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

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## Chapter 6

# Relativizing the Legal-Theoretical Concerns with Copyright Formalities

As concluded in the preceding chapter, reintroducing copyright formalities with the aim to address the various challenges in current copyright law may require changing or abolishing the international prohibition on formalities. Leaving aside the question of whether this is politically feasible, given that a substantive revision of the Berne Convention requires the unanimous support of all contracting states,<sup>1176</sup> the question emerges whether amending or abrogating the prohibition on formalities corresponds with the rationales behind this prohibition. As observed in Chapter 4, the prohibition on formalities was introduced to eliminate the difficulties of fulfilling formalities at the international level and to prevent that authors unnecessarily lose protection as a result of technical failures in the process of securing copyright. Under the influence of natural rights thinking (para. 3.3.2.1), it was considered that copyright should attach automatically upon creation and not upon completing statutory formalities.

While there are a few legal techniques that may help to prevent that authors must comply with formalities in multiple countries to secure international protection (see Chapter 7), it is more difficult to negate or accommodate the philosophical concerns with copyright formalities. The belief that copyright, as a ‘natural right’, cannot be subject to formalities is still very much alive. Even today, various copyright experts maintain that it would undermine the notion that copyright originates directly from the act of creation if the enjoyment or the exercise of copyright were to be subject to formalities.<sup>1177</sup> Therefore, these philosophical concerns deserve closer examination.

This chapter examines whether the philosophical claim that copyright is a natural right necessarily leads to the conclusion that copyright cannot be made conditional on formalities. To this end, it carefully analyzes the property and personality rights theories of copyright, in which the idea of copyright as a ‘natural right’ has its roots. More specifically, it studies whether, and to what degree, these theories accept that property and personality rights, in general, and copyright, in particular, are subject

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<sup>1176</sup> See art. 27(3) of the Berne Convention. See also Hishinuma 2010, at 471.

<sup>1177</sup> See Ginsburg 1994, at 133-134 and 147. See also Dietz 1978, at 24-25 (nos 53 and 54) and Von Lewinski 2008, at 43 (no. 3.25) and 119 (no. 5.58).

to formalities. In addition, this chapter analyzes whether reintroducing formalities is permitted under the concept of copyright as a human right. This question is relevant, because, by accepting that authors enjoy a fundamental right to receive protection for the creations of their mind, it seems to be implied that copyright belongs ‘naturally’ to authors and should be granted by the mere fact of the creation of their works.

After a brief introduction to the concept of copyright as a natural right (para. 6.1), this chapter continues with an in-depth examination of the leading philosophies that introduced this concept in copyright law, i.e., the property rights theory of copyright (para. 6.2) and the personality rights theory of copyright (para. 6.3). Subsequently, it scrutinizes the concept of copyright as a fundamental right (para. 6.4). The chapter concludes with an evaluation and assessment (para. 6.5), demonstrating that there is no ground for asserting that it is inappropriate to subject copyright as a natural right to formalities. Copyright formalities are inconsistent with the existing philosophical framework only in so far as they affect the personal link between the author and his work, which is manifested in the author’s moral rights, in particular.

## 6.1 Introduction to the Concept of Copyright as a Natural Right

As observed in para. 3.3.2.1, since the mid-nineteenth century, copyright formalities are believed to be inconsistent with the idea that copyright is a ‘natural right’ that is born with the creation of an original work of authorship. This theoretical conception suggests that copyright is a pre-existing right, concretized by positive law, to which authors are entitled by nature.<sup>1178</sup> Thus, copyright is thought not to be created by the law. The law only recognizes its existence and defines its legal boundaries.<sup>1179</sup> Also, this theory links copyright to the very nature of the author’s personal creation. This suggests that authors should not only be rewarded for the efforts they put in creating a work (economic rights), but also be protected against acts that can damage or alter their work or harm their name or reputation (moral rights).<sup>1180</sup> Formalities that must be complied with to secure protection or that would otherwise cause prejudice to the author’s economic or personal interests are in conflict with this concept.

The theory of natural rights is not easy to grasp.<sup>1181</sup> For one thing, it is difficult to understand – at least for lawyers in contemporary civil law systems – how a right

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<sup>1178</sup> Geiger 2008, at 108.

<sup>1179</sup> See Dietz 1978, at 25 (no. 54) and Von Lewinski 2008, at 119 (no. 5.58).

<sup>1180</sup> See Sterling 1998, at 306. Note that moral rights are not recognized in every country worldwide. One of the most well-known examples of countries that do not, or only marginally, protect moral rights is the US. In the UK, moral rights were fully recognized only when the Copyright, Designs and Patents Act 1988 became effective. See Bently & Sherman 2009, at 241-260.

<sup>1181</sup> See Vivant 1997, at 70-71: ‘we do not know, for our part, what is natural law’. See also Geiger 2008, at 108-109: ‘Because of its vagueness, natural law very easily provides the possibility for misuse and manipulation in favour of the opinion which one would like to uphold.’

may exist ‘naturally’, i.e., why it ought to be acknowledged or recognized and thus would be beyond the authority of a legislator to dismiss.<sup>1182</sup> Probably the concept is best understood if one realizes that, historically, natural rights derived from natural law. Natural law is often understood as a law that either comes from God or has its origin in ‘reason’. It prescribes ‘a body of rules, governing human conduct, which were conceived as part of a natural order of things’.<sup>1183</sup> The transition from natural law doctrine to that of subjective natural rights can be explained by the fact that the natural law doctrine ‘assumes the existence of natural rights, inborn in man, that are valid before any positive legal order is established’.<sup>1184</sup> Since natural law is rooted in morality (either that of God or that of ‘reason’), the authority of these pre-existing legal norms is also determined by morality. Hence, something in the natural order of things determines that one is morally entitled to a certain right. This may be referred to as a claim of ‘natural justice’, a claim that typically is of universal application.<sup>1185</sup> It follows that, if such a claim exists, the legislator will also be morally obliged to recognize this right and embody it in positive law. In this respect, the ‘function of a positive legal order (i.e. of the state), which terminates the state of nature, is ... to guarantee the natural rights by stipulating corresponding obligations’.<sup>1186</sup>

As observed, the idea that copyright is a ‘natural right’ arising automatically with the creation of a work can be traced back to the continental European property and personality rights theories of copyright (*droit d’auteur*), which developed in France and Germany in the course of the nineteenth century (see para. 3.3.2.1). These two theories assume the pre-existence of a ‘natural’ entitlement of man to the product of his mind. The property rights theory justifies this claim by arguing, in line with the labour theory of John Locke, that intellectual goods deserve protection because they are the fruits of the author’s labour. This theory thus adopts a largely object-oriented approach. The personality rights theory, on the other hand, states that a work should be protected since it is an expression of the author’s personality. By emphasizing the personal element in the author’s creation to substantiate the claim that copyright is a natural right, this theory essentially takes a subject-oriented approach.

The property and personality rights theories of copyright continue to represent a deep current in contemporary copyright thinking. In the continental European *droit*

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<sup>1182</sup> In both common law and civil law legal systems, the rule of law determines that legal norms must be laid down in a positive legal order to have normative effect. While in the common law legal system, great weight is attached to the body of precedent developed in case law, in the civil law legal system, all norms must be laid down in positive law. There is not much room, therefore, for recognition of a ‘natural’ legal order outside the positive legal order. At the most, in the civil law legal system, natural law is used as a critical standard to evaluate the positive legal order. See Burns 1995, at 27.

<sup>1183</sup> Jones 1994, 72-81, at 74.

<sup>1184</sup> Kelsen 1967, at 129.

<sup>1185</sup> Aristotle (1998), at 124 (book V, sec. 7), already acknowledges that natural justice (as distinguished from legal justice) ‘everywhere has the same force and does not exist by people’s thinking this or that’. See also Buckle 1993, at 162, concluding that, from an Aristotelian point of view, natural justice is ‘independent of particular positive laws, and applies to all people everywhere’.

<sup>1186</sup> Kelsen 1967, at 129.

*d'auteur* tradition, in particular, copyright is still regarded as a mixture of property and personality interests.<sup>1187</sup> The property rights theory is manifested most clearly in the prohibition and reward elements of copyright law, which concentrate chiefly on material interests (i.e., exploitation rights).<sup>1188</sup> The personality rights element, on the other hand, materializes particularly in connection with moral rights, which concern the author's immaterial interest.<sup>1189</sup> The property and personality rights elements of copyright, including their underlying ideologies, also persist in the idea of copyright as a fundamental right. Both the Universal Declaration of Human Rights and other human rights treaties confer on authors the right to benefit from the protection of the moral and material interests resulting from their intellectual creations.<sup>1190</sup>

In the next sections, the property and personality rights theories of copyright and the concept of copyright as a human right are examined with the aim of establishing whether and to what extent they allow a reintroduction of copyright formalities.

## 6.2 The Property Rights Theory of Copyright

One theory is which the concept of copyright as a 'natural right' is manifested is the property rights theory of copyright. This theory suggests that authors are 'naturally' entitled to enjoy the property in their creations, because they result from the labour they invested in them. It has been claimed, on the basis of this theory, that copyright cannot be subject to formalities, because, as a 'natural authorial property right',<sup>1191</sup> it ought to be protected from the moment of creation of a work of authorship.

This section examines the validity of this claim by scrutinizing the philosophical basis of the property rights theory, which can be found in the Lockean labour theory of property (para. 6.2.1), and analyzing how this theory has historically been applied by copyright scholars to substantiate this claim (para. 6.2.2). It concludes that, while the Lockean philosophy explains how property comes into being as a 'natural right' through the labour that a person exerts on natural resources, it does not suggest that property is necessarily absolute and unconditional. In fact, Locke emphasizes that in the civil society, a representative government may always restrict the enjoyment and the exercise of property by positive law, if the public interest so requires.

Even so, as our analysis shows, throughout the history of copyright, the Lockean labour theory of property has been consistently applied, not only to justify copyright protection, but also to support the claim that, as a natural right, copyright should be protected independent of formalities. Because this claim cannot be based on the

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<sup>1187</sup> See Hugenholtz 2001, at 346. See also Kase 1967, at 2: 'Copyright is generally regarded as a form of property, a personal right of the author, or a combination of personal and property rights.'

<sup>1188</sup> Guibault 2006, at 90.

<sup>1189</sup> *Ibid.*, at 90.

<sup>1190</sup> See, in particular, art. 27(2) of the Universal Declaration of Human Rights [UDHR] and art. 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights [ICESCR].

<sup>1191</sup> The phrase 'natural authorial property right' is borrowed from Deazley 2008a, para 2.

philosophy behind natural property, the question arises whether the aversion against formalities is an incident of copyright law or symptomatic for (natural) property law in general. To answer this question, the last part of this section draws a comparison with other private property rights. In particular, it examines how they are regulated and whether they can be subject to formalities (para. 6.2.3). This section reveals that several other types of property rights are conditional on formalities, which suggests that the assumed incompatibility between formalities and (natural) property rights is less obvious than what copyright law seems to imply at first sight.

### 6.2.1 THE PHILOSOPHICAL FOUNDATION OF PROPERTY

One of the main justifications for copyright protection, which has been applied both historically and currently, is that the fruits of the author's personal labour should be his because he has worked for them. This argument, which lays the groundwork for the idea of copyright as a property right, is based on the labour theory of property that was introduced by John Locke in his *Second Treatise on Civil Government*.<sup>1192</sup>

Whether Locke's labour theory of property also extends to intellectual property is uncertain. Legal scholars are divided on this question.<sup>1193</sup> In the part of the *Second Treatise* where Locke explains his labour theory of property, he makes no reference to intellectual property but only to physical and tangible property.<sup>1194</sup> Even so, in the eighteenth and nineteenth centuries, the labour theory of property was often applied by copyright scholars to defend the idea of copyright as a 'natural authorial property right'<sup>1195</sup> and, later, also to make a case for disentangling copyright and formalities (see para. 6.2.2). But even today, scholars repeatedly refer to it as a justification for copyright,<sup>1196</sup> arguing that, given the labour that authors put into creating their works, they are 'naturally' entitled to enjoy the fruits of their creations.<sup>1197</sup>

Although the question of whether the Lockean labour theory of property may be applied analogously to copyright is interesting and challenging, it goes beyond the

<sup>1192</sup> See Locke 1690 (1988), II (at 265-428) and, in particular, Chapter V: 'Of property' (at 285-302), in which Locke describes his labour theory of property. In this book, the indications I and II refer to the First Treatise and the Second Treatise of Locke's *Two Treatises of Government*, respectively.

<sup>1193</sup> Some scholars assert that Locke's labour theory of property also applies to intellectual property (see e.g. Zemer 2006, at 897 and 906-935), while other scholars argue that, at the most, it can be applied *mutatis mutandis* to the intangible realm (see e.g. Gordon 1993, at 1558-1559 and Reese 1995, at 708 and 710) or that it does not extend to intellectual property (see e.g. Drahos 1996, at 47, Craig 2002, at 21, Epstein 2005, at 21 and Deazley 2008a, para. 7).

<sup>1194</sup> See Locke 1690 (1988), II, Chapter V: 'Of property' (at 285-302), where he gives various examples of conventional property, such as land (sec. 32); products from agriculture (sec. 37), forestry (sec. 43) and fishery (sec. 30); and industrial goods (secs 42 and 43), but not of intellectual property.

<sup>1195</sup> The phrase 'natural authorial property right' is borrowed from Deazley 2008a, para 2.

<sup>1196</sup> See e.g. Hughes 1988, Gordon 1993, Senftleben 2004, at 10-12 and Zemer 2006.

<sup>1197</sup> See Craig 2002, at 15-21, for an exhaustive overview of case law and scholarly writings applying the labour theory of property to support the idea of a 'natural' entitlement to authorial creations.

scope of this book. More interesting for our research is the question of whether the labour theory of property – supposing that it can be applied to intellectual property, in general, and copyright, in particular – gives reason for the claim that copyright as a natural authorial property right ought to be protected without formalities.

This section examines this question by analyzing the Lockean labour theory of property (para. 6.2.1.1) and placing it in the broader context of the *Second Treatise*. In particular, it investigates how property is regulated in Locke's civil and political society (para. 6.2.1.2) and whether property in the civil and political society can still be acquired by labour (para. 6.2.1.3). It concludes that Locke's concept of property by labour does not prevent property rights from being statutorily limited or subject to formalities if there is a legitimate public interest for doing so (para. 6.2.1.4).

#### 6.2.1.1 THE LOCKEAN LABOUR THEORY OF PROPERTY

A central theme in Locke's *Second Treatise on Civil Government* is to explain why natural persons are entitled to the protection of their property, which he understands to include people's 'Lives, Liberties and Estates',<sup>1198</sup> in civil society. Locke believes that civil society is created precisely to protect property that people have acquired in the 'state of nature', thereby presupposing that property exists independently of and prior to the creation of civil society.<sup>1199</sup> Thus, Locke differentiates civil society from the pre-political state of nature, which he describes as a state of perfect freedom in which all men are equal. In the state of nature, every individual has legislative and judicial powers as well as 'the Executive Power of the Law of Nature'.<sup>1200</sup>

In his labour theory, Locke assumes that anyone in the state of nature can acquire property by appropriating the commons through his labour. He argues that, although God has given the earth and all the fruits that it naturally produces to mankind in common, 'there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man.'<sup>1201</sup> He finds this means of appropriation of the commons in the labour that man exerts upon natural resources. Because Locke believes that any person owns himself and, therefore, his own labour, the object that a person's labour enters into becomes the property of this person naturally. He expresses this as follows:

'every Man has a *Property* in his own *Person*. ... The *Labour* of his *Body*, and the *Work* of his *Hands* ... are properly his. Whatsoever then he removes out of the *State* that *Nature* hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state *Nature* placed it

<sup>1198</sup> Locke 1690 (1988), II, secs 87 (at 323) and 123 (at 350).

<sup>1199</sup> Strauss 1952, at 489.

<sup>1200</sup> Locke 1690 (1988), II, secs 4 (at 269) and 13 (at 275).

<sup>1201</sup> *Ibid.*, II, sec. 26 (at 286-287).

in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.<sup>1202</sup>

What Locke describes here is that, as long as there is ‘enough, and as good left in common for others’, man can by his labour acquire a property in the commons. In a subsequent section, he adds that, although the state of nature is a state of plenty,<sup>1203</sup> ‘nothing was made by God for Man to spoil or destroy’. For this reason, he believes that a person can appropriate only as much as he can make use of ‘to any advantage of life before it spoils’.<sup>1204</sup> All the rest must remain in the commons.<sup>1205</sup>

Apart from the ‘enough and as good’ and ‘no spoliation’ criteria, Locke’s labour theory contains no other limitations to the natural appropriation of property.<sup>1206</sup> This suggests that the Lockean concept of natural appropriation is fairly broad and leaves little room for regulating naturally acquired property. If applicable to copyright law, the ‘enough and as good’ criterion may explain the idea/expression dichotomy<sup>1207</sup> or perhaps certain free speech exceptions under copyright law, such as quotations and parodies.<sup>1208</sup> Likewise the ‘no spoliation’ provision may perhaps validate the limited duration of copyright.<sup>1209</sup> But, in general, Locke’s labour theory of property does not seem to justify the introduction of a statutory regime of limitations or formalities in copyright law. This can be explained by the simple fact that, because the setting of Locke’s labour theory is the state of nature, which is not centrally administered but characterized by individual liberty, it is not concerned with the prospect of imposing statutory or government-regulated limits on naturally acquired property.<sup>1210</sup>

Arguing that the inherent limitations of just appropriation are the only limitations to naturally acquired property, however, is incorrect and misleading. Locke clearly distinguishes the state of nature from the civil and political society. He argues that,

<sup>1202</sup> Ibid., II, sec. 27 (at 287-288).

<sup>1203</sup> Ibid., II, sec. 31 (at 290), where Locke, in explaining this state of plenty, cites the New Testament (1 Tim. vi. 12): ‘*God has given us all things richly*’.

<sup>1204</sup> Ibid., II, sec. 31 (at 290). But see, *ibid.*, secs 46 to 50 (at 300-302), stating that the introduction of ‘durable’ goods and money, in particular, gave a person the opportunity ‘to heap up as much ... as he pleased’, thus suggesting that storage of goods is an accepted phenomenon in the state of nature.

<sup>1205</sup> Ibid., II, sec. 31 (at 290), in which Locke readily admits that, in the state of nature, the ‘same Law of Nature, that does by this means give us Property, does also *bound that Property* too’.

<sup>1206</sup> But see Macpherson 1951, at 560-565, reading a third limitation in the *Second Treatise*, namely, that a person can only appropriate as much as he has mixed his labour with, thus suggesting that a person cannot acquire more property than he can produce. However, Macpherson admits that it is uncertain whether such ‘limitation on the natural right to appropriate’ was ever entertained by Locke.

<sup>1207</sup> See Hughes 1988, at 314: ‘some ideas and facts cannot be removed from the common because there would not be the slightest chance of there being “enough and as good” afterwards’.

<sup>1208</sup> See Gordon 1993, at 1583 et seq. See also Senftleben 2004, at 34-41.

<sup>1209</sup> See e.g. Zemer 2006, at 924-925, arguing that, after some time, works must enter the public domain to prevent ‘spoilage of social value’.

<sup>1210</sup> See Strauss 1952, at 491 et seq.

despite the legislative, judicial and executive powers of the law of nature, people in the state of nature cannot appropriately protect their lives, liberties and estates, since they are constantly exposed to possible infringement of their natural rights by other individuals.<sup>1211</sup> The insecurities of the state of nature induce people to exit this state and join the civil and political society. Accordingly, for Locke, the ultimate purpose for creating this society is the preservation of people's lives, liberties and estates.<sup>1212</sup> As the following section shows, when entering the civil and political society, people subject themselves and their property to a representative government that can enact binding laws that may limit private property for public interest objectives.

### 6.2.1.2 THE REGULATION OF PROPERTY IN THE CIVIL SOCIETY

Although the state of nature that Locke portrays in his *Second Treatise*, in theory, is 'a *State of perfect Freedom ... and ... Equality*' that 'has a Law of Nature to govern it',<sup>1213</sup> in reality, it is a state of insecurity. Since everyone is free and equal, the lives, liberties and estates of people are 'constantly exposed to the Invasion of others',<sup>1214</sup> Most people are 'no strict Observers of Equity and Justice'.<sup>1215</sup> Also, since people in the state of nature favour themselves, their legislative, judicial and executive powers cause injustice. It is difficult for men in the state of nature 'to be Judges in their own Cases', because self-love makes 'Men partial to themselves and their Friends' and ill-nature, passion and revenge carries them too far in punishing others.<sup>1216</sup>

For Locke, the state of nature is 'not to be endured',<sup>1217</sup> for it fails to sufficiently safeguard the right of self-preservation, which he believes is 'the most fundamental of all rights'.<sup>1218</sup> He thinks that this is the most important reason for people to leave the state of nature: 'The great end of Mens entering into Society is the enjoyment of their Properties in Peace and Safety'.<sup>1219</sup> By creating the civil and political society, people may remedy the various inconveniences of the state of nature.<sup>1220</sup>

Locke maintains that the logical consequence of this is that the social contract by which people, of their own free will, enter the civil society, obliges them to 'give up

<sup>1211</sup> Locke 1690 (1988), II, sec. 123 (at 350).

<sup>1212</sup> Ibid., II, sec. 124 (at 350-351): 'The great and *chief end* ... of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property.'

<sup>1213</sup> Ibid., II, secs 4 (at 269) and 6 (at 271).

<sup>1214</sup> Ibid., II, sec. 123 (at 350).

<sup>1215</sup> Ibid., II, sec. 123 (at 350).

<sup>1216</sup> Ibid., II, secs 13 (at 275) and 125 (at 351).

<sup>1217</sup> Ibid., II, sec. 13 (at 276).

<sup>1218</sup> Strauss 1952, at 483. See Locke 1690 (1988), I, sec. 88 (at 206): 'The first and strongest desire God Planted in Men, and wrought into the very Principles of their Nature being that of Self-preservation'.

<sup>1219</sup> Locke 1690 (1988), II, sec. 134 (at 355).

