kaminstein 1955, at 35-36 and Bogsch 1964, at 38-39.

4.5.1 THE FILM REGISTER TREATY

In 1989, the Treaty on the International Registration of Audiovisual Works ('Film Register Treaty') was adopted under the auspices of the WIPO. This Treaty aims to enhance the creation and circulation and combat the piracy of audiovisual works by increasing the legal certainty in transactions relating to such works.⁸⁸⁹ To that end, it creates an International Film Registry, in which statements about audiovisual works and interests and rights of exploitation in such works can be registered.⁸⁹⁰

The effect of registration is that it creates a rebuttable presumption of correctness of a recorded statement. Exceptions apply to statements that are contradicted by another recorded statement or that cannot be valid under the domestic copyright law of the contracting states.⁸⁹¹ The Treaty explicitly states that it cannot be interpreted as affecting existing copyright laws and treaties.⁸⁹² It does not interfere for example with the presumption of authorship in Article 15 of the Berne Convention. It is not a copyright treaty and therefore does not establish obligations for contracting states in this area.⁸⁹³ The International Film Registry that it creates has purely declaratory significance and does not affect the enjoyment or the exercise of copyright.⁸⁹⁴

The International Film Registry was established in Austria in 1991,⁸⁹⁵ but it never became a success because the level of adherence to the Film Register Treaty proved not to be satisfactory.⁸⁹⁶ In total, no more than 400 statements were registered.⁸⁹⁷ For this reason, the Registry in Austria was closed and moved to the WIPO headquarters in Geneva in 1993. Since then, the application of the Film Register Treaty has been suspended. At present, the Registry for all practical purposes is defunct.⁸⁹⁸

4.5.2 THE TRIPS AGREEMENT

The TRIPS Agreement was concluded in 1994 in the framework of the World Trade Organization (WTO).⁸⁹⁹ This Agreement builds directly on the groundwork of the

⁸⁸⁹ See the preamble of the Treaty on the International Registration of Audiovisual Works (Film Register Treaty), adopted in Geneva on 20 April 1989. The Treaty entered into force on 17 February 1991.

⁸⁹⁰ Art. 3(1) of the Film Register Treaty.

⁸⁹¹ *Ibid.*, art. 4(1).

⁸⁹² *Ibid.*, art. 4(2).

⁸⁹³ See the *Records of the Diplomatic Conference for the conclusion of a Treaty on the International Registration of Audiovisual Works 1989*, at 82.

⁸⁹⁴ See Kovács 1991, at 113-114.

⁸⁹⁵ Art. 3(3) of the Film Register Treaty.

⁸⁹⁶ See Kovács 1991, at 110-116.

⁸⁹⁷ See WIPO, 'Matters concerning the Treaty on the International Registration of Audiovisual Works', WIPO document (A/35/14), 18 August 2000, para. 4.

⁸⁹⁸ *Ibid.*, paras 5 and 6.

⁸⁹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994.

Berne Convention. It was not the intention of the TRIPS negotiators ‘to reinvent the intellectual property wheel’ by redesigning international copyright law.⁹⁰⁰ Instead of introducing a complete new set of rules, therefore, the provisions of substantive law of the Berne Convention were incorporated by reference into the TRIPS Agreement. This was accomplished by the ‘compliance clause’ of Article 9(1) of TRIPS, which requires all WTO members to comply with Articles 1 to 21 (with the exception of Article 6*bis* that relates to moral rights) and the Appendix of the Berne Convention (1971).⁹⁰¹ Therefore, WTO members are compelled to apply the relevant provisions of the Berne Convention, but they are not obliged to become members of it.

Among the Berne provisions that are incorporated by reference into the TRIPS Agreement is the prohibition on formalities of Article 5(2) of the Berne Convention. This did not lead to any debate during the preparation of the Agreement. Materially, the application of the Berne prohibition on formalities under the TRIPS Agreement seems to be no different than its application under the Berne Convention. Because the TRIPS Agreement contains no ‘*mutatis mutandis* application’ rule as the WIPO Copyright Treaty (see below), the prohibition on formalities seems to apply only to the rights that can be claimed pursuant to the provisions of the Berne Convention that are incorporated by reference, but not to the ‘Berne-plus’ rights that are further granted by the TRIPS Agreement. It could at most be argued that it may perhaps be applicable to the ‘Berne-plus’ rights that are directly linked to the Berne Convention or clearly lie within its object of protection. This is discussed in para. 5.1.2.