<sup>1220</sup> Ibid., II, secs 13 (at 276), 90 (at 326), 127 (at 325) and 136 (at 359).

all their Natural Power to the Society they enter into'.<sup>1221</sup> Furthermore, 'because no *Political Society* can be nor subsist without having in itself the Power to preserve the Property',<sup>1222</sup> each member of the society must authorize 'the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require'.<sup>1223</sup> By this political contract, people subject themselves to the 'Supreme Government',<sup>1224</sup> and assign the power to a '*Legislative*, which the publick has chosen and appointed' and which is 'acting pursuant to their trust'.<sup>1225</sup>

Accordingly, when entering society, people 'take Sanctuary under the establish'd laws of Government, and therein seek *the preservation of their Property*',<sup>1226</sup> i.e. 'of their Lives, Liberties and Estates'.<sup>1227</sup> Thus, while the state of nature is governed by natural law, the civil and political society has positive laws to govern it.<sup>1228</sup> Locke, in fact, attaches great importance to positive law,<sup>1229</sup> provided that it be 'indifferent, and the same to all Parties'<sup>1230</sup> and enacted by a representative government to whom the power of the members of society has been transferred by fiduciary contract.<sup>1231</sup> Locke believes that laws so enacted represent '*the consent of the Society*',<sup>1232</sup> and for this reason can rightfully bind the members of the civil and political society.<sup>1233</sup>

Locke asserts that people entering the civil society submit all their possessions to the laws of the community.<sup>1234</sup> By subjecting themselves to government, they confer the power on the legislature 'to make Laws for the regulating of *Property* between the Subjects one amongst another'.<sup>1235</sup> Even so, he adds that governments 'can never have a Power to take to themselves the whole or any part of the Subjects Property, without their own consent'.<sup>1236</sup> He reasons that 'this would be in effect to leave them no *Property* at all', while the preservation of property, being the end of civil society,

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<sup>1221</sup> Ibid., II, sec. 136 (at 359). Ibid., II, secs 87 to 89 (at 323-325).

<sup>1222</sup> Ibid., II, sec. 87 (at 324).

<sup>1223</sup> Ibid., II, sec. 89 (at 325).

<sup>1224</sup> Strauss 1952, at 487.

<sup>1225</sup> Locke 1690 (1988), II, secs 134 (at 356) and 240 (at 426-427).

<sup>1226</sup> Ibid., II, sec. 127 (at 352).

<sup>1227</sup> Ibid., II, secs 87 (at 323) and 123 (at 350).

<sup>1228</sup> Ibid., II, sec. 136 (at 359): 'the Community put the Legislative Power into such hands as they think fit, with this trust, that they shall be govern'd by *declared Laws*'.

<sup>1229</sup> Strauss 1952, at 489. See Locke 1690 (1988), II, sec. 124 (at 351), arguing that what was wanting in the state of nature is 'an *establish'd*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them', and sec. 134 (at 355), referring to positive law in the civil and political society as 'the great instrument and means' to ensure that people can enjoy 'their Properties in Peace and Safety'.

<sup>1230</sup> Locke 1690 (1988), II, sec. 87 (at 324). Ibid., II, sec. 142 (at 363).

<sup>1231</sup> Ibid., II, sec. 94 (at 329-330), on the representative government, and secs 134 (at 356) and 240 (at 426-427), on the fiduciary contract of assignment of powers.

<sup>1232</sup> Ibid., II, sec. 134 (at 356).

<sup>1233</sup> Ibid., II, secs 95 to 99 (at 330-333).

<sup>1234</sup> Ibid., II, sec. 120 (at 348).

<sup>1235</sup> Ibid., II, sec. 139 (at 361).

<sup>1236</sup> Ibid., II, sec. 139 (at 361).

‘necessarily supposes and requires, that the People should *have Property*’.<sup>1237</sup> Thus, governments cannot ‘dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure’.<sup>1238</sup> If they want to restrict or take away a man’s property, they can only do so ‘with his own consent, *i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them’.<sup>1239</sup>

Consequently, Locke reasons that in the civil and political society, the enjoyment and the exercise of property can be restricted by positive law, provided that this law is issued by a representative government. Nonetheless, there are limits to the degree to which governments can regulate private property. Locke states: ‘the power of the Society, or *Legislative* constituted by them, *can never be suppos’d to extend farther than the common good*’.<sup>1240</sup> Thus, all laws should be designed for ‘no other *end*, but the *Peace, Safety*, and *publick good* of the People.’<sup>1241</sup> Also, Locke maintains that all laws must ‘be conformable to the Law of Nature, *i.e.* to the will of God, of which that is a Declaration.’<sup>1242</sup> This means that, since ‘the *fundamental Law of Nature* [is] *the preservation of Mankind*’, all ‘*Humane Laws*’ should be directed to no other end but preservation as well.<sup>1243</sup> Hence, the government ‘is obliged to secure every ones Property’,<sup>1244</sup> but only ‘as far as is possible’.<sup>1245</sup> Some limitations to private property must be set if that is required for ‘the preservation of ... the rest of that Society’.<sup>1246</sup> This explains why Locke asserts that, when entering the civil and political society, people give up their natural power and put it ‘into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require’.<sup>1247</sup>

### 6.2.1.3 PROPERTY BY LABOUR IN THE CIVIL SOCIETY

The preceding section has shown that, in Locke’s civil and political society, private property is not necessarily absolute and unconditional but can be subject to statutory limitations issued for public interest considerations. The question remains what then is left of the Lockean labour theory of property. Does it still have normative value in Locke’s construction of the civil and political society? Or was it mainly introduced by Locke to justify the creation of the civil and political society (given that, if Locke

<sup>1237</sup> Ibid., II, secs 138 (at 360) and 139 (at 361).

<sup>1238</sup> Ibid., II, sec. 138 (at 361).

<sup>1239</sup> Ibid., II, sec. 140 (at 362).

<sup>1240</sup> Ibid., II, sec. 131 (at 353).

<sup>1241</sup> Ibid., II, secs 131 (at 353) and 142 (at 363).

<sup>1242</sup> Ibid., II, sec. 135 (at 358), where Locke unambiguously remarks that ‘the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others’.

<sup>1243</sup> Ibid., II, sec. 135 (at 357-358).

<sup>1244</sup> Ibid., II, sec. 131 (at 353).

<sup>1245</sup> Ibid., II, sec. 88 (at 324-325).

<sup>1246</sup> Ibid., II, sec. 129 (at 352).

<sup>1247</sup> Ibid., II, sec. 131 (at 353). Ibid., II, secs 89 (at 325), 134 (at 355-356) and 135 (at 357).

maintains that the end of society is the preservation of property, he must also prove that property predates society)? Put differently, the question is whether, in the civil and political society, property can still be perceived as a ‘natural right’ arising from labour or whether it must be seen as a creation of positive law *pur et simple*.

Some scholars, including well-known political philosophers such as Leo Strauss, think that labour alone is insufficient to establish a title to property in Locke’s civil and political society.<sup>1248</sup> Strauss argues that while labour was the only valid property title in the state of nature, in the civil and political society ‘the natural law regarding property ceases to be valid’.<sup>1249</sup> He thinks that, in order to regulate property between the subjects of society, the government should define what property can be acquired and to which extent things can actually be propertized.<sup>1250</sup> This suggests that, in the civil and political society, property can be regulated by positive law only.<sup>1251</sup>

However, to say that, in the civil and political society, labour alone is insufficient to supply a title to property and that ‘once civil society is formed ... the natural law regarding property ceases to be valid’<sup>1252</sup> is not to say that, in the civil and political society, a valid property title cannot begin by labour. Locke states that ‘Man ... had still in himself *the great Foundation of Property*’.<sup>1253</sup> Although people ‘by *positive agreement, settled a Property amongst themselves*’,<sup>1254</sup> he thinks that they can still acquire property by exerting labour upon natural resources. He explains:

‘And amongst those who are counted the Civiliz’d part of Mankind, who have made and multiplied positive Laws to determine Property, this original Law of Nature for the *beginning of Property*, in what was before common, still takes place’.<sup>1255</sup>

Thus, in the civil and political society, property can still be acquired by exerting labour on the commons. Nevertheless, positive law determines the extent to which it can be enjoyed and exercised by members of the society.<sup>1256</sup> This does not mean that

<sup>1248</sup> Strauss 1952, at 493 (‘One privilege enjoyed by man in the state of nature is indeed denied to man living in civil society: labor no longer creates a sufficient title to property’) and 495 (‘Labor ceases to supply a title to property in civil society’).

<sup>1249</sup> *Ibid.*, at 489-490.

<sup>1250</sup> *Ibid.*, at 498. See Locke 1690 (1988), II, sec. 50 (at 302): ‘For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions.’

<sup>1251</sup> Strauss 1952, at 489 and 495.

<sup>1252</sup> *Ibid.*, at 489.

<sup>1253</sup> Locke 1690 (1988), II, sec. 44 (at 298).

<sup>1254</sup> *Ibid.*, II, sec. 45 (at 299).

<sup>1255</sup> *Ibid.*, II, sec. 30 (at 289). *Ibid.*, II, sec. 28 (at 288-289), where Locke remarks: ‘We see in Commons, which remain so by Compact, that ‘tis the taking any part of what is common, and removing it out of the state Nature leaves it in, which *begins the Property*’. In Locke’s *Second Treatise*, civil society, political power and positive laws are created by ‘compact’. See e.g. Laslett 1988, at 113-114.

<sup>1256</sup> See Macpherson 1951, at 562, suggesting that, in the civil and political society, property acquired by labour is not an entity of natural law.

property in the civil and political society is a purely statutory creation.<sup>1257</sup> Rather, society demands it to be clearly defined and regulated by positive law, so as to keep order and peace between its individual members.<sup>1258</sup>

#### 6.2.1.4 CONCLUSION

The Lockean concept of property by labour is not as absolute and unconditional as it appears at first sight. Although the limitations to the appropriation of property in the state of nature leave little room for regulating property that a man naturally acquires by labour, the limits that can be put to the enjoyment and the exercise of property in the civil and political society are relatively broad. While governments are generally obliged to secure private property and, therefore, cannot arbitrarily deprive a person of his rightful possessions, they may limit and even take away a person's property if that is required for the attainment of regulatory or public interest objectives.

Accordingly, assuming that the Lockean labour theory of property also applies to intellectual property, it can be concluded that, from a Lockean viewpoint, copyright can always be statutorily restricted if that would be in the public interest. This sheds new light on the possibility of subjecting it to formalities. Although copyright under the labour theory can be said to arise from the creation of a work, the legislator may always decide to subject its enjoyment or exercise to formalities if there are genuine public interests that take priority over the private interests of copyright owners.

As a sidenote, on one occasion, Locke has even proposed subjecting copyright to formalities. This occurred in his *Memorandum on the 1662 Licensing Act*<sup>1259</sup> and the correspondence on the same topic with John Freke and Edward Clarke.<sup>1260</sup> In these writings, Locke strongly opposed the perpetual monopoly that the London stationers enjoyed pursuant to the Licensing Act of 1662.<sup>1261</sup> Responding to a petition in which the stationers heartily called for a continuation of their printing monopoly,<sup>1262</sup> Locke stated that it would be better if Parliament would 'secure the Authors property in his copy, or his to whom he has transferd it'.<sup>1263</sup> He proposed granting to authors a right to reprint on condition that the work was marked with the author's or the publisher's name or that three copies of any printed work were deposited for the use of the royal

<sup>1257</sup> See Strauss 1952, at 497-498, arguing that, because property antedates society and members of the society can still acquire it by labour, it must exist independently of the civil and political society.

<sup>1258</sup> *Ibid.*, at 494.

<sup>1259</sup> 'Locke's Memorandum on the 1662 Act', in: De Beer 1976-1989, V (1979), 785-791, and *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>1260</sup> For this correspondence, see De Beer 1976-1989, V (1979), at 282-283 (letter no. 1856), at 288-289 (letter no. 1858), at 291-292 (letter no. 1860), at 294-295 (letter no. 1862) and at 785-796.

<sup>1261</sup> See Astbury 1978 and Deazley 2008a.

<sup>1262</sup> See 'John Freke and Edward Clarke to Locke, 14 March [1695]', in: De Beer 1976-1989, V (1979), at 291-292 (letter no. 1860), indicating that members of the Stationers' Company urged Parliament to secure 'the regulation of property and disposal of it by making their Register the Standard of it'.

<sup>1263</sup> 'Locke's comments on the Licensing Bill, 1695', in: De Beer 1976-1989, V (1979), 795-796, at 795.

library and the public libraries of the Universities of Oxford and Cambridge.<sup>1264</sup> The certificate of deposit should vest in the author the sole right to reprint and to publish the work. To this effect, he proposed adopting a provision along these lines:

‘A receipt under the hand of the Kings Library Keeper and under the hand of the Vice Chancellor of each university to whom they are deliverd who are hereby required to give such receipts, for the said books, shall vest a priviledg in the Author of the said book his executors administrators and assignes of solely reprinting and publishing the said book for \_\_\_\_ years from the first edition thereof.’<sup>1265</sup>

Accordingly, although Locke condemned the stationers’ abuse of the registration process and their ignorance of the deposit requirement,<sup>1266</sup> his writings reveal that he did not at all object to subjecting the protection of copyright (in particular, authors’ rights) to compliance with statutory formalities – perhaps because this would pursue certain public interest objectives that were at the heart of his *Memorandum*, such as the enhancement of public access to literature and scholarship, the stimulation of the dissemination of information and the encouragement of study.<sup>1267</sup>

#### 6.2.2 THE IDEA OF COPYRIGHT AS A NATURAL PROPERTY RIGHT

Although it is uncertain whether the Lockean labour theory of property is applicable to copyright, in the eighteenth and nineteenth centuries, it was consistently invoked by scholars to prove that copyright is a natural property right that vests in the author and originates from authorial labour.<sup>1268</sup> The idea was introduced by book publishers in various European countries. In an attempt to protect their business, they prompted debates about the special nature of literary property, arguing that books are the fruits of creative labour and thus the property of their creators.<sup>1269</sup> This allowed publishers to retain their monopoly, as authors usually assigned all their rights to them.

From the mid-nineteenth century onwards, Locke’s labour theory of property was called upon once again, this time to support the idea that, as a natural property right, copyright should be protected ‘automatically’ with the creation of a work. It was on

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<sup>1264</sup> *Ibid.*, at 795-796.

<sup>1265</sup> *Ibid.*, at 796.

<sup>1266</sup> ‘Locke’s Memorandum on the 1662 Act’, in: De Beer 1976-1989, V (1979), 785-791, at 786, where Locke argues that stationers sometimes abused the register for their own gain, and 790-791, where he states that they often deliberately neglected the deposit obligation under the 1662 Licensing Act.

<sup>1267</sup> See Zemer 2006, at 899-900 and 900-905.

<sup>1268</sup> See e.g. Kamina 2001, at 390, Pfister 2005, at 124 (footnote 20) and Deazley 2008a, paras 2 and 7.

<sup>1269</sup> See Kase 1967, at 8 (and the references therein) and Gieseke 1995, at 115-135. See also Ladas 1938, I, at 5, describing that the idea of intellectual property rights was first advanced in eighteenth-century Germany and from there spread to other continental European countries, such as France.

the strength of this argument that, in continental European states in particular, calls were made to protect copyright independently from compliance with formalities.

To explain how the idea of copyright as a natural authorial property right entered the copyright arena and ultimately gave rise to the belief that copyright ought to be protected independently of formalities, this section describes the binary application of the Lockean labour theory of property in the field of copyright law in eighteenth and nineteenth century Europe. It explains how this theory was used to make a case for property in intellectual creations (para. 6.2.2.1) and for disentangling copyright and formalities (para. 6.2.2.2). It will be seen that scholars invoking Lockean theory to substantiate their case merely concentrated on the part where Locke explained his labour theory, without putting this theory in the broader context of Locke's civil and political society. The outcomes are therefore misleading. Although the labour theory may explain why copyright vests in the author, we have seen that it does not support the idea that copyright is absolute and unconditional and therefore cannot be subject to formalities. Even so, toward the end of the nineteenth century the idea spread that authors should enjoy a 'natural' and formality-free property in their creations.

#### 6.2.2.1 THE RECOGNITION OF PROPERTY IN INTELLECTUAL WORKS

In the UK, after the adoption of the 1710 Statute of Anne, publishers faced a loss of their monopoly. Unlike the perpetual right that they enjoyed under the old system of stationers' copyright, the Statute of Anne granted a limited copyright term only.<sup>1270</sup> In order to protect their book monopoly, they started a relentless campaign, known as the 'Battle of the Booksellers', for restoring perpetual copyright.<sup>1271</sup> To add force to their claims, the UK book publishers argued that, independently of the statutory copyright granted by the Statute of Anne, authors enjoyed a pre-existing, perpetual copyright at common law.<sup>1272</sup> This claim was based on the Lockean notion that the product of the mind is, by right, the 'natural' property of its creator.<sup>1273</sup>

At first, it seemed that the publishers indeed succeeded in their strategy. In 1769, the Court of King's Bench ruled, in the case of *Millar v. Taylor*,<sup>1274</sup> that the author

<sup>1270</sup> The Statute of Anne granted a twenty-one year term of protection for already existing copyrights (i.e. the old stationers' copyright). For new statutory copyrights, it granted a term of protection of fourteen years, after the expiration of which copyright automatically returned to the living author for another term of fourteen years. See secs I and XI of the Statute of Anne (1710).

<sup>1271</sup> For an exhaustive discussion of the 'Battle of the Booksellers', see Patterson 1968, at 154-179.

<sup>1272</sup> Sherman & Bently 1999, at 12. See also Patterson 1968, at 15 and 153, explaining that, should this argument be accepted by the courts, the door stood open for UK publishers to preserve their perpetual monopoly, because in those days it was common that authors assigned all their rights to them.

<sup>1273</sup> See Lord Mansfield in *Millar v. Taylor*, 98 *Eng. Rep.* 201, at 252, 4 *Burr.* 2303, at 2398 (Court of King's Bench, 1769), arguing that 'it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish'. See also Enfield 1774, at 21.

<sup>1274</sup> *Millar v. Taylor*, 4 *Burr.* 2303, 98 *Eng. Rep.* 201 (Court of King's Bench, 1769).

of a book maintained a common law copyright after publication and that this right was not abolished by the Statute of Anne. Hence, in this case, the court recognized that under common law, authors enjoyed a natural property right in their work.<sup>1275</sup> In 1774, however, the *Millar* ruling was reversed by the House of Lords in the case of *Donaldson v. Beckett*.<sup>1276</sup> While the House of Lords acknowledged that authors of unpublished literary works possessed a copyright at common law, it held that, after publication, the Statute of Anne put an end to this right. Following the publication of a work, authors could obtain protection by virtue of the statute only.<sup>1277</sup> In 1854, the House of Lords confirmed this reading in the case of *Jeffreys v. Boosey*.<sup>1278</sup> As a consequence, it became widely accepted in the UK that ‘the property of authors in their published productions depends entirely upon statutory enactment, and that no common law privilege remains, even supposing that it ever existed’.<sup>1279</sup>

The *Donaldson* case is generally considered to have settled the statutory basis of copyright law, limiting copyright in published works to the statutorily determined rights and obligations. Nevertheless, this did not stop the belief that authors enjoy a ‘natural’ property right in their works.<sup>1280</sup> As one commentator explains: ‘Attitudes as to the existence of the common law right ... waxed and waned throughout the nineteenth century’.<sup>1281</sup> In 1798, for example, the Court of King’s Bench ruled that, even after publication, common law remedies remained applicable (see para. 3.2.2.1 above).<sup>1282</sup> Moreover, the early-nineteenth century debates on copyright term reveal that authors like Robert Southey and William Wordsworth asserted that they should be ‘naturally’ entitled to enjoy copyright in perpetuity.<sup>1283</sup> Even so, by its ruling in the *Jeffreys v. Boosey* case, the House of Lords firmly established UK copyright ‘as a purely statutory phenomenon specifically grounded in public interest concerns’, thus rejecting the idea of copyright as a ‘natural authorial property right’.<sup>1284</sup>

<sup>1275</sup> Patterson 1968, at 15 and 170-172. Note, however, that the *Millar* case was decided by a majority of three to one, with a dissenting opinion rendered by Justice Yates, who argued (4 *Burr.* 2303, at 2359, 98 *Eng. Rep.* 201, at 231): “‘That every man is intitled to the fruits of his own labour”, I readily admit. But he can only be intitled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules of property’. He found that the stationers’ claim did not fall within any known kind of property at common law. Therefore, he asserted that the only copyright was the statutory copyright. See 4 *Burr.* 2303, at 2386, 98 *Eng. Rep.* 201, at 245-246.

<sup>1276</sup> *Donaldson v. Beckett*, 4 *Burr.* 2408, 98 *Eng. Rep.* 257, 2 *Brown’s Parl. Cases* 129, 1 *Eng. Rep.* 837 (House of Lords, 1774).

<sup>1277</sup> This is how most legal scholars explain the *Donaldson* case. But see Deazley 2006, at 13-25, arguing that, contrary to current beliefs, the House of Lords in the *Donaldson* case did not acknowledge, but in fact rejected, the existence of a common law copyright in the author’s unpublished manuscript.

<sup>1278</sup> *Jeffreys v. Boosey*, 10 *Eng. Rep.* 681, 4 *H.L.C.* 815 (House of Lords, 1854).

<sup>1279</sup> Chappell & Shoard 1863, at 1.

<sup>1280</sup> See Rose 1993, at 107-112.

<sup>1281</sup> Deazley 2006, at 27.

<sup>1282</sup> *Beckford v. Hood*, 101 *Eng. Rep.* 1164, 7 *T.R.* 620 (Court of King’s Bench, 1798).

<sup>1283</sup> For a comprehensive account of, and references to their writings, see Bently 2008, at 68-71.

<sup>1284</sup> Deazley 2008c, para. 2. See also Deazley 2006, at 56-67.

On the European mainland, the idea of intellectual property set off along similar lines as in the UK, although it developed in a different direction in the course of the nineteenth century. In France, the theory of literary property was introduced by the Parisian booksellers, who wished to validate their claim for protection in an attempt to counter the protests of provincial booksellers against their printing monopoly.<sup>1285</sup> In the seventeenth and eighteenth centuries, the French book trade had largely been monopolized by Parisian booksellers, who were given an important task in assisting the censor, thus enabling them to exercise a strict control over competing publishers from the provinces. Moreover, Parisian booksellers were favoured by the Crown in the granting and renewal of book privileges.<sup>1286</sup> The provincial publishers found this unacceptable and protested strongly, in particular when in 1723 the Parisian printing monopoly was strengthened by the then adopted *Code de la Librairie*.<sup>1287</sup>

In defending their monopoly, the Parisians sought justification for the protection that they were granted by way of royal privileges. Instead of relying upon economic necessity or historical precedent, they supported their claim by appealing to the idea of a property right that originates in natural law.<sup>1288</sup> In 1725, they requested Louis d'Héricourt, attorney at law, to prepare a report. In this report, D'Héricourt firmly rejected the idea that publishers become the owners of a work by royal privilege. He pleaded that the property of the work initially accrues to its author. Only through the acquisition of the manuscript is it transferred to the publisher. He argued:

‘a Manuscript ... is so much the property of its Author, that it is no more permissible to deprive him of it than it is to deprive him of money, goods, or even land; since, as we have observed, it is the fruit of his personal labour, which he must be at liberty to dispose of as he pleases, in order to obtain, in addition to the glory to which he might aspire, a profit which might supply his own needs, and even those of any persons who are connected to him’.<sup>1289</sup>

By invoking the Lockean claim that a work is the fruit of the author's personal labour, D'Héricourt argued that privileges did not constitute the printing monopoly, but merely acknowledged the ‘natural’ property rights of authors.<sup>1290</sup> This suited the Parisian booksellers perfectly. Pursuant to the *Code de la Librairie*, only designated

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<sup>1285</sup> Kamina 2001, at 388-389.

<sup>1286</sup> See Birn 1970, explaining the emergence of the book monopoly of the favoured Parisian publishers and analyzing the resulting conflict with the non-favoured provincial publishers.

<sup>1287</sup> On the *Code de la Librairie*, see para. 3.1.1.3 above.

<sup>1288</sup> Birn 1970, at 144. See also Dock 1962, at 115-118.

<sup>1289</sup> Louis d'Héricourt's memorandum (1725-1726), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org, transl. by A. Counter. The original phrase reads as follows (at 2-3): ‘qu'un Manuscrit ... est, en la personne de l'Auteur, un bien qui lui est rellement propre, qu'il n'est pas plus permis de l'en dépouiller que de son argent, de ses meubles, ou même d'une terre; parce que, comme nous l'avons observe, c'est le fruit du travail qui lui est personnel, dont il doit avoir la liberté de disposer à son gré, pour se procurer, outre l'honneur qu'il en espère, un profit qui lui procure ses besoins, et même ceux des personnes qui lui sont unies’.

<sup>1290</sup> Birn 1970, at 145.

*libraires* or *imprimeurs* were allowed to trade in books.<sup>1291</sup> As a result, authors had no choice but to abstain from publication or to transfer the ownership of their works to them. This allowed the Parisian booksellers to continue their monopoly.

In the 1760s, on the occasion of another address from the Parisian booksellers to defend their interests before the royal administration,<sup>1292</sup> the idea that authors have a pre-existing property in intellectual works was once more emphasized. This address, which was based on a letter from the French philosopher Denis Diderot,<sup>1293</sup> echoes D'Héricourt's views. To support the booksellers' monopoly, Diderot also argued in favour of private property in literary works,<sup>1294</sup> stating that royal privileges only recognized the property that authors 'naturally' possess as a result of creating their works.<sup>1295</sup> Thus Diderot believed that literary property did not find its origin in royal privileges. He merely regarded the latter as positive acts that officially approved the contract of transfer of literary property from the author to the bookseller.<sup>1296</sup>

The idea of literary and artistic property became more firmly established after the old book privilege system was replaced by the French revolutionary decrees of 1791 and 1793. These decrees treated intellectual works as private property, enduring for five or ten years after the author's death.<sup>1297</sup> Consequently, copyright was no longer seen as a public grant (a privilege), but as a private property right protected by civil law.<sup>1298</sup> In addition, because the Declaration of the Rights of Man of 1789 regarded property as 'an inviolable and sacred right' that is included among 'the natural and imprescriptible rights of man',<sup>1299</sup> it was increasingly accepted that copyright, being a private property right, was also based on considerations of natural law.

Nevertheless, there remained considerable debate about the question of the nature of literary and artistic property. As concluded in para. 3.2.3.2, in the first half of the

<sup>1291</sup> Art. 4 of the *Code de la Librairie* of 1723.

<sup>1292</sup> Parisian Booksellers memorandum (1764), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>1293</sup> See Chartier 2002, at 61 and 65 and Rideau 2008, at para. 3.

<sup>1294</sup> Diderot's Letter on the book trade (1763), in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org), transl. by L. Mulholland, at 16-17.

<sup>1295</sup> In arguing for property in authorial creations, Diderot strongly relied on the author's personality. He believed that for authors 'the dissemination of thought and the respect due to it' were more important than the economics of a book, which was the business of publishers. See Piriou 2002, at 95. See also Kretschmer & Kawohl 2004, at 31, observing that 'Diderot experimented with a non-labour, genius based theory of literary creation'. See also Pfister 2002, at 251 and Rideau 2008, at para. 6.

<sup>1296</sup> See e.g. Chartier 2002, at 62, arguing that Diderot saw book privileges not as a royal favour 'that can be granted, refused, or revoked by the sovereign at will'. See also Chartier 1994, at 15-16.

<sup>1297</sup> Art. 2 of the decree of 13-19 January 1791; art. 2 of the decree of 19-24 July 1793.

<sup>1298</sup> This development can be explained against the backdrop of the rise of civil law around the turn from the eighteenth to the nineteenth centuries. See Habermas 1989, at 75, explaining that '[with] the great codifications of civil law a system of norms was developed securing a private sphere in the strict sense, a sphere in which private people pursued their affairs with one another free from impositions by estate and state, at least in tendency. These codifications guaranteed the institution of private property and, in connection with it, the basic freedoms of contract, of trade, and of inheritance.'

<sup>1299</sup> Arts II and XVII of the French Declaration of the Rights of Man and of the Citizen of 1789.

nineteenth century, various legal scholars asserted that copyright was not and could not be a true property right.<sup>1300</sup> They postulated that ‘property’ is a concept that only applies to physical or tangible subject matter.<sup>1301</sup> If it could also apply to intellectual works, then it would create the threat of monopolizing knowledge and undermining freedom of expression.<sup>1302</sup> In addition, they argued that intellectual works could not be owned, as the essential condition of property, i.e., to exclusively enjoy its object, is absent in copyright.<sup>1303</sup> Once a work is published, the author loses control over who enjoys the authorial expression that it embodies.<sup>1304</sup> Finally, they rejected the idea that copyright, should it be classified as property right, is perpetual.<sup>1305</sup> For all these reasons, these scholars maintained that intellectual works were incapable of being appropriated and that copyright should rather be seen as a social contract, i.e., as a private claim of authors against society.<sup>1306</sup> Therefore, they perceived copyright as a ‘monopoly’ or ‘privilege’ granted by the legislator on behalf of the public.

Although the social contract theory enjoyed a short revival in the late nineteenth century,<sup>1307</sup> the property rights theory remained highly influential during nearly the entire nineteenth century.<sup>1308</sup> Even today, the concept of copyright as property right figures prominently in the French Intellectual Property Code,<sup>1309</sup> as well as in other

<sup>1300</sup> See Pfister 2005, at 128-141. Amongst the opponents of literary and artistic property were Augustin-Charles Renouard, Edouard Calmels, Louis Wolowski, Léonce de Lavergne, Pierre-Joseph Proudhon and Charles Demolombe. *Ibid.*, at 122-125.

<sup>1301</sup> See e.g. Renouard 1838-1839, I, at 456.

<sup>1302</sup> See Mr Lestibouois at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 716, querying: ‘*si l’œuvre humaine est la propriété de l’homme, si la chose façonnée par le génie créateur est à lui, que devient la pensée qui a présidé à la création?*’ and later concluding: ‘*Une pensée enfin ne peut être inféodée à un homme parce que les conceptions d’un individu ne peuvent être exclusives des conceptions d’un autre*’. See also Pfister 2005, at 130-131.

<sup>1303</sup> See Mr Berville, member of Parliament, at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 715, remarking that: ‘*publicité et propriété sont deux mots qui se repoussent naturellement, qui sont complètement incompatibles*’.

<sup>1304</sup> See e.g. Renouard 1838-1839, I, at 436-437 and 454, asserting: ‘*Donner et retenir la pensée est une impossibilité*’. See also Pfister 2005, at 132-137.

<sup>1305</sup> See Pfister 2005, at 136-141.

<sup>1306</sup> See Mr Lestibouois at the Parliamentary session of 22 March 1841, in: *Le Moniteur Universel*, 23 March 1841, 714-719, at 716, referring to such ‘*Contrat social*’. See also Pfister 2005, at 140-153.

<sup>1307</sup> See e.g. French Court of Cassation, 25 July 1887, *Grus v. Ricordi et Durdilly et comp.*, *Dalloz* 1888, 1, 5, at 12, using rethoric of the social contract theory to explain the nature of copyright: ‘*Attendu que les droits d’auteur et le monopole qu’ils confèrent sont désignés à tort, soit dans le langage usuel, soit dans le langage juridique, sous le nom de propriété; que loin de constituer une propriété comme celle que le Code Civil a définie et organisée pour les biens meubles et immeubles ils donnent seulement à ceux qui en sont investis le privilège exclusif d’une exploitation temporaire*’.

<sup>1308</sup> See Ladas 1938, I, at 5. See e.g. French Court of Cassation, 16 August 1880, *Gaudichot dit Michel Masson*, *Sirey* 1881, 1, 25, at 27, expressing the nature of copyright in positive terms as a property right: ‘*Attendu que, d’après les principes généraux du droit, la propriété littéraire et artistique, essentiellement mobilière, a les mêmes caractères et doit avoir le même sort que toute autre genre de propriété, moins la limitation que l’intérêt public a fait apporter à sa durée*’.

<sup>1309</sup> See art. L 111-1(1) French Intellectual Property Code, which literally speaks of the author’s right as ‘*un droit de propriété incorporelle*’ (an incorporeal property right).

national copyright laws across the globe.<sup>1310</sup> This shows how significant the impact of the property rights theory was, not just on the development of the French *droit d'auteur* doctrine, but on the reception and evolution of copyright in general. Given the high regard for property, this theory 'was very useful in the 18th and 19th centuries for the purpose of obtaining universal recognition of the author's right'.<sup>1311</sup>

#### 6.2.2.2 THE DISENTANGLEMENT OF COPYRIGHT AND FORMALITIES

While establishing the key justificatory basis for the idea of copyright as a 'natural' authorial property right, the Lockean labour theory was initially not used to support the idea that copyright as a 'natural' property right should emerge automatically and without formalities upon the creation of a work. In fact, the debates in France reveal that a person's opinion about the nature of copyright did not necessarily mirror his opinion about formalities. As observed in para. 3.2.3.3, in the 1830s, Gastambide, who supported the property rights theory, argued in favour of copyright formalities, while Renouard, who supported the social contract theory, rejected them.

In the mid-nineteenth century, when the idea of copyright as a 'natural' authorial property right had been firmly recognized and the focus had shifted from protecting publishers to protecting authors, things changed. The Lockean labour theory was yet again invoked, but this time to demonstrate that authors have a 'natural' entitlement to protection.<sup>1312</sup> Illustrative is the remark of Mr Dognée, the president of the *Institut des artistes liégeois* in Belgium, during the plenary session of the 1878 international conference on artistic property in Paris (see para. 4.2.1.2). He stated as follows:

'To each person the fruit of his work. It would be alarming if modest creators were denied a legitimate benefit, if they were forced to complete formalities in order to establish their property.'<sup>1313</sup>

This remark shows that, in the second half of the nineteenth century, an argument along the lines of the Lockean labour theory of property was used to defend the idea that copyright should arise 'naturally' upon creation of a work. This encouraged the idea that copyright ought to be protected without compliance with formalities.

At the end of the nineteenth century, symptoms of 'natural rights' reasoning with regard to copyright could be detected even in countries like the Netherlands. This is

<sup>1310</sup> See e.g. sec. 1(1) UK Copyright, Designs and Patents Act 1988: 'Copyright is a property right ...'. The idea of copyright as property right is also reflected in national legislation regulating copyright in an Intellectual Property Code (e.g., France, Spain, Chile, Ecuador) and in the names of international organizations that deal with copyright (e.g., the World Intellectual Property Organization).

<sup>1311</sup> Ladas 1938, I, at 8.

<sup>1312</sup> See Mr Dognée and Mr Lionel Laroze, in: *Congrès International de la Propriété Artistique 1878*, at 54 and 55, arguing that copyright as a property right is a 'sacred' and therefore an inviolable right.

<sup>1313</sup> Mr Dognée in *Congrès International de la Propriété Artistique 1878*, at 54: 'A chacun le fruit de son œuvre. Il serait à craindre que de modestes producteurs fussent dépouillés d'un bénéfice légitime, s'ils étaient astreints à accomplir des formalités préalables pour faire constater leur propriété.'

quite remarkable, because until then Dutch copyright had always been justified by utilitarian or pragmatic motives.<sup>1314</sup> Dutch lawmakers and legal theorists had simply been unwilling to accept the property rights theory and other theories explaining the ideological foundation of copyright. At its annual meeting in 1877, for example, the *Nederlandse Juristenvereniging* (Dutch Society of Lawyers) discussed the question: ‘According to what principle is the State required to protect the rights of writers and artists to the product of their labour?’<sup>1315</sup> This question was answered by a plain: ‘no such legal principle exists’.<sup>1316</sup> The majority of lawyers rejected both the literary or intellectual property theory (40 to 9), the theory that, like labourers, authors should be entitled to receive a reward for their labour (42 to 7),<sup>1317</sup> and the theory of a tacit contract by which a purchaser of a copy of a work commits himself to abstain from reprinting the work of the author (48 to 1).<sup>1318</sup> If the lawmaker was bound by a legal principle for protecting copyright, it was thought to exist in the public interest.<sup>1319</sup> A proposal to this effect was adopted by a majority of 36 to 10 (with 3 abstentions).<sup>1320</sup> This may explain why, in 1881, the Dutch government explicitly refuted the concept of intellectual property,<sup>1321</sup> but instead recognized ‘that the State has the power and the obligation to create by law a temporary and exclusive author’s right’.<sup>1322</sup>

This statement shows that, as late as 1881, the Dutch lawmaker adopted a purely positivistic approach to copyright law. This was not quite uncommon at the time.<sup>1323</sup> Even so, during the Parliamentary debates on the 1881 Copyright Act, Mr H.J.A.M. Schaepman asserted that, by the above statement, the government could have never intended the protection of copyright to be a ‘creation of the law’.<sup>1324</sup> The Dutch Minister of Justice, Mr A.E.J. Modderman, confirmed this and explained:

<sup>1314</sup> See De Beaufort 1909, at 70 et seq.

<sup>1315</sup> *Handelingen NJV* 1877, I, 33.

<sup>1316</sup> See the preliminary report of Mr J. Fresemann Viëtor, in: *Handelingen NJV* 1877, I, 34-49, at 44.

<sup>1317</sup> See Mr A.F. de Savornin Lohman in *Handelingen NJV* 1877, II, at 5 et seq. and 43 et seq.

<sup>1318</sup> *Handelingen NJV* 1877, II, 70-71.

<sup>1319</sup> Hugenholtz 1998, at 202.

<sup>1320</sup> See *Handelingen NJV* 1877, II, 69-71, at 71: ‘dat in het algemeen belang door de wet een recht tot uitsluitende reproductie moet worden gegeven’. See also Veegens 1896, at 412.

<sup>1321</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 58. The reason why the Dutch government and various Dutch jurists did not accept the idea of ‘intellectual property’ was that, in their view, copyright had nothing to do with ‘property’. They believed that adopting the term ‘intellectual property’ would entail the risk of confusion of tongues and misunderstanding.

<sup>1322</sup> See the Memorandum in Reply, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 51, expressing it as follows: ‘Wat den theoretischen grondslag van het auteursrecht betreft, de Regeering erkent geen zoogenaamde intellectueelen eigendom, maar wel de bevoegdheid en den plicht van den Staat om ... door de wet een tijdelijk uitsluitend recht ... te scheppen.’

<sup>1323</sup> See e.g. Hirsch Ballin 1947, at 16-17, observing that, with the rise of legal positivism in Dutch civil law in the course of the nineteenth century, the natural rights thinking gradually lost support.

<sup>1324</sup> Mr H.J.A.M. Schaepman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 56.

‘The word “*create*” is not used here in the sense that the lawmaker, in the view of the Government, would be free to *refrain from* establishing the author’s right, but to express that, in the absence of a regulation by law, the right would be worthless and without a real existence.’<sup>1325</sup>

While persisting in the idea that copyright must be regulated by positive law, this remark seems to display an undercurrent of ‘natural rights’ thinking in the sense that the Minister of Justice acknowledges that the author’s right ought to be recognized by the lawmaker. This contains the shadow of the idea of a ‘natural’ entitlement to copyright. This may perhaps also explain why, in the 1881 Copyright Act, the genesis of copyright was distangled from the fulfilment of formalities. The Explanatory Memorandum unambiguously stated that copyright comes into being with the act of creation:

‘The exclusive right arises from the act of authorship, not from the deposit of the work; the latter is a condition for the exercise of the right only.’<sup>1326</sup>

In practice, however, the formality-free coming into being of copyright under the 1881 Dutch Copyright Act was a legal fiction only. As demonstrated in Chapter 3, if a work was not deposited within one month after publication, copyright would cease to exist.<sup>1327</sup> Thus, the right could not be enjoyed if the statutory formalities were not fulfilled.<sup>1328</sup> For this reason, it appears wrong to attach much weight to the ‘natural rights’ claim that seems embedded in the above statements and in the recognition by the Dutch lawmaker that authors have the right ‘to reap the fruits of the products of their mind’.<sup>1329</sup> Rather, it seems to be an early symptom of natural rights infiltrating the otherwise pragmatic and positivistic legal thinking on ‘intellectual property’ that characterized the Netherlands in the second half of the nineteenth century (see para. 3.3.2.4). This would explain why the Dutch lawmaker, despite entertaining ‘natural rights’ arguments, strongly held on to a positivistic concept of copyright law.

The idea that copyright as a natural property right arises ‘automatically’ upon the creation of a work had a significant impact on copyright law and theory in various

<sup>1325</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 58: ‘Wanneer het woord “scheppen” gebruikt is, is het niet gebezigd in dien zin, dat het den wetgever, naar de opvatting van de Regering, ook zou vrijstaan het auteursrecht niet in ‘t leven te roepen, maar met de bedoeling om te doen uitkomen dat, zonder regeling bij de wet, het recht geen waarde ja ook geen reëel bestaan heeft.’

<sup>1326</sup> Explanatory Memorandum, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 94: ‘Het uitsluitend recht ontstaat door het auteurschap, niet door de inzending van het werk; deze is slechts eene voorwaarde voor de uitoefening van het recht’.

<sup>1327</sup> Art. 10 of the Dutch Copyright Act of 1881. See para. 3.3.1.2 above.

<sup>1328</sup> Memorandum in Reply, in: *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 95-96: ‘zoo wordt hier gaarne opnieuw de verklaring afgelegd, dat de inzending het auteursrecht niet scheidt, maar dat gemis aan inzending het doet vervallen.’

<sup>1329</sup> Mr A.E.J. Modderman, Parliamentary Report of the Dutch Lower Chamber, 1 June 1881, at 1627, in *Auteurswet 1881: Parlementaire geschiedenis wet 1881* (2006), at 59, referred to copyright as ‘het recht van auteurs enz. om vrucht te plukken van de voortbrengselen van hun geest’.

countries. As observed in Chapter 3 and Chapter 4, it was one of the main causes for the abolition of copyright formalities at the national level and, arguably, an auxiliary cause for the introduction of the international prohibition on formalities. Even today the idea has not lost its importance. This can be illustrated by the French Intellectual Property Code, which articulates that the mere fact of creation of a work of the mind confers on its author the protection afforded by French copyright law.<sup>1330</sup>

### 6.2.3 THE REGULATION OF PRIVATE PROPERTY RIGHTS

The previous sections have revealed that, while, from a philosophical viewpoint, the idea that property is a natural right does not necessarily imply that it is absolute and unconditional, in copyright law, it has been asserted that, if copyright is a property right that derives from natural law, its existence and its exercise cannot be subject to formalities. This claim seems odd, given that the Lockean labour theory of property, upon which it is allegedly based, nowhere suggests that property must be formality-free. In fact, Locke has explicitly underscored that private property, despite its roots in natural law, must be clearly defined and regulated by positive law and that it can always be limited by the legislator to attain public interest objectives.

To detect whether the aversion against formalities is peculiar to copyright law in particular, or characteristic of private property law in general, this section examines how private property is regulated and whether and to what extent it can be subject to formalities. To this end, it first sketches the legal framework of property regulation by explaining how, on the basis of the rule of law, natural property must be codified in positive law to have normative effect (para. 6.2.3.1). Subsequently, it studies how much room there is for limiting private property by scrutinizing the legal-theoretical justifications for property limitations (para. 6.2.3.2). Lastly, to discern how common or widespread formalities in property law are, this section draws a comparison with other private property laws (para. 6.2.3.3). It reveals that, while property often exists without formalities, formalities in property law are absolutely not a rarity.

#### 6.2.3.1 THE CODIFICATION OF NATURAL PROPERTY RIGHTS

As already emphasized by Locke, to have legally binding effect, all natural property rights must be concretized by social convention and, consequently, be contingent on conventional regulation. This implies that natural property rights must be defined by positive law and that, like all other property rights, natural property is subject to title conditions and property limitation rules that are laid down in positive law.

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<sup>1330</sup> Art. L 111-1(1) French Intellectual Property Code reads: '*L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle*'.

Title conditions and property limitation rules are necessary features of all modern property institutions.<sup>1331</sup> Title conditions, which must be fulfilled before a person (or a group) is invested with proprietary interests over a given resource, define property relationships between a subject and an object, thus creating legal certainty as well as transparency and clarity of the law. They vary from substantive conditions, such as creation, long possession and long usage of an object, to formal conditions, such as public registration and other constitutive formalities.<sup>1332</sup> Property limitation rules are rules that, often for reasons of general interest, restrict the ownership control powers of proprietors.<sup>1333</sup> Together these title conditions and property limitation rules set the boundaries of all private property institutions. They establish who is legally entitled to exercise proprietary control over what resources and whether, and to what degree, a person's private property can be utilized by another person or the state.

That natural property rights must be codified in and regulated by positive law is a result of the general principles of the rule of law. The rule of law states that, to have normative effect, a legal rule must be known by all citizens and, for that purpose, be laid down by law. But that is not all. To actually guide human conduct, the law must meet certain conditions.<sup>1334</sup> In order to be practicable and to create legal certainty, it must be generally applicable, promulgated, clear and consistent.<sup>1335</sup> It is commonly understood that, for these reasons, legal rules must be laid down in positive law,<sup>1336</sup> because natural law is too unclear and unspecific. As one commentator states:

‘Positive law is law whose content is clear, specific, and determinate enough to guide and coordinate human conduct, to create stable expectations, and to be enforceable in court. The principles of natural or moral law are too general, too open ended, take in too much private conduct, and admit of too many conflicting interpretations to function as positive law.’<sup>1337</sup>

That legal rules must be laid down in positive law does not imply that natural law has entirely lost its function. While the two are not necessarily related, positive law can borrow its authority from prior natural law or delegate some ‘meta-legal norms’

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<sup>1331</sup> See Harris 1996, at 5.

<sup>1332</sup> *Ibid.*, at 39-40.

<sup>1333</sup> *Ibid.*, at 33-36.

<sup>1334</sup> See e.g. Raz 1979, at 213 and Marmor 2004, at 2-9.