4.5.3 THE WIPO COPYRIGHT TREATY

The WIPO Copyright Treaty (WCT) was established in 1996 as a special agreement to the Berne Convention aimed to respond to the new challenges of the digital era.⁹⁰² Because the number of contracting parties to the Berne Convention had increased greatly (from 58 in 1970, to 70 in 1980, 83 in 1990 and 147 in 2000)⁹⁰³ and revision of the Berne Convention requires unanimity,⁹⁰⁴ it was very difficult to adapt to these challenges within the framework of the Berne Convention. This led to the adoption of a separate ‘special agreement’,⁹⁰⁵ the WCT, which was also open for signature by WIPO member countries that were not party to the Berne Convention.⁹⁰⁶

Similar to the TRIPS Agreement, the provisions of substantive law of the Berne Convention are incorporated by reference in the WCT by the ‘compliance clause’ of

⁹⁰⁰ Gervais 2003, para. 1.96, at 68.

⁹⁰¹ *Ibid.*, paras 2.89 to 2.97, at 124-130.

⁹⁰² Art. 1(1) of the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

⁹⁰³ See the WIPO statistics about the number of contracting parties to the Berne Convention, available at: <http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en>.

⁹⁰⁴ See art. 27 of the Berne Convention (1971).

⁹⁰⁵ Special agreements are explicitly permitted by art. 20 of the Berne Convention (1971).

⁹⁰⁶ Ficsor 2002, para. C1.17, at 426-428.

Article 1(4) of the WCT. This requires contracting parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention (1971). These provisions are believed to ‘form the bedrock of all international norms setting authors’ rights in literary and artistic works’.⁹⁰⁷ Consequently, at first glance, the WCT builds on the groundwork of the Berne Convention in the same way as the TRIPS Agreement does.

However, the WCT contains a special rule for the application of Articles 2 to 6 of the Berne Convention in the WCT context. Pursuant to Article 3 of the WCT, these provisions apply *mutatis mutandis* in respect of the protection provided for in the WCT. This implies that the prohibition on formalities of Article 5(2) of the Berne Convention applies not only to the Berne provisions as incorporated by reference in the WCT, but also to the ‘Berne-plus’ rights in the WCT.⁹⁰⁸ This ‘*mutatis mutandis* application’ rule was inspired by the idea that the WCT should be built upon the same cornerstone principles that are definitely established at the international level by the Berne Convention. It was thought that this would put the rights contemplated by the WCT ‘in the proper context of a comprehensive system’.⁹⁰⁹

How Article 5(1) and (2) of the Berne Convention are to be read in the context of the WCT is further clarified in an Agreed Statement. If the original wording of these two paragraphs is re-phrased according to the instruction of the Agreed Statement concerning Article 3 of the WCT, we see how they apply in the WCT context:

‘(1) Authors shall enjoy, in respect of works for which they are protected under *the Berne Convention and the WCT*, in *Contracting Parties to the WCT* other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by *the Berne Convention and the WCT*.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; [...].’⁹¹⁰

Para. 5.1.2 analyzes in more detail how the prohibition on formalities of Article 5(2) of the Berne Convention applies *mutatis mutandis* in the WCT context.

4.6 Conclusion

The previous overview of copyright formalities in the international legal framework has revealed that the introduction of the prohibition on formalities in Article 5(2) of the Berne Convention was greatly inspired by pragmatic reasons. Not long after the

⁹⁰⁷ *Records of the diplomatic conference in Geneva 1996*, para. 1.05, at 170.

⁹⁰⁸ *Ibid.*, para. 2.02, at 172. See also Ficsor 2002, paras C3.01 to C3.07, at 460-464.

⁹⁰⁹ *Records of the diplomatic conference in Geneva 1996*, para. 2.05, at 172.

⁹¹⁰ Art. 5(1) and (2) of the Berne Convention (1971) read according to the instruction (in italics) of the Agreed Statement concerning art. 3 of the WCT. See also Ficsor 2002, para. C1.24, at 434-435.

first bilateral copyright treaties were concluded, calls were made to liberate authors from the multitude of formalities that they must comply with to secure protection in different states. These calls inspired the framers of the Berne Convention to draft a multilateral treaty that would ensure the easiest and most straightforward protection of international copyright, without the requirement for authors to fulfil formalities in each and every contracting state where they seek copyright protection.⁹¹¹

Therefore, the Berne Convention of 1886 adopted the principle that international copyright protection was secured if the formalities in the home country of the work were fulfilled. On this point, an exception was made to the rule of national treatment on which the Berne Convention was founded. In practice, the country of origin rule with respect to formalities raised problems. National courts did not always interpret it correctly and continued to impose domestic formalities on foreign authors seeking protection under the Berne Convention. Moreover, authors experienced difficulty in proving that they enjoyed copyright in the country of origin of the work, especially if this country did not make copyright protection dependent on formalities.