<sup>1335</sup> See e.g. Fuller 1964, at 33 et seq., Raz 1979, at 214-219, Finnis 1980, at 270-273 and Marmor 2004, at 5-7. Courts often apply these principles of the rule of law. See e.g. German Federal Constitutional Court, decision of 7 July 1971, *Private Tonbandvervielfältigungen*, *BVerfGE* 31, 255, at 264, which underlines the need for clarity and justiciability of legal norms (*‘Normklarheit und Justitiabilität’*).

<sup>1336</sup> See *Re Manitoba Language Rights*, [1985] 1 *S.C.R.* 721 (Supreme Court of Canada, 1984), at 749-750, stating that ‘the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order’, thus concluding that: ‘The rule of law simply cannot be fulfilled in a province that has no positive law.’

<sup>1337</sup> Murphy 2005, at 4-5.

that derive from natural law (e.g. morals or justice).<sup>1338</sup> However, if it delegates such norms, ‘then these norms are transformed into norms of positive law’.<sup>1339</sup>

The intersection between natural law and positive law is nicely illustrated in two German court decisions discussing the nature of copyright in the second half of the twentieth century. In 1955, the Federal Supreme Court (*Bundesgerichtshof*) issued a decision which portrayed the author’s right to control the exploitation of his work as a natural right that comes into being by the act of creation. The Court stated that copyright is not a legislative grant, but follows from the nature of the work, i.e., the author’s intellectual property, which is merely recognized and regulated by positive law.<sup>1340</sup> The German Federal Constitutional Court (*Bundesverfassungsgericht*) ruled similarly in a 1988 decision, in which it was asked to determine whether a copyright limitation was in line with the property rights clause in Article 14 of the Basic Law (*Grundgesetz*) of Germany. The Court judged that, without codification in positive law, copyright would lack real existence. It explained this as follows:

‘Copyright and the economic rights derived from it are property in the sense of Article 14(1), first sentence, Basic Law. Property is the allocation of a right to a legal entity. In order to be practicable, it necessarily needs to be given a definitive legal form by the legislator. This is particularly true for intellectual property, because – not least given the nature of the authorial creation – there often is no direct factual bond between the author and the user of a work.’<sup>1341</sup>

Thus, while private property may perhaps derive from natural law, it must always be laid down in and be defined by positive law. This corresponds with the principles of the rule of law and is essential for the legal system to operate successfully.

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<sup>1338</sup> See Hill 1921, at 131, observing that ‘just as every positive law borrows all its efficacy from prior natural law, even so every positive right borrows all its strength and force from prior natural right. Positive law is an application of natural law, it makes natural law clearer, it adds to the moral sense of obligation and future sanction’. See also Kelsen 1967, at 354.

<sup>1339</sup> Kelsen 1967, at 354.

<sup>1340</sup> German Federal Supreme Court, decision of 18 May 1955, I ZR 8/54, *UFITA* 1955, II, 314-335, at 322-323: ‘Die Herrschaft des Urhebers über sein Werk ... wird ihm hiernach nicht erst durch den Gesetzgeber verliehen, sondern folgt aus der Natur der Sache, nämlich aus seinem geistigen Eigentum, das durch die positive Gesetzgebung nur seine Anerkennung und Ausgestaltung findet.’

<sup>1341</sup> German Federal Constitutional Court, decision of 11 October 1988, *Vollzugsanstalten*, *BVerfGE* 79, 29, at 40: ‘Das Urheberrecht und die daraus abgeleiteten vermögenswerten Rechte sind Eigentum im Sinne des Art. 14 Abs. 1 Satz 1 GG. Eigentum ist die Zuordnung eines Rechtsguts zu einem Rechtsträger. Dies bedarf, um praktikabel zu sein, notwendigerweise der rechtlichen Ausformung durch den Gesetzgeber. Das gilt in besonderem Maße für das geistige Eigentum, da – nicht zuletzt angesichts der Natur der Urheberleistung – ein unmittelbares tatsächliches Band zwischen dem Urheber und dem Werknutzer in einer Vielzahl von Fällen fehlt.’

6.2.3.2 *JUSTIFICATIONS FOR LIMITING PRIVATE PROPERTY*

It is one thing to say that private property, even if derived from natural law, must be enacted by positive law and another to ask whether and to what degree a legislator may limit private property by imposing a certain title condition or subjecting it to a property limitation rule. This question is relevant for our book, since it determines the extent to which a legislator, when securing private property by positive law, can make its enjoyment or its exercise conditional on formalities.

It is generally accepted that the enjoyment or the exercise of private property can be limited. As Locke already pointed out, even if it derives from natural law, private property can be subject to statutory limitations if that be in the public interest (see para. 6.2.1.2). This is also acknowledged by the European Convention on Human Rights (ECHR), which protects private property by virtue of Article 1 of its first protocol.<sup>1342</sup> This states that, notwithstanding the right to the peaceful enjoyment of a person's property, a member state retains the right 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'.<sup>1343</sup> This rule, the effects of which are discussed exhaustively in para. 6.4.2 below, shows that considerations of 'general interest' may justify subjecting private property to limitations.<sup>1344</sup>

The justifications for imposing limitations on private property rights can be quite diverse. One type of justification, which seems to have been highly influential at the time of the drafting of the property rights clause in Protocol 1 of the ECHR, is the social function theory of property.<sup>1345</sup> A known advocate of this theory is Duguit, a French theorist of constitutional law, who presented property as an objective duty or obligation to employ the wealth produced by property to support and enlarge social interdependence.<sup>1346</sup> Duguit stated that property was not aimed to protect the private interests of individuals, but to fulfil an important social function in society. This implied that private property could be restricted by legislative intervention if its use inflicted harm on the public interest or if it remained without utility to the possessor or to society.<sup>1347</sup> The social function theory of property had great impact on property law in civil law countries such as Germany, France and Italy.<sup>1348</sup> Its influence seems to extend to Article 14 of the German Basic Law, which states that property entails obligations and that its use shall serve the public interest (see para. 6.4.2).

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<sup>1342</sup> Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], adopted by the members of the Council of Europe in Rome on 4 November 1950.

<sup>1343</sup> Art. 1 of Protocol no. 1 to the ECHR, adopted in Paris on 20 March 1952.

<sup>1344</sup> See Çoban 2004, at 107-108 and Anderson 1999, at 547, concluding that the concept of 'general interest' under the ECHR does not materially differ from the concept of 'public interest'.

<sup>1345</sup> Çoban 2004, at 108.

<sup>1346</sup> See Duguit 1923, at 320, arguing that property 'is the social function of the possessor of wealth'.

<sup>1347</sup> *Ibid.*, at 320-326, giving examples of unutilized property, such as land that remains uncultivated and durable goods that are deserted, left unrepaired or simply remain unutilized by their proprietors.

<sup>1348</sup> Pejovich 2008, at 88-89 and 147.

From a classical-liberal perspective, two other types of justifications are typically invoked.<sup>1349</sup> Relying on an autonomy-based notion of self-protection,<sup>1350</sup> the first of these justifications, i.e. the principle of harm, states that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’.<sup>1351</sup> To apply this principle, the concept of harm must be properly defined.<sup>1352</sup> One way of doing so is to link the principle of harm to the theory of autonomy-based freedom of Joseph Raz, which suggests that, to be free, a person must have prospects and opportunities. Depriving him of these prospects and opportunities would reduce his chances for autonomous development, thus causing him harm.<sup>1353</sup> From this it can be inferred that governments, which are obliged to secure the autonomy of people and ‘to advance an autonomy-enhancing social and economic environment’,<sup>1354</sup> may use coercion, e.g., by imposing property limitation rules, if that is required to prevent harm.<sup>1355</sup> Hence, if autonomy is valued highly, the autonomy of one person can justifiably be restricted ‘for the sake of the greater autonomy of others or even of that person himself in the future’.<sup>1356</sup>

The second classical-liberal justification for limiting property can be found in the principle of liberty, as described by John Rawls in the first of his two principles of justice. It assumes that, in a just society, ‘[each] person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all’.<sup>1357</sup> Among other fundamental rights, these basic liberties include the right to hold private property.<sup>1358</sup> As the principle of liberty has priority over any other principle,<sup>1359</sup> it cannot be restricted but ‘for the sake of liberty itself’.<sup>1360</sup> This implies that, in cases of competing interests and conflicts of rights, a balancing test must be applied to establish the priority of the one basic liberty over the other.<sup>1361</sup> In contrast to the other justifications, which involve an assessment with public interest and harm, the principle of liberty is less suitable for defining determinate limitations

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<sup>1349</sup> Çoban 2004, at 110-113.

<sup>1350</sup> See Mill 1859, at 21-22, arguing that ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.’

<sup>1351</sup> *Ibid.*, at 22.

<sup>1352</sup> Çoban 2004, at 110.

<sup>1353</sup> Raz 1986, at 413.

<sup>1354</sup> Çoban 2004, at 111.

<sup>1355</sup> Raz 1986, at 416-417.

<sup>1356</sup> *Ibid.*, at 419.

<sup>1357</sup> Rawls 1982, at 5. While initially the principle read ‘each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others’ (see Rawls 1971, at 60 (§ 11)), it was adjusted after it had been exposed to critique by Hart. See Hart 1973, at 542-555.

<sup>1358</sup> Rawls 1971, at 61 (§ 11).

<sup>1359</sup> *Ibid.*, at 61 (§ 11), stating that ‘a departure from the institutions of equal liberty ... cannot be justified by, or compensated for, by greater social and economic advantage’. *Ibid.*, at 244 (§ 39).

<sup>1360</sup> *Ibid.*, at 244 (§ 39).

<sup>1361</sup> Çoban 2004, at 113.

on property. Rather this principle is fit for establishing limits on fundamental rights, including property rights, on a case-by-case basis (see also para. 6.3.3.2).

The justifications for property limitations imply that, for reasons of public interest or in case of harm, competing interests or conflicts of rights, private property can be justifiably restricted. This suggests that, if there is a legitimate reason for doing so, a legislator can limit private property by imposing title conditions, property limitation rules or formalities. The next section demonstrates that it is not uncommon, in specific cases, for private property rights to be conditional on formalities.

### 6.2.3.3 *FORMALITIES ASSOCIATED WITH PROPERTY RIGHTS*

Although formalities are rarely imposed on ‘ordinary’ tangible property that can be taken physical possession of fairly easily, such as consumption goods (e.g. food and clothing) and inexpensive consumer goods (e.g. furniture, electronic equipment and tools), formalities are more commonly imposed on property that does not fit these characteristics.<sup>1362</sup> Registration of property, for example, is useful when it concerns relatively valuable property that can be identified more precisely by description than by possession (e.g. landed property) or that warrants registration for the purpose of facilitating valid title transfers (e.g. movable property such as motor vehicles). Also, registration can be helpful to point out partial ownership interests in property (e.g. company shares and charges on property) and to concretize intangible property that cannot be physically possessed (e.g. intellectual property).<sup>1363</sup> This section describes a number of property registration schemes, the rationales of which – to a greater or lesser extent – can be compared to the rationales of copyright formalities.

One field in which formalities are common is real property and land ownership, in particular. Although landed property is tangible in the sense that one can stand on it, build a house on it, exploit it, and so forth, proving to be the rightful owner of a plot of land may be fairly difficult.<sup>1364</sup> Obviously, one can put a fence around land to show that it is propertized. However, if the land is abandoned for some time and the fence is removed, the land owner has no evidence to establish his property title or to prove where the exact boundary of the plot begins or ends. This bears a resemblance to copyright law, where the proprietary bond between the right owner and the work and the precise legal boundaries of the right are also difficult to establish.

Consequently, without legal documents verifying the ownership and demarcating the boundaries of land, there is a great risk of legal uncertainty for both land owners and third parties that intend to purchase a plot of land or utilize, cultivate or develop it without knowing that it is propertized. The notarial deed recording the vesting or

<sup>1362</sup> See Baird & Jackson 1984, at 303-311.

<sup>1363</sup> Ibid, at 304. See also Lurger 2006, at 50-51.

<sup>1364</sup> See Baird & Jackson 1984, at 305.

transfer of landed property may be satisfactory for a land owner to prove his title, but it does not necessarily allow third parties to obtain information about whether a plot of land is propertized and to whom it rightfully belongs. Such information can be acquired only if it is made available to the public. For this reason, most countries have set up land registers that are open for public inspection. This is intended to provide land owners, purchasers of land and third parties with adequate legal certainty.<sup>1365</sup>

Land registration typically takes the form of a recordation of the property title or of the notarial deed in which the transfer of ownership or the vesting of real rights in land is recorded.<sup>1366</sup> The national systems of land registration vary from constitutive systems, in which registration is a prerequisite for completing the transfer or vesting property in land,<sup>1367</sup> to declaratory systems, in which registration is not required for acquiring ownership in land but only for rendering the creation or transfer of landed property enforceable in relation to third parties.<sup>1368</sup> Although the legal effects of land registration may vary from country to country,<sup>1369</sup> therefore, both the enjoyment and the exercise of landed property can be made conditional on formalities.

Land registration obviously is not the only form of property registration. Another type of property that is often subject to registration is motor vehicles. Although the requirement to register cars and motorcycles is usually of a public law character,<sup>1370</sup> in some countries, registration also plays a significant role in establishing good faith acquisitions of property. In the Netherlands, for example, the mere fact that a person who has been transferred the property of a car takes possession of it is not enough to establish bona fide acquisition.<sup>1371</sup> To that end, he should have also examined the validity of the car registration papers.<sup>1372</sup> The same applies in Italy.<sup>1373</sup> The idea is that, since there is a car registration system, the purchaser of a used car must

<sup>1365</sup> See Zevenbergen 2003, at 125, 128-130 and 137. See also Zevenbergen 2002, at 3.

<sup>1366</sup> See Henssen 1995 and Zevenbergen 2002, at 48-62.

<sup>1367</sup> See e.g. secs 7(1) and 11 of the UK Land Registration Act (2002), c. 9 (for England and Wales), sec. 3(1)(a) of the UK Land Registration (Scotland) Act (1979), c. 33 (for Scotland) and secs 25 and 37 to 39 of the Irish Registration of Title Act 1964 (no. 16/1964). See also arts 873 and 891 of the German Civil Code and art. 3:84 in conjunction with art. 3:89 of the Dutch Civil Code.

<sup>1368</sup> See e.g. arts 34 and 38(1) of the Spanish Mortgage Law of 8 February 1946 and arts 28 and 30(1) of the French decree n° 55-22 of 4 January 1955 concerning the reform of land registration.

<sup>1369</sup> See Schmid & Hertel 2005, at 27-46.

<sup>1370</sup> The car registration system adds to improving road safety, since the certificate of registration allows authorities to determine whether only those categories of vehicles are driven for which a person has a driving licence. Also, registration may be proof of payment of taxes on motor vehicles. See Recitals 2 and 4 of Council Directive 1999/37/EC of 29 April 1999 on the registration documents for vehicles, *OJ L 138/57*, 1 June 1999. See also European Court of Justice, judgment of 21 March 2002, case C-451/99, *Cura Anlagen GmbH v. Auto Service Leasing GmbH*, [2002] ECR I-03193, para. 41.

<sup>1371</sup> Salomons 2008, at 153.

<sup>1372</sup> See e.g. the rulings of the Dutch Supreme Court of 4 April 1986, *Apon v. Bisterbosch*, *NJ* 1986, 810, note W.M. Kleijn and of 7 October 2005, *Coppes v. Van de Kolk*, *NJ* 2006, 351, note W.M. Kleijn.

<sup>1373</sup> See arts. 815 and 1153 to 1156 of the Italian Civil Code (*Codice civile*) in conjunction with art. 93 of the Italian Traffic Code (*Codice della Strada*) of 30 April 1992.

ascertain whether the seller is the legal owner of the car, thus reducing ‘the possibility of thieves in the chain of title and other nonconsensual title transfers’.<sup>1374</sup> A register of copyright information could reduce the same uncertainty about the authenticity of copyright ownership in situations where the copyright is assigned or licensed to third parties.<sup>1375</sup>

Additionally, the laws of some countries oblige companies to register charges on land and intangible movable property, such as goodwill, intellectual property, book debts and uncalled share capital in the companies charges register.<sup>1376</sup> Furthermore, companies that issue shares are often obliged by law to keep a register of shares.<sup>1377</sup> Although these charges and shares represent capital and asset value rather than true property, they resemble property in so far as they signify partial ownership interests and can be transferred to third parties.<sup>1378</sup> Just like the intangible link between works and copyright owners, the connection between companies and capital and between companies and shareholders is not immediately visible. That is undesirable for many reasons, related to both public law (e.g. tax payments) and private law (e.g. mergers and acquisitions where capital and asset value are transferred from the one company to the other). The registers are aimed at the establishment of more clarity about these issues and the provision of ample information about the ownership situation of a company.

Finally, as observed in Chapter 2, registration schemes are habitually in place for the acquisition and transfer of intellectual property rights, such as patents, designs and trademarks. Given that, similar to copyright, these rights may also be qualified as natural property,<sup>1379</sup> it appears odd that, in copyright law, formalities are regarded as being inconsistent with natural property rights ideology. It does not follow from philosophical principles that property rights, even if derived from natural law, must exist without formalities. From a legal-theoretical viewpoint, therefore, there seems to be no reason why copyright – or at least the economic elements of copyright that originate from and are related to property – cannot be subject to formalities.

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<sup>1374</sup> Baird & Jackson 1984, at 310.

<sup>1375</sup> See ALAI, ‘Memorandum on Creative Commons Licenses’ (2006), discussing the legal uncertainty surrounding Creative Commons licences that is caused by the impossibility for licensees (the public) to control whether the licensor is really the copyright owner and/or holds all the relevant rights.

<sup>1376</sup> See e.g. sec. 93 of the UK Companies Act (1989), c. 40 and sec. 99 of the Irish Companies Act 1963 (no. 33/1963).

<sup>1377</sup> See e.g. arts 2:85 and 2:194 of the Dutch Civil Code.

<sup>1378</sup> Lurger 2006, at 41.

<sup>1379</sup> To the extent that the Lockean labour theory of property applies to intellectual property, copyright as well as patents, trademarks and design rights may qualify as natural rights, provided that they are the result of the author’s, inventor’s or creator’s labour. See Hughes 1988, at 297-330 and Harris 1996, at 200. See also Vivant 1997, at 60-61 and, with respect to US patent law, Mossoff 2007.

### 6.3 The Personality Rights Theory of Copyright

Another theory upon which the claim that copyright cannot be subject to formalities is often based is the personality rights theory of copyright. This theory suggests that works merit protection, not because of the intellectual labour that authors invest in their creations, but to protect the personality of authors, which is manifested in their works.<sup>1380</sup> From this premise, the conclusion has been drawn that protection must commence from the moment that the personality of the author is expressed in the work. This implies that copyright should attach upon creation and, consequently, that the enjoyment of copyright should not be conditional on formalities.

This section studies the validity of the claim that copyright, as a personality right, cannot be subject to formalities. In so doing, this section follows the same outline as the previous section. It starts with an examination of the philosophical foundation of the personality rights theory of copyright, which can be found in the late eighteenth and early nineteenth century works of Kant, Fichte and Hegel (para. 6.3.1). Next, it analyzes how, in the nineteenth century, the theory matured and gave rise to the idea that copyright should exist independently of formalities (para. 6.3.2). Even though it cannot be deduced from the philosophers' writings that copyright must be protected without formalities, it will be demonstrated that, by linking copyright to the 'higher' fundamental right of personality, their theories strengthened the idea that copyright must arise automatically, without formalities, upon the creation of a work.

The belief that copyright protects the author's personality as reflected in his work thus initiated the idea that at least the coming into existence of copyright should not depend on formalities. This raises the question of whether this is consistent with the system of regulation of fundamental rights, particularly those related to the right of personality. This question is examined in the last part of this section, which draws a comparison with certain fundamental rights and studies how they are regulated and whether they can be subject to formalities (para. 6.3.3). It concludes that formalities may be imposed to regulate the exercise of fundamental rights in the public interest, but that formalities can never be a *sine qua non* for their protection.

#### 6.3.1 THE PHILOSOPHICAL FOUNDATION OF PERSONALITY RIGHTS

The theory that works must be protected because it reflects the personality of their creators is grounded on the works of Immanuel Kant, Johann Gottlieb Fichte and Georg Friedrich Wilhelm Hegel. At the end of the eighteenth century, Kant and Fichte were engaged in a discussion about unauthorized reprinting and publication of books. Both of them wrote essays in which they vigorously argued for copyright protection on the basis that the author's personality was manifested in the work. By

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<sup>1380</sup> Hughes 1988, at 330.

depicting copyright as an intrinsic part of the fundamental right of personality, Kant and Fichte elevated its status to a ‘natural’ and inborn right of the author.

In the early nineteenth century, the personality of the author was also at the heart of Hegel’s justification for copyright protection. He treated copyright as an example of property in which authors can manifest their will. In contrast to Kant and Fichte, however, he did not qualify copyright as a ‘natural’ or innate right that derives from the author’s fundamental right of personality. Instead, it will be seen that, in Hegel’s view, the acquisition of property is a factual deed and not a ‘natural’ act and that, to have legally binding effect, property must be well defined by positive law.

This section describes the personality rights theory of copyright, as developed by Kant (para. 6.3.1.1), Fichte (para. 6.3.1.2) and Hegel (para. 6.3.1.3), and examines if there is anything in their writings that reveals whether these philosophers approve or oppose copyright formalities. It demonstrates that, while Kant and Fichte are utterly silent on the issue, Hegel believed that formalities can play an important role, not only in acquiring property, but also in giving it a determinative form.

### 6.3.1.1 KANT’S ‘ON THE INJUSTICE OF REPRINTING BOOKS’

The idea that creative works merit protection on account of the author’s personality was first developed by Immanuel Kant in his essay ‘*Von der Unrechtmäßigkeit des Büchernachdrucks*’ (‘On the Injustice of Reprinting Books’).<sup>1381</sup> Kant considers the right to control the reprinting of books to originate from the author’s natural right of self-expression.<sup>1382</sup> On the basis of the principle that what is written in a book is part of the author’s personality,<sup>1383</sup> he argues that in a book the author expresses his own thoughts.<sup>1384</sup> Thus, for Kant, a book is not merely a physical object capable of being owned, but also a means through which the author speaks to his readers.<sup>1385</sup>

From this premise Kant construes a right that allows authors to control the public dissemination by others of the speech that is contained in their writings. This right is separate from the property right in the book as a physical object (*ius in re*). Kant believes that a copy of a book may belong to anyone and that the rightful possessor of a copy may use and circulate it in his own name and at his own discretion.<sup>1386</sup> By publishing a book, on the other hand, a publisher delivers the author’s speech to the public. Therefore, Kant considers book publishing to be a business that a publisher carries out in the name of the author.<sup>1387</sup> In view of that, he argues that a publisher is

<sup>1381</sup> Kant 1785. See also Kant 1797, sec. 31 (at 127-129).

<sup>1382</sup> Kretschmer & Kawohl 2004, at 31.

<sup>1383</sup> See Ladas 1938, I, at 8 and Kase 1967, at 10.

<sup>1384</sup> See Geller 1994, at 168, arguing that, since Kant refers to the author’s thoughts and not necessarily to the author’s personality, he relies on ‘a somewhat less expansive view of self-expression’.

<sup>1385</sup> Kant 1785, at 406: ‘*In einem Buche als Schrift redet der Autor zu seinem Leser*’.

<sup>1386</sup> *Ibid.*, at 406.

<sup>1387</sup> *Ibid.*, at 406-407.

not entitled to publish a book, and thus speak in the author's name, without having obtained an explicit mandate from the author.<sup>1388</sup> From this, Kant concludes that any unauthorized publication of books is prohibited by operation of the law.<sup>1389</sup>

Accordingly, for Kant, the author of a book has the right 'to prevent anyone from presenting him as speaking to the public without his consent'.<sup>1390</sup> This right to refuse the public dissemination of his speech is not a property right,<sup>1391</sup> but an inalienable right (a '*ius personalissimum*') of the author.<sup>1392</sup> This should not be confused with a personal right. Kant nowhere used the term 'personal right' in relation to the right of the author. In Kant's view, it is rather the publisher who is authorized by the author to speak in his name who enjoys a personal right.<sup>1393</sup> Only he has acquired the right, at the exclusion of all others, to reproduce the author's book and to deliver his speech to the public. Anyone that publishes a book without authorization makes illegitimate use of the author's discourse (*furtum usus*) and, consequently, infringes the personal right of the publisher to address the public in the name of the author.<sup>1394</sup>

Kant's conception of the author's right (*ius personalissimum*) is rather limited. It only allows the author to protect 'the autonomy of self-expression', meaning that he alone may decide whom to permit to publish his book and to speak in his name.<sup>1395</sup> Once the author has mandated a publisher to transmit his speech to the public, Kant assumes that he has 'entirely and without reservation given up to the publisher his right to the managing of his business with the public'.<sup>1396</sup> Hence, only the publisher, and not the author, is entrusted with the exploitation of the book.<sup>1397</sup> In addition, the author has no rights to control the 'integrity' of his book. Kant finds translations and modifications of books acceptable as long as they are not presented as a discourse of the author of the original.<sup>1398</sup> Lastly, Kant's theory of authors' rights does not extend

<sup>1388</sup> Ibid., at 412. See also Kant 1797, sec. 31 (at 128).

<sup>1389</sup> See Kant 1797, sec. 31 (at 128), stating: '*Der Büchernachdruck ist von rechtswegen verboten*'.

<sup>1390</sup> Kant 1785, at 416, referring to the author's right as a right '*zu verhindern, daß ein anderer ihn nicht ohne seine Einwilligung zum Publicum reden lasse*'.

<sup>1391</sup> See Kant 1785, at 403, arguing that the only kind of property in the literary domain, i.e., the author's ownership to his thoughts, cannot prevent unauthorized reprinting, because 'the author's ownership to his thoughts ... remains his in spite of any reprinting'. See also Kawohl 2008b, para. 3.

<sup>1392</sup> Kant 1785, at 417. See also Kant 1797, sec. 31 (at 129).

<sup>1393</sup> See Strömholm 1967-1973, I (1967), at 190: '*Les remarques qu'il consacre au droit de l'auteur, et à la construction juridique de celui-ci, ont un caractère subsidiaire et accidentel. C'est le droit de l'éditeur qu'il qualifie comme un droit personnelle*'. See also Saunders 1992, at 113.

<sup>1394</sup> See Kant 1797, sec. 31 (at 128-129).

<sup>1395</sup> Geller 1994, at 168-169.

<sup>1396</sup> Kant 1785, at 408.

<sup>1397</sup> This explains why Kant qualifies the unauthorized publication of a book as a wrong committed, not upon the author, but upon the authorized publisher. In his view, only the publisher is injured by such illegitimate act. Ibid., at 408 and 412. See also Kant 1797, sec. 31 (at 128).

<sup>1398</sup> See Kant 1785, at 417.

to artistic works, because he argues that the creator's immaterial discourse in a work of art is inseparable from the physical object in which it is embodied.<sup>1399</sup>

Kant names the author's right (*ius personalissimum*) 'an innate right, invested in his own person'.<sup>1400</sup> He defines an 'innate right' as 'a right that belong to anyone by nature, independently of any juridical act',<sup>1401</sup> thus elevating the class of the author's right to a 'higher right' existing in the domain of natural law.<sup>1402</sup> Kant distinguishes 'innate rights' from 'acquired rights' that are founded on a positive legal act.<sup>1403</sup> The personal right of the publisher arguably belongs to the latter category of rights. This suggests that the publisher's right is a product of positive or statutory law and thus a man-made right in the sense that it proceeds from the will of a lawmaker.<sup>1404</sup>

Because Kant's essay does not deal with copyright formalities, it is impossible to say anything about his position on this topic. However, if, on the basis of his theory, the argument is made that copyright cannot be subject to formalities, because it is a 'natural right' that is based on the author's personality, then the logical consequence is that this only relates to the (limited) author's right to protect the autonomy of self-expression. The publisher's right to control the exploitation of the author's work has not been qualified by Kant as a natural right. On the basis of Kant's essay, therefore, it arguably cannot be assumed that the publisher's right, which has more in common with current copyright, at least as far as the economic rights are concerned, would in any way be affected by natural rights claims opposing copyright formalities.

### 6.3.1.2 FICHTE'S 'PROOF OF THE ILLEGALITY OF REPRINTING'

Kant's ideas on author's rights were expanded on by Fichte in his essay '*Beweis der Unrechtmäßigkeit des Büchernachdruck*' ('Proof of the Illegality of Reprinting').<sup>1405</sup> In this essay, Fichte describes the grounds on which the author of a book could lay claim to a right of intellectual ownership in his work, by explaining how ideas, once communicated, could remain the author's property.<sup>1406</sup> Thus, Fichte – and afterward also Hegel – takes no distance from the idea of literary property.<sup>1407</sup> However, he so

<sup>1399</sup> Ibid., at 415-416. See also Saunders 1992, at 112.

<sup>1400</sup> Kant 1785, at 416, speaking of the author's right as '*ein angeborenes Recht in seiner eignen Person*'.

<sup>1401</sup> Kant 1797, at XLIV (introduction), explaining that: '*das angeborne ... Recht ist ... dasjenige Recht ... welches, unabhängig von allem rechtlichen Act, jedermann von Natur zukommt*'.

<sup>1402</sup> See Saunders 1992, at 113-114, arguing that, in his essay, Kant differentiates the author's right 'in a manner characteristic of natural law thinking from rights established in positive law'.

<sup>1403</sup> Kant 1797, at XLIV (introduction).

<sup>1404</sup> See Kant 1797, at XLIV (introduction), distinguishing between '*[der] Rechte, als systematischer Lehren, in das Naturrecht, das auf lauter Principien a priori beruht, und das positive (statutarische) Recht, was aus dem Willen eines Gesetzgebers hervorgeht*'. See also Saunders 1992, at 114.

<sup>1405</sup> Fichte 1793. Ibid., at 472-473, referring to Kant's 'On the Injustice of Reprinting Books', which he claims not to have known when writing his 'Proof of the Illegality of Reprinting'.

<sup>1406</sup> Woodmansee 1984, at 444-445.

<sup>1407</sup> Kawohl 2008b, para. 3.

obviously seeks the justification of copyright in the author's personality and in the fundamental right of self-expression that his concept of literary property belongs to the category of personality rights rather than that of property rights.<sup>1408</sup>

Fichte's justification of the author's right proceeds from the same distinction that Kant made between the physical and the intellectual aspects of a book. The novelty of his theory is that he further divided the latter into 'a material aspect, the content of the book, the ideas it presents' and 'the form of these ideas, the way in which, the combination in which, the phrasing and wording in which they are presented.'<sup>1409</sup> He then assigns a property right to each of these aspects. For Fichte, the ownership of the book as printed matter 'passes indisputably to the buyer upon purchase of the book'.<sup>1410</sup> However, the buyer does not acquire full intellectual ownership, but only 'the possibility of appropriating the author's ideas'.<sup>1411</sup> Upon publication the content of a book clearly ceases to be 'the exclusive property of its first proprietor'.<sup>1412</sup> Still, it continues to be his property in common with the many others who make the author's ideas their own by reading the book and thinking through its content.<sup>1413</sup>

The form in which the author's ideas are expressed, on the other hand, 'remains forever his exclusive property'.<sup>1414</sup> Fichte infers this from the argument that, even if two people, independently of each other, can think about a topic in exactly the same way, it is absolutely impossible that they ever assimilate ideas into their own system of thought in exactly the same form.<sup>1415</sup> Fichte argues that, when writing a book, the author 'must give his thoughts a certain form, and he can give them no other form than his own because he has no other'.<sup>1416</sup> Given that 'each individual has his own thought processes, his own way of forming concepts and connecting them',<sup>1417</sup> he asserts that 'no one can appropriate [the author's] thoughts without thereby altering their form'.<sup>1418</sup> Therefore, Fichte concludes that, after publication, the form in which the author has expressed his ideas is and remains his exclusive property.<sup>1419</sup>

This distinction between freely usable 'ideas' and the protected 'form' of these ideas changed the perception of copyright in two important ways.<sup>1420</sup> As observed, on the object side, copyright came to be seen as no longer protecting concrete items, but abstract authored works (para. 3.3.2.3). On the subject side, the abstract 'form'

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<sup>1408</sup> Kawohl & Kretschmer 2009, at 212.

<sup>1409</sup> Fichte 1793, at 447.

<sup>1410</sup> *Ibid.*, at 447. *Ibid.*, at 449-450.

<sup>1411</sup> *Ibid.*, at 448.

<sup>1412</sup> *Ibid.*, at 450.

<sup>1413</sup> *Ibid.*, at 447-448 and 450.

<sup>1414</sup> *Ibid.*, at 451.

<sup>1415</sup> *Ibid.*, at 451.

<sup>1416</sup> *Ibid.*, at 451.

<sup>1417</sup> *Ibid.*, at 450.

<sup>1418</sup> *Ibid.*, at 451.

<sup>1419</sup> *Ibid.*, at 457.

<sup>1420</sup> Kawohl & Kretschmer 2009, at 211.

concept provided a very strong justification for copyright to be vested in the author (para. 3.3.2.1). It not only accentuated the personal element in the author's creation, but also linked everything done to the work back to the personality of the author by assuring protection against any taking of the personal and unique form in which the author had expressed his ideas.<sup>1421</sup> According to Fichte, the author has the right not merely to demand paternity of his work, but also 'to prevent anyone from infringing upon his exclusive ownership of this form and taking possession of it'.<sup>1422</sup>

The author-centred element in Fichte's theory becomes particularly evident in the relationship between the author and the publisher. For Fichte, the author's property of his ideas in their specific form of expression is so personal that he considers it to be inalienable. For this reason, he believes that publishing contracts cannot be based on an assignment of the author's rights, but only grant to publishers the usufruct of the author's property.<sup>1423</sup> Thus Fichte regards publishers as the representatives of the author.<sup>1424</sup> This explains why he considers the unauthorized publication of a book to be not merely an infringement of the publisher's right to the usufruct of the author's property, but to also hinder 'the author in the exercise of his absolute right'.<sup>1425</sup>

In his essay, Fichte defines the nature of the author's right as 'his natural, inborn, and inalienable right of ownership'.<sup>1426</sup> This suggests that Fichte considers this right to exist by virtue of natural law and that he believes that it merits protection, even if it has not been recognized by positive law.<sup>1427</sup> However, this definition says nothing about Fichte's position toward formalities. Since Fichte does not further address this issue, it can only be guessed what his viewpoint on the topic really was.

### 6.3.1.3 HEGEL'S 'ELEMENTS OF THE PHILOSOPHY OF RIGHT'

Another legal philosopher who is often associated with the personality rights theory of copyright is Hegel. In his '*Grundlinien der Philosophie des Rechts*' ('Elements of the Philosophy of Rights'),<sup>1428</sup> he explains, broadly speaking, how individuals can be free, i.e., how they can 'actualize their personality and subjectivity in a fulfilling social context'.<sup>1429</sup> Hegel describes three consecutive spheres of 'right' that progress

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<sup>1421</sup> Ibid., at 216.

<sup>1422</sup> Fichte 1793, at 451-452.

<sup>1423</sup> Ibid., at 457, explaining that, through the grant of the usufruct of the author's property, the publisher is authorized 'to sell to whomever he can and wants, not the author's ideas and their form, but only the possibility of appropriating the former thanks to their appearance in print'.

<sup>1424</sup> Ibid., at 457, where Fichte articulates that '[in] all respects, then, [the publisher] acts not in his own name but in the name and by mandate of the author', and 459.

<sup>1425</sup> Ibid., at 459.

<sup>1426</sup> Ibid., at 460-461.

<sup>1427</sup> Ibid., at 461, insinuating that the author's right need not be explicitly enacted ('*Daß man ein solches Recht nicht verletzt sehen wolle, wird wohl ohne ausdrückliche Erinnerung voraus gesetzt*').

<sup>1428</sup> Hegel 1821 (1991).

<sup>1429</sup> Wood 1991, at xvii.

toward the actualization of this freedom. The first sphere is ‘abstract right’.<sup>1430</sup> This is the sphere in which people are concerned only with their ‘outwardness’, which extends from a person’s external body to the external objects that he owns.<sup>1431</sup> The person’s will is only partly free.<sup>1432</sup> In the sphere of ‘abstract right’, people pursue universal or general interests. The second sphere is ‘morality’,<sup>1433</sup> which forms the step to the ‘inwardness’ of a person. The person’s will ‘acquires determinate shape in the mode of singular individuality or subjectivity’, but still is only partly free.<sup>1434</sup> This is the sphere of subjective freedom in which people ‘measure their choices and reflect on their actions from the standpoint of conscience’.<sup>1435</sup> Here, people pursue merely individual interests. The third sphere is ‘ethical life’.<sup>1436</sup> It is the sphere where the universal notions of ‘abstract right’ and the individual subjective feelings of ‘morality’ merge. In this sphere, people pursue universal or general interests, because they perceive them as being in their own individual interests. This is the sphere in which people are actually free.<sup>1437</sup>

This section describes the Hegelian concepts of property and intellectual property in the spheres of ‘abstract right’ and ‘ethical life’. The sphere of ‘morality’ shall not be discussed, since it is a transitional phase in the development toward the ‘ethical life’ in which individuals become detached from the material world. The subjective freedom consists precisely in being free from the limitations that the material world imposes on the person’s will.<sup>1438</sup> It thus is purely an inward-looking sphere.

#### *The Hegelian Concept of Property in the Sphere of ‘Abstract Right’*

Property plays a critical role in the first sphere of ‘abstract right’.<sup>1439</sup> Hegel assumes that, through property, a person gives his will existence (*Dasein*).<sup>1440</sup> He believes that by appropriating a thing, a person manifests his will in relation to the thing, i.e., he confers upon the thing an end other than that which it immediately possessed. That is, he gives it his soul.<sup>1441</sup> Hegel reasons that a thing can become a person’s

<sup>1430</sup> On ‘abstract right’, see Hegel 1821 (1991), secs 34 to 104 (at 67-132).

<sup>1431</sup> Hegel 1821 (1991), sec. 41 (at 73). See also Wood 1991, at xiv and Schroeder 2006, at 466-468.

<sup>1432</sup> See Hegel 1821 (1991), secs 10 and 11 (at 44-45).

<sup>1433</sup> On ‘morality’, see Hegel 1821 (1991), secs 105 to 141 (at 135-186).

<sup>1434</sup> Dallmayr 1993, at 111.

<sup>1435</sup> Wood 1991, at xiv.

<sup>1436</sup> On ‘ethical life’, see Hegel 1821 (1991), secs 142 to 360 (at 189-380).

<sup>1437</sup> See Wood 1991, at xvi, explaining that, for Hegel, ‘[the] only real guarantee of freedom is a well-constituted ethical life, which integrates the rights of persons and subjects into an organic system of customs and institutions providing individuals with concretely fulfilling lives’.

<sup>1438</sup> Hegel 1821 (1991), sec. 104 (at 131-132).

<sup>1439</sup> *Ibid.*, sec. 45 (at 77), arguing that ‘from the point of view of freedom, property, as the first *existence* (*Dasein*) of freedom, is an essential end for itself’.

<sup>1440</sup> *Ibid.*, sec. 46 (at 78).

<sup>1441</sup> *Ibid.*, sec. 44 (at 76).

private property, because a person is a specific entity whose will may become objective in a thing.<sup>1442</sup> He thus sees in property ‘the *existence (Dasein)* of personality’.<sup>1443</sup>

Hegel’s ideas of property also apply to intellectual property. For Hegel, the thing that one can take possession of can also be an intangible object. He states that, while intellectual accomplishments are ‘of an inward and spiritual nature ... , the spirit is equally capable, through expressing them, of giving them an external existence’.<sup>1444</sup> Furthermore, because they can also be disposed of and become objects of contract, Hegel finds that works of the mind can be defined as ‘things’ on which authors can manifest their will.<sup>1445</sup> Therefore, authors can claim them as their property.

Hegel emphasizes that a person’s inner idea and will that something be his is not enough to constitute property. Property should also be recognized as such by others. This implies that a person must take possession of a thing by giving it the predicate of his private property, which must appear in it in an external form.<sup>1446</sup>

One way to take possession of a thing is by imposing a form on it.<sup>1447</sup> For Hegel, the creation of a literary work is a legitimate way to manifest one’s will in and take possession of one’s intellectual work.<sup>1448</sup> The transition of intellectual property into externality (‘in which it falls within the definition of legal and rightful property’)<sup>1449</sup> might take two forms.<sup>1450</sup> First, it can ‘be immediately transformed into the external quality of a thing (*Sache*)’, namely, the literary work *qua* thing, whereby ‘the form which makes it an external thing ... is of a mechanical kind’.<sup>1451</sup> If someone buys a literary work *qua* thing, he may appropriate the thoughts and ideas that the author has communicated and thereby take possession of ‘the *universal ways and means* of so expressing himself’.<sup>1452</sup> However, he does not take possession of the second form of externality, i.e., the distinctive mode of expression of the author’s thoughts and ideas.<sup>1453</sup> Hegel believes that the author of a book has not immediately alienated ‘the *universal ways and means* of reproducing’ the expression of his thoughts and ideas in a distinctive form.<sup>1454</sup> The author remains the exclusive owner of these.<sup>1455</sup>

<sup>1442</sup> Ibid., sec. 46 (at 77).

<sup>1443</sup> Ibid., sec. 51 (at 81). Ibid., sec. 41 (at 73).

<sup>1444</sup> Ibid., sec. 43 (at 74-75).

<sup>1445</sup> Ibid., sec. 43 (at 75).

<sup>1446</sup> Ibid., sec. 51 (at 81).

<sup>1447</sup> Ibid., sec. 56 (at 85), where Hegel explains that, when a form is imposed on a thing, ‘it combines the subjective and the objective’.

<sup>1448</sup> See Kretschmer & Kawohl 2004, at 32, concluding that ‘formation has in Hegel’s theory a similar function as labour in Locke’s’.

<sup>1449</sup> Hegel 1821 (1991), sec. 43 (at 75).

<sup>1450</sup> See Kretschmer & Kawohl 2004, at 32, asserting that ‘Hegel employed a twin concept of form (on the objective side) and formation (on the subjective side).’

<sup>1451</sup> Hegel 1821 (1991), sec. 68 (at 98).

<sup>1452</sup> Ibid., sec. 68 (at 98).

<sup>1453</sup> Ibid., sec. 69 (at 99-101).

<sup>1454</sup> Ibid., sec. 69 (at 99).

But formation is not the only way in which one can take possession of a thing.<sup>1456</sup> Hegel believes that, because possession is a personal claim to or a projection of the person's will on a thing, 'the most complete mode' of taking possession of a thing is by designating its ownership,<sup>1457</sup> i.e., by marking the thing as his own.<sup>1458</sup> He writes: 'It is precisely through the ability to make a sign and by so doing to acquire things (*Dinge*) that human beings display their mastery over the latter'.<sup>1459</sup> By marking a thing with a sign, a person can easily indicate that he has placed his will in it.<sup>1460</sup>

This is important for the topic of this book. If possession through marking is the most adequate way in which a person can externally manifest his will in a property, then fulfilling formalities as a means to complete a copyright claim would be totally acceptable.<sup>1461</sup> Although formation remains the most appropriate way to take initial possession of a work of authorship, its intangible character may cause difficulties in substantiating a genuine property claim on this basis alone. Intellectual property can not be physically grasped.<sup>1462</sup> From a Hegelian perspective, the difficulties of taking possession of intellectual property can be remedied by designating ownership, e.g., by means of completing formalities. This may help 'to distinguish the legal right of property from the mere fact of physical relations with tangible objects'.<sup>1463</sup>

But how does this relate to the nature of the author's right in Hegelian theory? In contrast with Kant and Fichte, Hegel does not explicitly qualify the author's right as a natural or innate right. He does not even consider it to be inalienable.<sup>1464</sup> Although Hegel speaks of the absolute and universal right of people to manifest their will in a thing so as to appropriate it,<sup>1465</sup> this right is arguably not a 'natural right'. Being able to manifest one's will in a thing is just a skill that all human beings possess.<sup>1466</sup>

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<sup>1455</sup> Ibid., sec. 69 (at 100-101), explaining the effect of honour in preventing plagiarism, arguing that it is honour – and not necessarily right and the law – that 'should deter people from committing it'.

<sup>1456</sup> Ibid., sec. 54 (at 84), where Hegel argued that a person can take possession of a thing by physically seizing it, by giving it form or by designating its ownership.

<sup>1457</sup> Ibid., sec. 58 (at 88).

<sup>1458</sup> Schroeder 2006, at 469-470 and 471: 'Far from being a poor substitute for physical custody, marking is a more adequate form of possession.' But see Kretschmer & Kawohl 2004, at 32, arguing that mere symbolic marking of the property is not an appropriate way to acquire property.

<sup>1459</sup> Hegel 1821 (1991), sec. 58 (at 88).

<sup>1460</sup> Ibid., sec. 58 (at 88): '[The] effect of the sign is more or less implicit (*an sich*) in the other ways of taking possession, too. If I seize a thing or give form to it, the ultimate significance is likewise a sign, a sign given to others in order to exclude them and to show that I have placed my will in the thing.'

<sup>1461</sup> See Schroeder 2006, at 471.

<sup>1462</sup> Ibid., at 470.

<sup>1463</sup> Ibid., at 470.