For this reason, the 1908 revision of the Berne Convention introduced the rule of independence of protection and prohibition on formalities. This ensured that authors enjoyed protection under the Berne Convention independently from the existence of protection in the work's country of origin. Therefore authors were no longer obliged to prove that their works were protected in the country of origin. This enabled them to optimally secure international copyright protection without the previous difficulty of establishing that the domestic formalities, if existent, had been fulfilled.

Consequently, at the international level, the prohibition on formalities was based principally on pragmatic rationales and not, as some believe, on principles of natural law.⁹¹² The Berne Convention aimed to 'streamline' copyright protection at the international level without encroaching too seriously on the legal-theoretical basis of copyright or the domestic legislation of individual Union states.⁹¹³ This may explain why the question of formalities did not receive any ideological reflection during the various diplomatic conferences adopting or revising the Berne Convention. Also the early commentaries of the Berne Convention contain no references to natural law as a possible rationale behind the prohibition on formalities. The drafters of the Berne Convention only sought to reconcile the question of copyright formalities for purely international situations. Therefore, they were more concerned with the practicability and political feasibility of the treaty than with ideological considerations.⁹¹⁴

⁹¹¹ See also Kohler 1896, at 341, emphasizing the enormous difficulties that authors could be confronted with if they had to comply with various types of formalities in different countries.

⁹¹² See e.g. Dietz 1978, at 25 (no. 54) and Von Lewinski 2008, at 119 (no. 5.58).

⁹¹³ See Okediji 2004, at 143, arguing that, instead of unilaterally imposing copyright norms on states, the Berne Convention plays a 'coordinating function' to govern the relationships between states.

⁹¹⁴ See Masouyé 1978, at 10, arguing that, for doctrinal reasons or difficulties of translation, the drafters of the Berne Convention explicitly avoided the expressions *droit d'auteur*, copyright or *Urheberrecht* and, instead, used the more neutral terminology 'protection of literary and artistic works'.

However, it seems to be incorrect to completely deny the influence of ideological motivations in relation to the prohibition on copyright formalities. In comparison to owners of industrial property rights, which pursuant to the Paris Convention for the Protection of Industrial Property are required to fulfil formalities in all countries in which they seek protection, the Berne Convention liberated authors from complying with formalities in foreign countries from its early inception. This is often explained by the intricacy and cost of completing formalities in multiple countries. Still, this argument is not completely satisfactory, because the international difficulties are no different for literary and artistic property than they are for industrial property.

The special position of the author may perhaps explain this difference. At the end of the nineteenth century, there was a strong romantic undercurrent in copyright law urging for authorship to be duly protected. It was deemed unfair for authors to lose protection as a result of international obstacles associated with fulfilling formalities. It was said that all authors, even the humblest ones, should be able to reap the fruit of their creative labour. Because, in practice, authors often relied on their publishers for completing formalities in foreign countries, they risked losing protection due to failures that were not their own. This was considered to be unreasonable.

Thus, while it were mostly pragmatic reasons that initiated the introduction of the prohibition on formalities in the Berne Convention, an ideological influence seems to be manifest at least in the background. This is not really surprising, given that the drafting of the Berne Convention was carried out by different national delegations, which certainly were not ignorant of developments in national copyright law at that time. Hence, doctrinal principles, including the natural rights thinking that gained ground in Europe during the nineteenth century, may well have had an influence on the drafting of the Convention.⁹¹⁵

The prohibition on formalities is strongly anchored in contemporary international copyright law. It is included in the Berne Convention and incorporated by reference in the TRIPS Agreement and the WCT. The only convention that does not prohibit formalities, but lays down a uniform and standardized formality – i.e., a ©-notice – is the UCC. Nonetheless, its influence is minor, as most countries nowadays adhere to the Berne Convention, the TRIPS Agreement and/or the WCT.⁹¹⁶

⁹¹⁵ See Grosheide 1986, at 82.

⁹¹⁶ Von Lewinski 2006.