<sup>1464</sup> Hegel 1821 (1991), sec. 69 (at 99), stating that by publishing a work the author does not *immediately* alienate his rights, thus suggesting that, in principle, copyright can be alienated. See also Schroeder 2006, at 482-484. But see Kretschmer & Kawohl 2004, at 32, maintaining that 'Hegel distinguishes between disposable things of "external" nature and inalienable "inner" capabilities'.

<sup>1465</sup> Hegel 1821 (1991), secs 44 (at 75) and 52 (at 82).

<sup>1466</sup> See Schroeder 2006, 484-491, concluding that 'Hegel believes that there are no natural rights of any sort'. But see Burns 1995, at 30, arguing that the 'abstract principles of natural law' that Hegel refers to in his writings 'establish certain types of rights, which might be termed natural rights'.

Moreover, as we shall see next, for Hegel, ‘abstract right’, such as property, must also be defined by positive law when it passes to the sphere of ‘ethical life’. In this respect, formalities can play a key role in making ‘abstract right’ determinate.

*The Hegelian Concept of Property in the Sphere of ‘Ethical Life’*

Hegel believes that property rights acquire new significance when their existence in the sphere of ‘ethical life’ has been transformed from a ‘general’ abstract right – via ‘morality’ – to a ‘universal’ positive right. Whereas property rights were ‘previously *immediate* and *abstract*’, in the state, all acquisitions and transactions of property must ‘be undertaken and expressed in the *form* which [the universal will expressed in positive law] gives to them’.<sup>1467</sup> In this sphere, all property, including intellectual property and copyright, must be formally defined by positive law.<sup>1468</sup>

Hegel arrives at this conclusion because he holds the opinion that in ‘ethical life’, abstract right has no ‘validity and objective actuality’ without ‘an *existence* in which it is *universally recognized, known, and willed*’.<sup>1469</sup> In order to become law and have binding force on everyone in the state, he thinks that abstract right should be posited in an objective existence, be known as universally valid and take on a determinate form.<sup>1470</sup> Hegel argues that this can only be achieved by way of positive law,<sup>1471</sup> thus ascribing to positive law the task of making abstract right determinate.<sup>1472</sup>

In making abstract right determinate, Hegel finds that ‘*formalities* which make it capable of proof and valid before the law’ can play a central role.<sup>1473</sup> He states:

‘When right is posited as what it is in itself, it is law. I possess something or own a property which I took over as ownerless; this property must now also be recognized and posited as mine. This is why there are *formalities* in society with reference to property: boundary stones are erected as symbols for others to recognize, and mortgage books and property registers are compiled.’<sup>1474</sup>

<sup>1467</sup> Hegel 1821 (1991), sec. 217 (at 249).

<sup>1468</sup> Drahos 1996, at 89. See Hegel 1821 (1991), sec. 69 (at 100). *Ibid.*, preface (at 13), defining positive rights (‘laws of right’) as ‘something *laid down*, something *derived from* human beings’, as opposed to natural rights (‘laws of nature’), which are ‘simply there and ... valid as they stand’.

<sup>1469</sup> Hegel 1821 (1991), sec. 209 (at 240).

<sup>1470</sup> *Ibid.*, secs 210 to 214 (at 240-246).

<sup>1471</sup> *Ibid.*, secs 211 (at 241-243), drawing a comparison between customary law and legal code, and 212 (at 244), where Hegel writes: ‘In positive right, what is *legal* (*gesetzmäßig*) is therefore the source of cognition of what is *right* (*Recht*), or more precisely, of what is *lawful* (*Rechters*)’.

<sup>1472</sup> Wood 1991, at xv-xvi: ‘It is the function of positive law ... to make rights determinate. Our rights as persons have validity only when they are expressed in law.’ See also Burns 1995, at 29-31.

<sup>1473</sup> Hegel 1821 (1991), sec. 217 (at 249).

<sup>1474</sup> *Ibid.*, sec. 217 (at 250).

While Hegel takes note of some allegedly negative aspects of formalities, such as that formalities exist only to attract money for the authorities,<sup>1475</sup> he is not convinced by them. He argues that formalities can play a fundamental role in establishing legal certainty over property claims by alerting the public to their existence. He writes:

‘[The] essential aspect of such forms is that what is right in itself should also be posited as right. My will is a rational will; it has validity, and this validity should be recognized by others. Here is the point at which my subjectivity and that of others must be put aside, and the will must attain a security, stability, and objectivity which form alone can give it.’<sup>1476</sup>

Accordingly, Hegel considers formalities to be essential indicators for identifying property. Especially in cases where property claims are uncertain, e.g., because the proprietor has no physical possession of the property, he seems to find it appropriate that lawmakers subject the enjoyment or the exercise of the relevant property right to a formality of some kind. Hegel reasons that, in such cases, individuals put aside their subjective property claims in the interest of the common good.

### 6.3.2 THE IDEA OF COPYRIGHT AS A RIGHT OF PERSONALITY

In the mid-nineteenth century, the theories of Kant, Fichte and Hegel were adopted by legal scholars in continental Europe, who further developed the idea of copyright as a right of personality.<sup>1477</sup> In Germany, in particular, the personality rights theory of copyright evolved into a separate, stand-alone copyright theory that was taught to give an ideological explanation for why authors merit protection for the intellectual achievements springing from their personality. In France and subsequently also in other continental European countries, the belief that a work emanates from the personhood of the author gradually led to the recognition of moral rights.<sup>1478</sup>

The personality rights theory also had a great impact on copyright formalities. In Germany, the belief that copyright protects the author’s personality as manifested in his work led to the idea that copyright should be secured upon creation, because that is the moment in which the author’s personality is expressed in the work. Given that creation became the sole relevant act upon which copyright attached, it was said that no formalities of any kind were required for copyright to come into being.

To explicate how the idea of copyright as a personality right evolved, this section first briefly describes how, in the nineteenth century, the personality rights theory of copyright became central to German legal thinking and led to the recognition of the

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<sup>1475</sup> Ibid., sec. 217 (at 250).

<sup>1476</sup> Ibid., sec. 217 (at 250).

<sup>1477</sup> See e.g. Kase 1967, at 11, Vogel 1994, at 589-590 and Drahos 1996, at 80. See also Kawohl 2008c, para. 2, stating, however, that Hegel’s theory was not often mentioned by German legal scholars who developed the personality rights theory of copyright in the second half of the nineteenth century.

<sup>1478</sup> See Pfister 2005, at 126-127, 152-153 and 178-181.

author's moral right in continental Europe (para. 6.3.2.1). Next, it explains how this theory added to the idea that copyright should come into existence independently of formalities (para. 6.3.2.2). This section reveals that the supporters of the personality rights theory of copyright strongly objected to formalities that are a *sine qua non* for protection and that they accepted formalities as to the *exercise* of rights only if there was a legitimate public interest at stake. As we shall see in para. 6.3.3 below, this is consistent with the way in which other personality rights are regulated.

### 6.3.2.1 THE RECOGNITION OF A COPYRIGHT DERIVING FROM PERSONALITY

In nineteenth century Germany, there was ample room for the rise of the personality rights theory of copyright. The property rights theory of copyright was not generally accepted. Under the influence of the Historical School of Law,<sup>1479</sup> Germany saw a revival of the study of Roman law, pursuant to which property can merely extend to physical goods.<sup>1480</sup> Moreover, German publishers who engaged in the unauthorized reprinting and publication of books stated that it is impossible that property exists in intellectual creations.<sup>1481</sup> Therefore, the theory of intellectual property, while having some supporters, soon lost popularity in nineteenth century Germany.<sup>1482</sup>

Although the idea of copyright as a personality right (*Persönlichkeitsrecht*) was already elaborated on by Neustetel in 1824,<sup>1483</sup> it was not until the 1850s that it was further expanded by scholars such as Bluntschli and Volkmann,<sup>1484</sup> who emphasized the inextricable bond between the author and his work.<sup>1485</sup> Bluntschli maintained that copyright automatically springs from the author's personality, because the latter is directly reflected in the author's creation. He stated as follows:

*‘Das Werk als Geistesproduct gehört zunächst dem Autor an, der es erzeugt hat, nicht als eine körperliche Sache, ... sondern als eine Offenbarung und ein Ausdruck seines persönlichen Geistes. Zwischen Autor und Werk besteht ein*

<sup>1479</sup> On the rise of the Historical School of Law in Germany, see Gale 1982, at 123 et seq.

<sup>1480</sup> See e.g. Neustetel 1824, at 4-15 (para. 2) and Dahn 1877, at 111.

<sup>1481</sup> See Woodmansee 1984, at 443-444 and Saunders 1992, at 108-109.

<sup>1482</sup> See Kawohl 2008b, para. 3, explaining that, at the end of the eighteenth century, only few German scholars had adopted Locke's labour theory of property and that, because natural law discourse at that time was declining, it was unlikely to be accepted as justification for copyright in Germany.

<sup>1483</sup> Neustetel 1824, at 44-61 (para. 6), calling the unauthorized publication of a book an offence against *‘das unmittelbar aus der Persönlichkeit des Schriftstellers folgende Recht der Bekanntmachung’*. His work echoes the Kantian theory of the author's natural freedom to express himself, arguing that the author has a right to be able to communicate his thoughts and, therefore, to decide on the delivery of his speech and the publication of his book to the public. See also Kawohl 2008d, para. 4.

<sup>1484</sup> See Bluntschli 1853-1854 and Volkmann 1856.

<sup>1485</sup> See also Harum 1857, at 52-57 (paras 25 and 26), who also strongly relied on the Kantian theory of the author's natural freedom to express himself, but who did not further expand on this theory.

*natürlicher Zusammenhang, wie zwischen Schöpfer und Geschöpf, und jener hat ein natürliches Recht, dass dieses Verhältnis geachtet werde.*<sup>1486</sup>

This idea was adopted by Volkmann. In an attempt to establish that artistic works merit copyright protection as much as literary works do, he used similar personality rights arguments. Volkmann argued that artistic skills are part of the personality of the artist. He regarded these skills as the means with which the artist endeavours to transform the inner perception, which he may borrow from a certain image, into an outwardly perceptible form, such as a painting, a stone or a copper plate.<sup>1487</sup>

In the last quarter of the nineteenth century, the idea of copyright as a personality right was further developed and integrated into a uniform personality rights theory by Gareis and Gierke.<sup>1488</sup> Gareis classified copyright, together with other ‘individual rights’ (*Individualrechten*),<sup>1489</sup> as a separate category of rights within the system of German civil law.<sup>1490</sup> He believed that copyright gives authors the power to exercise control over what is individual about their own person and to have the authenticity of the result of their individual creativity recognized and protected.<sup>1491</sup>

Gierke undertook a similar exercise. He counted copyright among the personality rights (*Persönlichkeitsrechten*), which he defined as ‘rights to one’s own person’.<sup>1492</sup> Gierke regarded personality rights as civil rights that are allied to the general ‘right of personality’, i.e., a fundamental right that underpins and reaches to the inside of all subjective rights.<sup>1493</sup> While Gierke acknowledged that copyright also contains an economic component,<sup>1494</sup> he categorized it as a personality right, because its object, the work of the mind, is the product of the author’s personality.<sup>1495</sup> He thus believed that copyright should be protected as an absolute right of the author.<sup>1496</sup>

Although the personality rights theory of copyright appears to have been mostly influential in Germany, where it developed into a distinct theory of copyright, it also left its traces in other countries. In France, the idea that copyright postulates ‘the *continuum* between the author and the work’<sup>1497</sup> incontrovertibly contributed to the recognition of the author’s moral rights. In the 1870s, it inspired Morillot to develop his theory of moral rights, stating that, apart from an economic element, there is also

<sup>1486</sup> Bluntschli 1853-1854, I (1853), at 191-192.

<sup>1487</sup> Volkmann 1856, at 19.

<sup>1488</sup> Vogel 1994, at 589-590.

<sup>1489</sup> See Gareis 1877, at 197-198, naming the right to one’s name, the right to a commercial name, the trademark right and the design patent right as other examples of ‘individual rights’.

<sup>1490</sup> *Ibid.*, at 199-202, positioning individual rights next to real rights (property law), claim rights (law of obligations) and rights enshrined in family law and in the law of legacies.

<sup>1491</sup> *Ibid.*, at 197-198 and 200.

<sup>1492</sup> Gierke 1895-1917, I (1895), at 702 et seq.

<sup>1493</sup> *Ibid.*, I (1895), at 702-703.

<sup>1494</sup> *Ibid.*, I (1895), at 706-707 and 766.

<sup>1495</sup> *Ibid.*, I (1895), at 756. See also Vogel 1994, at 590.

<sup>1496</sup> *Ibid.*, I (1895), at 703.

<sup>1497</sup> Vivant 1997, at 92-93.

a personal, moral component to copyright.<sup>1498</sup> At present, several copyright laws still recognize the dual, i.e., moral and economic, nature of copyright.<sup>1499</sup> But the theory also survived in twentieth century legal writing. In the 1950s, Desbois, for example, argued that creative works reflect the author's personality and that the unauthorized publication of a work affects the person of the author as much as his work.<sup>1500</sup>

### 6.3.2.2 THE DISENTANGLEMENT OF COPYRIGHT AND FORMALITIES

Apart from laying the groundwork for a widespread recognition of the protection of the personality and integrity of authors,<sup>1501</sup> the personality rights theory of copyright also gave rise to the idea that copyright should come into existence independently of formalities. By qualifying copyright as '*eines unmittelbar aus geistiger Schöpfung fließenden Rechtes*',<sup>1502</sup> the supporters of the personality rights theory assumed that it is born automatically, without formalities, upon the creation of a work.<sup>1503</sup>

In contending for a copyright that arises directly upon the creation of a work, the supporters of the personality rights theory did not rely on 'natural law'. In nineteenth century Germany, natural law arguments had generally been condemned under the influence of the Historical School of Law.<sup>1504</sup> Copyright therefore was not perceived as a natural, inborn right of the author,<sup>1505</sup> but as a positive right that is the result of enactment by the lawmaker.<sup>1506</sup> Yet authors were not totally without help if their personality rights were not duly protected by the state.<sup>1507</sup> Gierke, for example, argued that they could have recourse to 'the right of self-help'.<sup>1508</sup> This would allow authors to take corrective or preventive measures if, without legislative intervention, irreparable damages for their personality right were anticipated.<sup>1509</sup>

<sup>1498</sup> See Morillot 1872 and Morillot 1878, at 108-125.

<sup>1499</sup> See e.g. Art. L 111-1(2) of the French Intellectual Property Code: '*Ce droit comporte des attributs d'ordre intellectuel et moral ainsi que des attributs d'ordre patrimonial*'.

<sup>1500</sup> See Desbois 1950, at 63. See also Vivant 1997, note 64 (at 118-119), and the references therein.

<sup>1501</sup> See e.g. Ladas 1938, I, at 9, Saunders 1992, at 115, Vogel 1994, at 590 Goldstein 2001, at 9 and Goldstein & Hugenholtz 2010, at 20.

<sup>1502</sup> Gierke 1895-1917, I (1895), at 753.

<sup>1503</sup> *Ibid.*, I (1895), at 755: '*durch die Schöpfung eines Geisteswerkes [entsteht] in der Person seines Schöpfers ein gutes Recht*'. See also Bluntschli 1853-1854, I (1853), at 199: '*Das Autorrecht ... entsteht aus der Urhebererschaft*'.

<sup>1504</sup> See Gareis 1877, at 198.

<sup>1505</sup> *Ibid.*, at 198-199.

<sup>1506</sup> *Ibid.*, at 199 and 201. See also Gierke 1895-1917, I (1895), at 707, referring to copyright and other personality rights as '*besondere gesetzliche Rechte*', thus situating these rights in positive law.

<sup>1507</sup> See Vogel 1994, at 590.

<sup>1508</sup> See Gierke 1895-1917, I (1895), at 705-706.

<sup>1509</sup> *Ibid.*, I (1895), at 338. For a recent discussion on the application of self-help provisions in copyright law, see Cohen 1998, being very critical about a wide acceptance of an author's right of self-help in copyright matters, because this may upset the balance with legitimate users' interests.

Instead of applying natural rights rhetoric, the supporters of the personality rights theory stated that copyright arises immediately upon the creation of a work because it is an utterly personal (*'menschlichen'*) right<sup>1510</sup> that is directly connected with the fundamental right of personality. By attributing to copyright a higher metaphysical status, they accentuated the personal and inextricable bond that links authors to their works. Illustrative is the following comment of Dahn, explaining:

*'Den Kern des Urheberrechts bildet das höchst individuelle Geistesband, das "vinculum spirituale", welches den Schöpfer eines Geistesproducts und sein Geschöpf verknüpft und welches so höchst persönlich ist wie die Ehre, wie die Eigenart des Menschen.'*<sup>1511</sup>

Because copyright was deemed to protect the inextricable, intellectual bond that exists between the author and his work, it was believed to be a highly personal right that, unless determined otherwise by the legislator, is born with, remains attached to and dies with the author.<sup>1512</sup> The supporters of the personality rights theory therefore argued that the legislator should protect copyright from the moment of creation, not to recognize that copyright comes into being 'naturally' upon creation, but because, from this moment, the author's personality is manifested in the work.<sup>1513</sup>

This had important consequences for copyright formalities. Although personality rights, in general, could be subject to formalities,<sup>1514</sup> it was stated that, for copyright, formalities were needless, since the act of creation constituted the most satisfactory legal basis for securing protection. Consequently, because copyright was deemed to come into existence through the very act of creation (*'die geistige Schöpfungsthat'*) and through the act of creation alone,<sup>1515</sup> no formalities of any sort were required for securing protection of the author's personality as reflected in his creation.

As observed in Chapter 3, in Germany, this initiated the abolition of virtually all constitutive formalities at the end of the nineteenth century. If the German legislator imposed copyright formalities, they affected the *exercise* of the right only. This was considered to be justified, provided that it was based on a true public need.<sup>1516</sup>

This is in line with the mindset in late nineteenth century Germany that aimed to fairly reconcile the interests of the beneficiaries of civil rights with the interests of

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<sup>1510</sup> See e.g. Bluntschli 1853-1854, I (1853), at 186: *'Heutzutage gehört das Autorrecht zu den allgemein anerkannten menschlichen Rechten'*.

<sup>1511</sup> Dahn 1877, at 113.

<sup>1512</sup> See Gierke 1895-1917, I (1895), at 707: *'Die Persönlichkeitsrechte sind an sich höchstpersönliche Rechte, die in einer bestimmten Person entstehen, an sie gebunden bleiben und mit ihr untergehen.'*

<sup>1513</sup> *Ibid.*, I (1895), at 707 and 787.

<sup>1514</sup> *Ibid.*, I (1895), at 707.

<sup>1515</sup> *Ibid.*, I (1895), at 766 and 787-788.

<sup>1516</sup> See Fischer 1870, at 33-34 and Dambach 1871, at 205-207.

other persons and those of society.<sup>1517</sup> Rather than being an end in itself, copyright was said to be directed at fulfilling a social function within the broader context of society.<sup>1518</sup> This explains why limited formalities (e.g., situation specific formalities) could be imposed to uphold the balance between copyright and the public interest.<sup>1519</sup> Yet, copyright formalities could not lead to a defeat of the author's right to protection of his personality as manifested in his work. That was deemed unacceptable.

### 6.3.3 THE REGULATION OF OTHER PERSONALITY-RELATED RIGHTS

The preceding section has demonstrated that the idea that copyright derives from the author's personality has been an important reason for the claim that the existence of copyright must not be subject to formalities. Although formalities as to the exercise of copyright may be acceptable, at least if they do not lead to a loss of protection, the personality rights theory objects to formalities that are a *sine qua non* for protection.

This raises the question whether this is in harmony with the way in which other personality rights are regulated. Such rights exist in the sphere of fundamental rights in particular. Examples are a person's right to a name and rights related to personal liberty and autonomy, such as the right of privacy and the freedom of (political and religious) speech and thought. This section examines how these personality-related fundamental rights are regulated by describing their codification in international and national law (para. 6.3.3.1) and studying the natural inherent limitations of personal liberties (para. 6.3.3.2). In addition, it investigates whether and to what degree these personality-related fundamental rights can be subject to formalities (para. 6.3.3.3).

This section reveals that, in cases of competing interests or conflicts of rights, the *exercise*, though not the existence, of personality-related fundamental rights can be subject to formalities. This corroborates our findings in the previous section that the personality-related aspects of copyright ought to be formality-free, unless there is a public interest that gives cause for imposing formalities as to their exercise.

#### 6.3.3.1 THE CODIFICATION OF PERSONALITY-RELATED RIGHTS

Personality-related fundamental rights are traditionally understood as rights that are inherent to human life and that exist independently of positive law. Like most other

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<sup>1517</sup> See Bluntschli 1853-1854, I (1853), at 193: '*Aufgabe der Gesetzgebung und der Jurisprudenz ist es daher, die beiderseitigen Rechte des Autors und des Publicums an dem veröffentlichten Werke richtig auseinandersetzen.*' See also Gierke 1895-1917, I (1895), at 755 and Kohler 1880, at 37 et seq.

<sup>1518</sup> See Geiger 2008, at 104-105.

<sup>1519</sup> Ortloff 1861, at 332-334.

fundamental rights, they are said to have roots in natural law.<sup>1520</sup> Ultimately, these rights derive from the concept of personal freedom, i.e., ‘the one sole and original right that belongs to every human being by virtue of his humanity’.<sup>1521</sup> The chief natural and innate right of man being the right to the unconstrained exercise of his freedom,<sup>1522</sup> every person must have the right to defend one’s own ‘life, liberty and property’<sup>1523</sup> and ‘to autonomously determine one’s own inner life without wrongful interference by others’.<sup>1524</sup> Thus, if it is assumed that all men are naturally born free, they should enjoy the right to protect their liberty and personality by birth.

Similar to natural property rights, the general principles of the rule of law dictate that personality-related fundamental rights, even if they originate from natural law, should be properly defined by positive law to have normative effect.<sup>1525</sup> These rights have been codified, first, in national constitutions and, later, in the mid-twentieth century, in international conventions on human rights, such as the International Bill of Human Rights, i.e., the Universal Declaration of Human Rights (UDHR) plus the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols,<sup>1526</sup> and the European Convention on Human Rights (ECHR).

### 6.3.3.2 THE NATURAL INHERENT LIMITATIONS OF PERSONAL LIBERTIES

That men ‘naturally’ enjoy personality-related fundamental rights by birth does not imply that these rights are also unconditional. That would be practically impossible, since personal liberties are not unique to a single person, but shared with other free individuals.<sup>1527</sup> To ensure freedom for everyone in society, therefore, the liberty and personality of other people must be duly respected. As observed, this is also implicit in Rawls’ principle of liberty (para. 6.2.3.2). This requires recognition both for the fundamental rights of other individuals and for public rights that aim to preserve the

<sup>1520</sup> See Jones 1994, at 2-3 and 72.

<sup>1521</sup> See Kant 1797, at XLV (introduction), stating: ‘*Freyheit ... ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit, zustehende Recht*’. See Saunders 1992, at 113.

<sup>1522</sup> See Hart 1955, at 175, arguing that ‘if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free’.

<sup>1523</sup> Heyman 1998, at 1317 et seq., stating that the ‘rights to life, liberty and property’ establish freedom in the external realm. As observed, Locke also referred to the rights to life, liberty and property.

<sup>1524</sup> *Ibid.*, at 1323 et seq., stating that the ‘rights of personality’ establish freedom in the internal realm.

<sup>1525</sup> See Jones 1994, at 81.

<sup>1526</sup> Universal Declaration of Human Rights [UDHR], adopted by the UN General Assembly in Paris on 10 December 1948; International Covenant on Economic, Social and Cultural Rights [ICESCR] and International Covenant on Civil and Political Rights [ICCPR], plus the First Optional Protocol to the ICCPR, adopted by the UN General Assembly in New York on 16 December 1966; Second Optional Protocol to the ICCPR, adopted by the UN General Assembly in New York on 15 December 1989.

<sup>1527</sup> Heyman 1998, at 1314.

democratic and societal order.<sup>1528</sup> The fundamental rights that flow from the concept of personal freedom are diverse and range from rights to life, liberty and property to rights of personality, such as the right to freedom of speech and the right to privacy. Given that these rights vary in content, yet derive from the same concept of personal freedom, there may be cases of conflicts of rights. To avoid such conflicts of rights, most personality-related fundamental rights can be limited by the law.<sup>1529</sup>

Thus, most personality-related fundamental rights are not absolute, but subject to natural inherent limitations that derive from ‘their place within the larger framework of rights, and the duty to respect the rights of others’.<sup>1530</sup> Even if it is recognized that persons ‘naturally’ possess the right to protect their liberty and personality by birth, which suggests that this right ought to be safeguarded by the law, the lawmaker or a judge may subject it to certain limitations if this is needed to protect the liberty and personality of other members of society.<sup>1531</sup> This is also acknowledged by the 1789 French Declaration of the Rights of Man,<sup>1532</sup> the principles of which are still recalled in the current French Constitution.<sup>1533</sup> In addition, there can be a moral justification for why one fundamental freedom should prevail over the other.<sup>1534</sup>

That, in particular circumstances, the exercise of personality-related fundamental rights can be statutorily limited has also been recognized in national constitutions in which these rights are codified. Some constitutions contain general clauses allowing fundamental rights to be subject to limitations, provided that they are prescribed by the law and are reasonable and justifiable in a free and democratic society,<sup>1535</sup> while other constitutions lay down limitation clauses for specific categories of personality-related fundamental rights. This is the case, for example, in the Netherlands, where a number of personality-related fundamental rights can be limited by or pursuant to the law.<sup>1536</sup> Also, in Germany, Article 2(1) of the Basic Law states that everyone has

<sup>1528</sup> See Dworkin 1978, at 191, stating that ‘although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit’.

<sup>1529</sup> See e.g. Finnis 1980, at 223, Heyman 1998, at 1314 and Eberle 2008, at 35-40.

<sup>1530</sup> Heyman 1998, at 1306.

<sup>1531</sup> *Ibid.*, at 1306. See also Kant 1797, at XXXIII-XXXIV (introduction), at XXXIV, asserting: ‘*Also ist das allgemeine Rechtsgesetz: handle äußerlich so, daß der freye Gebrauch deiner Willkühr mit der Freyheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne*’.

<sup>1532</sup> See art. IV of the 1789 French Declaration of the Rights of Man and of the Citizen, emphasizing that limits to the right of personal liberty must be set by the law. See also Eberle 2008, at 37 (note 91).

<sup>1533</sup> Preamble of the French Constitution, *Journal Officiel de la République Française*, 5 October 1958.

<sup>1534</sup> See Hart 1955, at 178. In addition to personality-related fundamental rights that can be subject to a limitation, there are also fundamental rights that are so elementary and morally self-evident that they are absolute and do not allow for any exceptions, such as the prohibition of torture or slavery.

<sup>1535</sup> See sec. 1 of the Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act (1982), c. 11 (UK), sec. 5 of the New Zealand Bill of Rights Act 1990, Public Act No. 109 of 28 August 1990, and sec. 36(1) of the Constitution of the Republic of South Africa, Law no. 108 (1996).

<sup>1536</sup> See e.g. arts 4 (right to vote), 6(1) (freedom of religion), 7(1) and (3) (freedom of speech), 10(1) (right to privacy) and 11 (right to personal integrity) of the Dutch Constitution.

the right to the free development of his personality, ‘insofar as he does not violate the rights of others or offend against the constitutional order or the moral law’.<sup>1537</sup>

Comparable limitations to personality-related fundamental rights are contained in the international treaties on human rights. These understand that fundamental rights and freedoms do not come alone and recognize that one’s personality can be freely and fully developed only if certain duties and responsibilities to the community are imposed on their addressees.<sup>1538</sup> Therefore, they permit contracting states to subject the exercise of some personality-related fundamental rights to limitations, provided that they are (i) prescribed by law, (ii) serve a legitimate aim, and (iii) are necessary in a democratic society. The latter means that there must be a ‘pressing social need’ and that a limitation must be ‘proportionate to the legitimate aim pursued’.<sup>1539</sup> For example, while, pursuant to Article 10 of the ECHR, every person enjoys the right to freedom of expression, the exercise of this right ‘may be subject to ... formalities, conditions, restrictions or penalties’, provided that they satisfy the three conditions mentioned above.<sup>1540</sup> Similar limitations can be imposed with regard to the right of privacy,<sup>1541</sup> and a number of other personality-related fundamental rights.<sup>1542</sup>

### 6.3.3.3 FORMALITIES ASSOCIATED WITH PERSONALITY RIGHTS

That the exercise of personality-related fundamental rights in specific circumstances can be limited or subject to formalities is not merely a theoretical conclusion. There are various examples of personality-related fundamental rights that are conditional on formalities. This section describes two personality rights, the registration systems of which have rationales that are similar to those of copyright formalities.

One example of a personality-related fundamental right the exercise of which can be and often is subject to formalities is the right to a name.<sup>1543</sup> Although the right to have and to use a name is absolute, most states have in place a system of registering

<sup>1537</sup> The text of art. 2(1) of the Basic Law (*Grundgesetz*) of Germany reads as follows: ‘*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*’

<sup>1538</sup> See, generally, art. 29(1) UDHR and the preambles of the ICESCR and the ICCPR and, specifically with respect to the right to freedom of expression, art. 19(3) ICCPR and art. 10(2) ECHR.

<sup>1539</sup> See European Court of Human Rights, judgments of 7 December 1976, *Handyside v. UK* (appl. no. 5493/72), §§ 48-50 and 26 April 1979, *The Sunday Times v. UK* (appl. no. 6538/74), § 62.

<sup>1540</sup> Art. 10(2) ECHR. See also art. 19 in conjunction with art. 29(2) UDHR and art. 19(3) ICCPR.

<sup>1541</sup> See art. 12 in conjunction with art. 29(2) UDHR, art. 17(1) ICCPR and art. 8(2) ECHR.

<sup>1542</sup> See e.g. art. 18 in conjunction with art. 29(2) UDHR, art. 18(3) ICCPR and art. 9(2) ECHR (freedom of thought and religion), and art. 13(1) in conjunction with art. 29(2) UDHR, art. 12(3) ICCPR and art. 2(3) of Protocol no. 4 to the ECHR (freedom of movement and choice of residence).

<sup>1543</sup> See art. 24(2) ICCPR and art. 7(1) of the Convention on the Rights of the Child [CRC], adopted by the UN General Assembly in New York on 20 November 1989. See also European Court of Human Rights, judgment of 22 February 1994, *Burghartz v. Switzerland* (appl. no. 16213/90), § 24 and Van Dijk et al. 2006, at 685-686, recognizing that the right to a name (i.e. to a first name and a family name) falls within the scope of the right to respect for private and family life in art. 8 ECHR.

names from birth, usually as part of a more sophisticated civil registration system of births, marriages and deaths.<sup>1544</sup> Birth registration is deemed important, for it gives a person not just an identity (by establishing proof of a person's name, age and parentage), but also an official legal existence as a member of society and proof of nationality.<sup>1545</sup> Because birth registration aims to give the otherwise abstract identity of a person a more concrete and fixed form, its rationale is comparable to copyright formalities that aim to concretize abstract authored works. The documents resulting from civil registration, whether these are simple extracts or official legal documents, such as passports and identity cards, enable persons to prove their identity and other important facts.<sup>1546</sup> This creates legal certainty for third parties that can rely on these documents to identify the persons with whom they participate in social life or have economic or legal relationships. In addition, it establishes important benefits for the registered person, who, without proof of identity, cannot always fully participate in social, economic or political life.<sup>1547</sup> For this reason, the right to birth registration is sometimes regarded as being a fundamental human right by itself.<sup>1548</sup>

Another fundamental right that in most countries can only be legally executed in accordance with statutory formalities is the right to marry.<sup>1549</sup> Often the law requires marriages to be recorded in a register, e.g., the civil register of births, marriages and deaths.<sup>1550</sup> The idea is that if two people, through the act of marriage, make a legally binding commitment to each other, this should be duly and lastingly notified to third parties, such as state authorities and private parties. That is because marriage entails important proprietary and inheritory legal consequences. Just like the bond between authors and works or between assignees and the copyright that is assigned to them, the marital bond between two people is not tangible. The certificate of marriage can create adequate proof of the marital relationship, but it cannot satisfactorily provide the public with information because it typically remains in the hands of the persons concerned and therefore is not always directly available for public scrutiny. This is why most countries require marriages to be registered.<sup>1551</sup> Only this can ensure that the public has ample legal certainty about the legal consequences of marriage.

<sup>1544</sup> Countries that maintain civil registries include the Netherlands (*Register van de Burgerlijke Stand*), France (*Office de l'État civil*), Germany (*Standesamt*), the UK (local register offices), the majority of states in the US (Offices of Vital Statistics) and most other countries around the world.

<sup>1545</sup> UNICEF-IRC 2002, at 1, 2 and 21-22.

<sup>1546</sup> See United Nations 2002, paras 22 (at 5) and 35 (at 8).

<sup>1547</sup> UNICEF-IRC 2002, at 4-7. See also United Nations 2002, para. 27 (at 5-6).

<sup>1548</sup> See e.g. Marta Santos Pais, 'Editorial', in: UNICEF-IRC 2002, at 1. See also art. 24(2) ICCPR and art. 7(1) CRC, which establish a direct link between the right to a name and birth registration.

<sup>1549</sup> See art. 12 ECHR, providing that men and women have the right to marry 'according to the national laws governing the exercise of this right'.

<sup>1550</sup> See e.g. arts 1:43 to 1:49a of the Dutch Civil Code, mapping out the formalities for getting married.

<sup>1551</sup> Such registers are consistent with the international treaties. See European Court of Human Rights, judgment of 18 December 1974, *X v. Federal Republic of Germany* (appl. no. 6167/73), stating that a refusal to register a marriage that was not concluded in accordance with the formal procedures laid down by the law constitutes no breach of art. 12 ECHR. See also Van Dijk et al. 2006, at 844.

## 6.4 The Idea of Copyright as a Fundamental Right

The previous two sections, which dealt with the idea of copyright as a property right and as a personality right, steered the discussion close to the idea of copyright as a fundamental right, which has sparked a fierce debate in the last sixty years.<sup>1552</sup> Since 1948, authors enjoy a fundamental right to benefit from the protection of the moral and material interests resulting from their works.<sup>1553</sup> In addition, authorial creations have found protection under the property rights clause of Article 1 of Protocol No. 1 of the ECHR.<sup>1554</sup> Lately, the idea has also been voiced that the author's moral rights might be protected under the right of privacy or the freedom of expression.<sup>1555</sup>

The recognition of copyright as a fundamental right appears to have strengthened the idea that copyright is a right that emanates from the person of the author and that should be protected from the moment the author put his labour or personality in the work. At first sight, copyright formalities fit this concept poorly. As one drafter of the copyright clause in Article 27 of the UDHR stated, the vocation for creating intellectual works is common to all men, regardless of their social position, and thus warrants protection in the same way as all other fundamental human rights.<sup>1556</sup> Other legal commentators have asserted that, from the viewpoint of human rights, creation alone might not be a sufficient argument for authors to claim a fundamental right in intellectual works, but that this might be different if a work is intimately linked to its creator.<sup>1557</sup> This suggests that, in the fundamental rights discourse, a distinction should perhaps be made between the author's moral and material interests.<sup>1558</sup>

To determine whether and to what degree formalities are consistent with the idea of copyright as a fundamental right, this section investigates the (inter)national legal framework of human rights. It first examines the fundamental right to protection of intellectual works in Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR (para. 6.4.1) and then explores the material and moral interests that this right aims to protect, by separately examining the fundamental right of property (para. 6.4.2) and the fundamental rights related to personality (para. 6.4.3). By studying the property and personality rights aspects of copyright from the viewpoint of human rights, this section supplements the foregoing sections. That is also the reason why it follows a different outline. It does not scrutinize philosophical, legal-historical and theoretical arguments, but concentrates predominantly on contemporary positive law.

This section analyzes the relevant provisions of the main international treaties on human rights (i.e., the UDHR, ICESCR and ICCPR and the ECHR). At the national

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<sup>1552</sup> See e.g. Yu 2007, at 1047-1075, for an overview of the recognition of, and controversy surrounding, the protection of the moral and material interests of authors under the UDHR and ICESCR.

<sup>1553</sup> See art. 27(2) UDHR and art. 15(1)(c) ICESCR.

<sup>1554</sup> See the references to case law of the European Court of Human Rights in para. 6.4.2 below.

<sup>1555</sup> See e.g. Vivant 1997, at 106-107, Hugenholtz 2001, at 346 and Drexl 2007, at 167 et seq.

<sup>1556</sup> Cassin 1960, at 229. On Cassin's essay, see Vivant 1997, at 86-87 and Torremans 2008, at 198.

<sup>1557</sup> Vivant 1997, at 86 et seq.

<sup>1558</sup> *Ibid.*, at 106-107.

level, it focuses on the Basic Law of Germany, since this protects both the author's material interests under the fundamental right of property (Article 14) and his moral interests under the fundamental right of personality (Article 2(1) in conjunction with Article 1(1)). Also, it analyzes the case law of the European Court of Human Rights and the German Federal Constitutional Court (*Bundesverfassungsgericht*).

The section concludes that, from a human rights perspective, it is problematic to subject the author's moral rights to formalities, since these rights aim to protect the personal bond between authors and their creations. The author's economic rights, on the other hand, can be made conditional on formalities without causing interference with the national or international framework of fundamental rights.

#### 6.4.1 THE FUNDAMENTAL RIGHT TO PROTECTION OF CREATIONS OF THE MIND

Pursuant to Article 27(2) UDHR and Article 15(1)(c) ICESCR, each person has the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This right has a twofold objective. It aims to protect the personal bond between authors and their creations by securing the moral rights of authors to be recognized as the creators of their works and to object to any distortion, mutilation or modification of their works that would prejudice their honour and reputation.<sup>1559</sup> Moreover, it aims to protect authors' material interests by ensuring that they enjoy an adequate standard of living from their works. This may take the form of protecting their economic rights.<sup>1560</sup>

In the system of human rights, Article 27(2) UDHR and Article 15(1)(c) ICESCR do not qualify as 'classic' human rights (i.e. civil and political rights), but as 'social' human rights (i.e. economic, social and cultural rights).<sup>1561</sup> Whereas 'classic' human rights protect individuals against state interference by imposing an obligation on the state to respect these rights, 'social' human rights instruct the state to protect certain human values by providing the means for people to effectively enjoy them.<sup>1562</sup> This implies that Article 27(2) UDHR and Article 15(1)(c) ICESCR are not immediately applicable, but must first be implemented by states.<sup>1563</sup> Although contracting states are obliged to establish a set of measures to secure the protection of the moral and material interests resulting from authors' works, they have a considerable margin of

<sup>1559</sup> UN Committee on Economic, Social and Cultural Rights 2006, paras 2, 12 and 13.

<sup>1560</sup> *Ibid.*, paras 2 and 15. *Ibid.*, para. 10, stating that contracting states are not bound to protect the moral and material interests of authors by a regime of copyright or intellectual property rights protection.

<sup>1561</sup> In general, it can be said that the civil and political rights are laid down in arts 1 to 21 UDHR and the ICCPR and the economic, social and cultural rights in arts. 22 to 28 UDHR and the ICESCR.

<sup>1562</sup> See e.g. Akkermans et al. 2005, at 39 and 149 et seq.

<sup>1563</sup> Because the UDHR is merely a 'declaration' and has no contracting parties, it has no legally binding effect. Therefore its norms must be implemented in national law by definition. The ICESCR provides for progressive realization and, consequently, imposes positive obligations on contracting states. See UN Committee on Economic, Social and Cultural Rights 2006, para. 25 et seq.

discretion in assessing which measures are most suitable to attain this objective.<sup>1564</sup> In fact, they are not obliged to protect the author's moral and material interests by a coherent regime of copyright law.<sup>1565</sup> This shows that statutory copyright is not to be equated with the fundamental right of protection of intellectual creations.<sup>1566</sup>

For copyright law and policy, it does not make much difference that intellectual creations are protected by human rights. When implementing laws to give effect to Article 27(2) UDHR and Article 15(1)(c) ICESCR, contracting states must take due account of other human rights.<sup>1567</sup> This means that states are obliged to strike a fair balance between protecting the moral and material interests resulting from creative works and safeguarding other human rights.<sup>1568</sup> This also corresponds with the spirit of the UDHR and the ICESCR. Along with the protection of the interests of authors, these treaties protect the public's right to enjoy the benefits of cultural and scientific advancements.<sup>1569</sup> Consequently, when implementing copyright law and policy, 'the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration'.<sup>1570</sup>

Formalities may play a significant role in striking the balance between protecting the interests of authors and preserving public access to their creations for the benefit of society at large. By subjecting copyright to an easy and straightforward formality, it can be guaranteed that authors retain an effective protection of their rights, while works for which the formalities have not been fulfilled may become freely available for public use. A formality-based copyright regime can thus promote the full range of rights guaranteed by the UDHR and the ICESCR. These treaties do not seem to prohibit that. Other intellectual property rights, such as patents and trademarks, the subject matter of which might also fall within the ambit of Article 27(2) UDHR and Article 15(1)(c) ICESCR,<sup>1571</sup> are often also conditional on formalities.

However, there is one caveat. The author's moral rights are so intrinsically linked to his personality that subjecting these rights to formalities may be an unjustifiable impediment of the protection of the author's moral interests. As we shall see below, a limitation of moral rights is permitted only in exceptional cases (para. 6.4.3).

<sup>1564</sup> See UN Sub-Commission on Human Rights 2000, para. 4, UN Committee on Economic, Social and Cultural Rights 2006, para. 47, Yu 2007, at 1092-1093, Yu 2008, at 81 and Torremans 2008, at 202.

<sup>1565</sup> UN Committee on Economic, Social and Cultural Rights 2006, para. 10.

<sup>1566</sup> *Ibid.*, paras 1 to 3. See also Yu 2008, at 78-79.

<sup>1567</sup> See art. 5(1) ICESCR. See also UN Committee on Economic, Social and Cultural Rights 2006, paras 11 and 35, emphasizing that the implementation of copyright law or policy should not unjustifiably limit the enjoyment by others of their fundamental rights and freedoms.

<sup>1568</sup> Torremans 2008, at 212-214. See also UN Sub-Commission on Human Rights 2000, para. 1 (stating that the right to protection of intellectual works is 'a human right, subject to limitations in the public interest') and UN Committee on Economic, Social and Cultural Rights 2006, paras 22 to 24.

<sup>1569</sup> See art. 27(1) UDHR and art. 15(1)(b) ICESCR.

<sup>1570</sup> UN Committee on Economic, Social and Cultural Rights 2006, para. 35. *Ibid.*, para. 39 sub e. See also Helfer 2008, at 74 and Torremans 2008, at 201 and 206-207.

<sup>1571</sup> See UN Committee on Economic, Social and Cultural Rights 2006, para. 9, defining the phrase 'any scientific, literary or artistic production' to which the protection of art. 15(1)(c) ICESCR extends.

## 6.4.2 THE FUNDAMENTAL RIGHT OF PROPERTY

Except for the general protection of the author's moral and material interests under Article 27(2) UDHR and Article 15(1)(c) ICESCR, the two components of this right may also receive separate protection within the framework of human rights.

The material interests of authors are also safeguarded by the fundamental right of property. Although this right is not broadly recognized in the framework of human rights,<sup>1572</sup> it is protected by some (inter)national legal instruments, such as Article 1 of Protocol No. 1 of the ECHR and Article 14 of the German Basic Law. It has been consistently held by the European Court of Human Rights and the German Federal Constitutional Court that the peaceful enjoyment of one's possessions is not limited to tangible objects, but also covers intellectual property, such as patents, trademarks and copyright.<sup>1573</sup> Additionally, the Charter of Fundamental Rights of the European Union also explicitly states that intellectual property shall be protected.<sup>1574</sup>

To see whether and to what degree copyright formalities are compatible with the fundamental right of property, this section studies the property rights clauses in the ECHR and the German Basic Law and the corresponding case law of the European Court of Human Rights and the German Federal Constitutional Court. It scrutinizes whether the fundamental right of property permits imposing formalities establishing title conditions (para. 6.4.2.1) or formalities affecting the exercise (para. 6.4.2.2) or the enforcement of rights (para. 6.4.2.3). Moreover, it will analyze whether a regime of formalities is allowed if it affects legitimate expectations resulting from existing rights (para. 6.4.2.4). This section concludes that the fundamental right of property leaves considerable room for subjecting intellectual property to formalities. Because intellectual property is a social product with a social function, there is enough space for public interest considerations when defining or demarcating this right.<sup>1575</sup>

<sup>1572</sup> See Rahmatian 2008, at 345. While art. 17 UDHR recognizes the right of property, it is not included in the other treaties of the International Bill of Human Rights, i.e., the ICESCR and ICCPR.

<sup>1573</sup> See, for patents, European Court of Human Rights, decisions of 4 October 1990, *Smith Kline and French Laboratories Ltd v. Netherlands* (appl. no. 12633/87) and 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97), German Federal Constitutional Court, decision of 15 January 1974, *Patentanmeldungen*, BVerfGE 36, 281, at 290-291; for trademarks, European Court of Human Rights (Grand Chamber), judgment of 11 January 2007, *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 218; and for copyright and related rights, European Court of Human Rights, decisions of 14 January 1998, *Aral v. Turkey* (appl. no. 24563/94) and 5 July 2005, *Melnychuk v. Ukraine* (appl. no. 28743/03), German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 238-239 and 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 283.

<sup>1574</sup> Art. 17(2) of the Charter of Fundamental Rights of the EU, *OJ C* 303/01 of 14 December 2007.

<sup>1575</sup> On the social function of intellectual property, see e.g. UN Sub-Commission on Human Rights 2000, paras 5 and 6 and UN Committee on Economic, Social and Cultural Rights 2006, para. 35.

## 6.4.2.1 FORMALITIES ESTABLISHING TITLE CONDITIONS

Given that copyright falls within the ambit of the fundamental right of property, the question can be raised whether, pursuant to this fundamental right, the acquisition of copyright can be subject to formalities. Because, in most European states, copyright formalities have long been abolished, this question obviously has never been examined by the European Court of Human Rights. Even so, its case law contains interesting observations on the relation between acquisitions of property rights, in general, and the fundamental right of property as recognized in Article 1 of Protocol No. 1.

Article 1 of Protocol No. 1 of the ECHR states that every person is entitled to the peaceful enjoyment of his possessions, without explaining what ‘possessions’ are or under which – substantive or formal – conditions of title they can be acquired. The European Court of Human Rights is not preoccupied with this question either. It has consistently held that the ‘issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1’.<sup>1576</sup>

Consequently, the European Court of Human Rights does not examine whether an applicant ought to have a title to a substantive property interest, but only whether he has legally acquired such title by virtue of the provisions of the applicable domestic law. It makes no difference whether substantive or formal conditions of title are involved. In the *Smith Kline v. Netherlands* case, for example, the Court held that a Dutch patent fell within the ambit of the term ‘possessions’ in Article 1 of Protocol No. 1 of the ECHR, because under Dutch law a patent holder is referred to as the proprietor of a patent and, subject to the provisions of the Patents Act, patents are transferable and assignable.<sup>1577</sup> In the *Anheuser-Busch Inc. v. Portugal* case, the Grand Chamber held that Article 1 of Protocol no. 1 applies not only to registered trademarks, but also to trademark applications. Despite the fact that trademark applications can be revoked, the Court argued that they can possess a substantial financial value, because Portuguese law allows them to be assigned or licensed to third parties.<sup>1578</sup> Conversely, the Court has ruled that ‘a conditional claim which has lapsed as a result of the failure to fulfil the condition’ cannot be a ‘possession’ under Article 1 of Protocol No. 1.<sup>1579</sup>

<sup>1576</sup> See European Court of Human Rights, judgments of 11 October 2005 (Chamber) and 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), § 42 (Chamber) and § 63 (Grand Chamber).

<sup>1577</sup> European Court of Human Rights, decision of 4 October 1990, *Smith Kline and French Laboratories Ltd v. Netherlands* (appl. no. 12633/87).

<sup>1578</sup> European Court of Human Rights, judgment of 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), §§ 66-78.

<sup>1579</sup> European Court of Human Rights, decision of 10 July 2002, *Gratzinger and Gratzingerova v. Czech Republic* (appl. no. 39794/98), § 69.

Thus, Article 1 of Protocol No. 1 of the ECHR does not establish when and under what conditions a property title must be recognized. It merely requires that property that has been legally acquired be enjoyed peacefully. This is in agreement with settled case law of the European Court of Human Rights holding that Article 1 of Protocol No. 1 protects existing property and does not guarantee the right to acquire property.<sup>1580</sup> Accordingly, contracting states enjoy a broad margin of appreciation in establishing whether and under which title conditions they recognize property.<sup>1581</sup> It follows that Article 1 of Protocol No. 1 of the ECHR cannot be said to stand in the way of subjecting property, including copyright, to formal conditions of title.

That the question of the applicable title conditions is a matter for the discretion of the national lawmaker seems to be also confirmed by Article 14(1) of the German Basic Law. While recognizing a fundamental property right, the Basic Law states that the content and limits of property shall be defined by the law.<sup>1582</sup> This suggests that pursuant to German constitutional law, property is not absolute. The lawmaker can establish its content and limits, including the appropriate title conditions.<sup>1583</sup> The German Federal Constitutional Court indeed recognizes constitutional protection for property only in so far as the statutory formalities have been completed.<sup>1584</sup>

#### 6.4.2.2 FORMALITIES AFFECTING THE EXERCISE OF RIGHTS

Another question is whether the fundamental right of property permits lawmakers to limit the exercise of copyright by imposing formalities to that effect. In general, this seems acceptable. The second paragraph of Article 1 of Protocol No. 1 of the ECHR allows contracting states to limit the exercise of property rights in accordance with the general interest. This seems to give them ‘an almost unlimited power to impose restrictions on the use of property’ for public interest considerations.<sup>1585</sup>

To see whether a property limitation is compatible with the ECHR, the European Court of Human Rights examines whether it strikes a reasonable balance ‘between

<sup>1580</sup> European Court of Human Rights, judgment of 13 June 1979, *Marckx v. Belgium* (appl. no. 6833/74), § 50.

<sup>1581</sup> This margin of appreciation may well be explained by the fact that, at the time of adopting Article 1 of Protocol No. 1 ECHR, governments declared that they need sufficient leeway ‘to adopt or modify economic and social policies implicating private property’. See Helfer 2008, at 32 and 35.

<sup>1582</sup> See art. 14(1) of the Basic Law (*Grundgesetz*) of Germany: ‘*Das Eigentum ... [wird] gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.*’

<sup>1583</sup> See German Federal Constitutional Court, decisions of 17 November 1966, *Tollwut*, BVerfGE 20, 351, at 355 (‘*Da es keinen “Absoluten” Begriff des Eigentums gibt, ist es Sache des Gesetzgebers, Inhalt und Schranken des Eigentums zu bestimmen*’), and 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 240. See also Niebler 1982, at 230 and Antoni 2003, at 201 (para. 4).

<sup>1584</sup> See German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 218, stating, with regard to trademarks: ‘*Verfassungsmäßigen Eigentumsschutz können nur solche Warenzeichen genießen, die schutzfähig, rechtmäßig eingetragen und aufrechterhalten worden sind.*’

<sup>1585</sup> Van Dijk et al. 2006, at 887.

the general interest of the community and the requirements of the protection of the individual's fundamental rights'.<sup>1586</sup> The Court accepts that legislators enjoy a broad margin of appreciation.<sup>1587</sup> It usually follows their judgment as to what policy aims qualify as being in the public interest.<sup>1588</sup> Furthermore, the standard that it applies to resolve whether a property limitation rule is acceptable in each case is considerably low.<sup>1589</sup> The Court only observes that it does not cause the applicant to bear 'a special and excessive burden' that upsets the reasonable balance.<sup>1590</sup>

This seems to leave sufficient scope for subjecting the exercise of property rights to formalities. This is demonstrated, for example, in the *Yaroslavtsev v. Russia* case, concerning the legitimacy of Russian regulations preventing registration of vehicles the lawfulness of the acquisition of which could not be shown. Although the applicant complained that these regulations violated his right under Article 1 of Protocol No. 1 ECHR, the Court held that they were proportionate to the legitimate aim pursued. The Court recognized the general importance of a registration system ensuring the traceability of the legal owner of a vehicle for the purposes of road traffic regulation, as well as the wide margin of appreciation afforded to states.<sup>1591</sup>

While this case obviously says nothing about imposing formalities on copyright, it does indicate that, within the human rights framework, subjecting the exercise of property rights to formalities is not something that is immediately objectionable. From the viewpoint of the fundamental right of property, the exercise of copyright can be made conditional on formalities to pursue a legitimate 'general interest' aim.

Article 14(2) of the German Basic Law contains a similar balancing test, stating that property entails obligations and that its use shall serve the public good.<sup>1592</sup> This is what in German literature is referred to as 'the social obligation of property' ('*die Sozialbindung des Eigentums*').<sup>1593</sup> It obliges the German lawmaker to take account of the well-being of the general public when regulating the content and limits of property.<sup>1594</sup> Thus, on the one hand, the legislator has a constitutional duty to ensure that property can be lawfully enjoyed; in the case of copyright, this means that there

<sup>1586</sup> European Court of Human Rights, judgment of 25 October 1989, *Allan Jacobsson v. Sweden* (No. 1) (appl. no. 10842/84), § 55.

<sup>1587</sup> *Ibid.*, § 55. See also Van Dijk et al. 2006, at 887-890.

<sup>1588</sup> European Court of Human Rights, judgment of 28 September 1995, *Spadea and Scalabrino v. Italy* (appl. no. 12868/87), § 29.

<sup>1589</sup> Van Dijk et al. 2006, at 888-889.

<sup>1590</sup> See European Court of Human Rights, judgment of 9 June 2005, *Kirilova and Others v. Bulgaria* (appl. nos 42908/98, 44038/98, 44816/98 and 7319/02), § 123.

<sup>1591</sup> European Court of Human Rights, judgment of 2 December 2004, *Yaroslavtsev v. Russia* (appl. no. 42138/02), §§ 30-36.

<sup>1592</sup> Art. 14(2) of the Basic Law (*Grundgesetz*) of Germany reads: '*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*'

<sup>1593</sup> Niebler 1982, at 233 et seq. See also Leinemann 1998.

<sup>1594</sup> See Niebler 1982, at 236-237 and Antoni 2003, at 202-203 (paras 4 and 6). See e.g. German Federal Constitutional Court, decisions of 12 January 1967, *Grundstücksverkehrsgesetz*, BVerfGE 21, 73, at 83 et seq., and 11 October 1988, *Vollzugsanstalten*, BVerfGE 79, 29, at 40 et seq.

should be adequate legal safeguards to ensure that authors can enjoy the economic benefits resulting from their creations and be free to exercise their copyright at their own discretion.<sup>1595</sup> On the other hand, the lawmaker must also define appropriate standards ensuring that the use and exploitation of property corresponds to its nature and social significance.<sup>1596</sup> It should not only protect the rights of authors, but also safeguard the rights of others and the interest of the public well-being.<sup>1597</sup>

Hence, the public interest is an important parameter for the German lawmaker in the creation of copyright laws that satisfy the constitutional standard. It establishes not only the justification for, but also the periphery of copyright limitations. They should be proportionate to the objectives pursued and extend no further than is required for the well-being of the public.<sup>1598</sup> Limitations to copyright that are motivated by public interest considerations must actually be justified by such an interest.<sup>1599</sup> Moreover, the stronger the constitutionally protected core of copyright is affected by a limitation, the higher the public interest should be to actually justify the limitation.<sup>1600</sup>

A balancing test of the kind applied by the German Federal Constitutional Court may be useful for establishing limitations to copyright law, both for now and for the future.<sup>1601</sup> Although the Court has sometimes attached a comparatively great weight to the financial interests of authors, thus favouring proprietary interests over public interests,<sup>1602</sup> the balancing test illustrates that property, in general, and copyright, in particular, can be limited, provided that there is a genuine public interest.<sup>1603</sup> In view

<sup>1595</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 240-241, 7 July 1971, *Schulfunksendungen*, BVerfGE 31, 270, at 274, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392 and 400, considering this to be the constitutionally protected core of copyright ('den grundgesetzlichen geschützten Kern des Urheberrechts').

<sup>1596</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, at 241, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392.

<sup>1597</sup> German Federal Constitutional Court, decisions of 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 287, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 394.

<sup>1598</sup> German Federal Constitutional Court, decision of 11 October 1988, *Vollzugsanstalten*, BVerfGE 79, 29, at 40 et seq.

<sup>1599</sup> See German Federal Constitutional Court, decision of 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 400, holding that a disproportionate copyright limitation that is not consistent with the social obligation of property cannot be justified by art. 14(2) of the German Basic Law.

<sup>1600</sup> *Ibid.*, at 400. See also Badura 2007, at 51 et seq. and at 57 et seq.

<sup>1601</sup> See Graber 2005, at 108, Geiger 2008, at 129 and Braegelmann 2009, at 141.

<sup>1602</sup> See German Federal Constitutional Court, decisions of 7 July 1971, *Schulbuchprivileg*, BVerfGE 31, 229, and 25 October 1978, *Kirchenmusik*, BVerfGE 49, 382, at 392.

<sup>1603</sup> An example of a court case in which authors' and users' interests were carefully balanced is German Federal Supreme Court, decision of 11 July 2002, I ZR 255/00 (*Elektronischer Pressespiegel*), GRUR 2002, 963-967, limiting the authors' rights by permitting the scanning and distribution of newspapers in 'electronic press clipping services' on condition that remuneration is paid.

of that, it seems safe to conclude that the German Basic Law raises no constitutional objections to limiting copyright or subjecting its exercise to formalities.<sup>1604</sup>

#### 6.4.2.3 FORMALITIES AFFECTING THE ENFORCEMENT OF RIGHTS

A related question, for which we have to make a detour to the fundamental right of access to court, is whether formalities are compatible with the framework of human rights should the enforcement of copyright in court depend on their compliance. The right of access to court is enshrined, *inter alia*, in Article 6(1) of the ECHR.<sup>1605</sup> This right guarantees to everyone who claims that an interference with the exercise of his civil rights is unlawful, the right to submit that claim to a court or tribunal.<sup>1606</sup>

Because the right of access to court, by its very nature, calls for regulation by the state, it is not absolute but may be subject to limitations.<sup>1607</sup> The European Court of Human Rights has held that a limitation must pursue a legitimate aim and that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>1608</sup> A legitimate aim for restricting the right of access to court can be to guarantee legal certainty,<sup>1609</sup> but also, for example, to ensure the effectiveness of a centralized European patent register.<sup>1610</sup> As a rule, a limitation cannot justify impairing the very essence of the right of access to court.<sup>1611</sup> This is not the case if the law merely requires a plaintiff to take affirmative steps to be able to enforce his right in court. Consequently, as long as the author's right of access to court is not actually taken away by a formality-based regime (e.g., if formalities can be fulfilled at any time during the copyright term), such

<sup>1604</sup> In other areas of law, formalities as to the exercise of rights have been accepted. See German Federal Constitutional Court, decision of 7 August 1962, *Feldmühle-Urteil*, BVerfGE 14, 263, at 277, stating that the requirement to register mergers of business into the Trade Register in order to legally transfer the company capital of the one entity to the other does not infringe on art. 14 Basic Law.

<sup>1605</sup> European Court of Human Rights, judgment of 21 February 1975, *Golder v. UK* (appl. no. 4451/70), § 36. See also Van Dijk et al. 2006, at 557-578.

<sup>1606</sup> See European Court of Human Rights, judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium* (appl. nos 6878/75 and 7238/75), § 44.

<sup>1607</sup> See European Court of Human Rights, judgment of 27 August 1991, *Philis v. Greece* (appl. nos 12750/87, 13780/88 and 14003/88), § 59. See also Van Dijk et al. 2006, at 569 et seq.

<sup>1608</sup> European Court of Human Rights, judgments of 28 May 1985, *Ashingdane v. UK* (appl. no. 8225/78), § 57, and 21 September 1994, *Fayed v. UK* (appl. no. 17101/90), § 65.

<sup>1609</sup> See European Court of Human Rights, judgments of 10 July 2001, *Tricard v. France* (appl. no. 40472/98), § 29 and 11 October 2001, *Rodríguez Valín v. Spain* (appl. no. 47792/99), § 22.

<sup>1610</sup> See European Court of Human Rights, decision of 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97).

<sup>1611</sup> European Court of Human Rights, judgments of 24 October 1979, *Winterwerp v. Netherlands* (appl. no. 6301/73), § 60 and 28 May 1985, *Ashingdane v. UK* (appl. no. 8225/78), § 57.

‘conditional’ right of access to court seems not to be incompatible with Article 6(1) of the ECHR.<sup>1612</sup>

On a different note, access to court must always be granted to enable persons to contest a refusal to register or dispute other negative decisions with which they may be confronted in the process of completing formalities. In the case of *Lenzing AG v. UK*, for example, the European Court of Human Rights held that, in order to prevent arbitrary or discriminatory treatment of patent applications, the law should provide a means of judicial review by an impartial and independent court or tribunal.<sup>1613</sup>

#### 6.4.2.4 FORMALITIES AFFECTING PRE-EXISTING RIGHTS

A last question is whether national lawmakers, pursuant to the fundamental right of property, may retrospectively subject pre-existing rights to formalities. Since Article 1 of Protocol No. 1 of the ECHR protects existing possessions only,<sup>1614</sup> it seems to be permitted to impose formalities on property yet to be created. However, because the protection of Article 1 of Protocol No. 1 of the ECHR extends to existing claims that yield ‘a “legitimate expectation” of obtaining effective enjoyment of a property right’,<sup>1615</sup> it is uncertain whether it is also allowed to subject the enjoyment of pre-existing property to formalities.<sup>1616</sup> This seems to depend on whether the formalities pursue a legitimate aim and strike a reasonable and proportionate balance between protecting the rights of property owners and the broader public interest.<sup>1617</sup>

Accordingly, it depends on the circumstances of the case whether laws that make the protection of pre-existing property rights conditional on formalities constitute a breach of Article 1 of Protocol No. 1 of the ECHR. It appears that, to comply with their obligations under the ECHR, contracting states must as a minimum provide for flexible transitional measures, giving owners of existing property rights sufficient leeway by laying down an acceptable timeframe for fulfilling the formalities.

In general, it seems wrong to assume that laws the effect of which is to deprive persons of a pre-existing property right necessarily violate the fundamental right of property. In 1971, for example, the German Federal Constitutional Court ruled that the 1965 Copyright Act of Germany, which significantly weakened the protection of

<sup>1612</sup> In the US, for example, authors of works of US origin cannot file a copyright infringement suit until registration of the copyright claim is made. See 17 USC § 411. However, registration in the US may be made at any time during the subsistence of the copyright term. See 17 USC § 408.

<sup>1613</sup> See European Court of Human Rights, decision of 9 September 1998, *Lenzing AG v. UK* (appl. no. 38817/97).

<sup>1614</sup> European Court of Human Rights, judgment of 13 June 1979, *Marckx v. Belgium* (appl. no. 6833/74), § 50.

<sup>1615</sup> European Court of Human Rights, judgment of 28 September 2004, *Kopecký v. Slovakia* (appl. no. 44912/98), § 35 under c.

<sup>1616</sup> See European Court of Human Rights, judgment of 11 January 2007 (Grand Chamber), *Anheuser-Busch Inc. v. Portugal* (appl. no. 73049/01), § 82.

<sup>1617</sup> *Ibid.*, § 82. See also Helfer 2008, at 71-73.

performers, was in compliance with the property rights clause of Article 14(1) of the German Basic Law. While performers previously enjoyed the stronger protection of copyright, the 1965 Act protected them under the regime of neighbouring rights. As a result, certain exclusive rights were transformed into remuneration rights and the term of protection of the performer's life plus fifty years was shortened to a term of twenty-five years. The Court reasoned that the constitutional property rights clause authorizes the lawmaker not only to establish the content of new rights, but also to recast the content of existing rights, if this is necessary. The legislature thus enjoys a wide discretion. The only duty the constitution imposes on it is to adopt laws that correspond to the nature of the property right and bring the interests of right owners and of the general public into just equation.<sup>1618</sup> This does not mean that substantive changes are inadmissible. The Court has stated that the grant of a certain property right at one time does not imply the inviolability of this right for all times.<sup>1619</sup>

Thus, it seems acceptable to subject the protection of pre-existing property rights to formalities, provided that they serve a legitimate aim and maintain a fair balance between protecting the proprietor and safeguarding the public interest. The German Federal Constitutional Court, for example, held that the German registration system for geographical indications of wine was at odds with Article 14 of the Basic Law, as it excluded estates and vineyards smaller than five hectares from registration. As a result, wines of small enterprises could not be marketed with an indication of the place of origin, thus rendering existing trademarks of small enterprises, to the extent that they included geographical indications, entirely valueless.<sup>1620</sup> On the other hand, the Federal Constitutional Court approved amendments to the German Patents Act, pursuant to which pending patent applications, at a certain point in the registration procedure, are subject to public disclosure. Although this could harm the proprietary interests of the inventor, the Court found that the procedure was proportionate to the aim of simplifying and improving the existing patent registration system and upheld the balance between protecting potential patent owners and safeguarding the public interest. Therefore, it was consistent with Article 14 of the Basic Law.<sup>1621</sup>

#### 6.4.3 THE FUNDAMENTAL RIGHTS RELATED TO PERSONALITY

The other aspect of Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR, namely the protection of the author's moral rights, may also be safeguarded by other

<sup>1618</sup> German Federal Constitutional Court, decision of 8 July 1971, *Bearbeiter-Urheberrechte*, BVerfGE 31, 275, at 284-287.

<sup>1619</sup> *Ibid.*, at 284. For an extensive discussion of this case, see Braegelman 2009, at 131-133.

<sup>1620</sup> See German Federal Constitutional Court, decision of 22 May 1979, *Schloßberg*, BVerfGE 51, 193, at 219-220. See also Niebler 1980, at 230-231 and Van der Walt 1998, para. 7.

<sup>1621</sup> German Federal Constitutional Court, decision of 15 January 1974, *Patentanmeldungen*, BVerfGE 36, 281, at 292 et seq. See also Van der Walt 1998, para. 7.

fundamental rights. Although there is no case law yet to support this claim,<sup>1622</sup> some legal commentators have argued that moral rights might fall within the ambit of the right of privacy<sup>1623</sup> or the right to freedom of expression,<sup>1624</sup> depending on whether it aims to protect the author's private sphere (e.g., the right to claim authorship, the right of attribution or the right of integrity) or his freedom of speech (e.g., the right of first publication and the right to withdraw works previously published).

The consequence of considering moral rights to be an intrinsic part of the right of privacy or the right to freedom of speech appears to be that their existence cannot be subject to formalities. The right of privacy and the freedom of speech are rights that everyone enjoys by virtue of the international human rights treaties.<sup>1625</sup> This implies that no formalities may be imposed as a *sine qua non* for their protection. Unlike the author's economic rights, the title conditions of which may be determined by the lawmaker pursuant to the fundamental right of property, the protection of moral rights should commence from the moment of creation of the work. That also fits the nature of these rights. Moral rights are a legal recognition of the personal bond between the author and his work and contribute to the acknowledgment of the author's work 'as having an intrinsic value as an expression of human dignity and creativity'.<sup>1626</sup> To respect the author's dignity, it seems inappropriate and, from a human rights point of view, arguably illegitimate to subject their existence to formalities.

Under the fundamental right of privacy and the freedom of speech, it would be permitted to limit the exercise of moral rights, e.g. by imposing formalities, but only if such limitation is prescribed by law, pursues a legitimate aim, is proportionate to that aim and corresponds to a pressing social need (para. 6.3.3). Although it depends on the circumstances of the case whether a limitation will satisfy these requirements, it seems that, because moral rights aim to protect the personal link between the author and work, the public interest objective for limiting the exercise of moral rights must be relatively high so as to be able to meet the proportionality requirement.<sup>1627</sup>

At the national level, authorial dignity might also be safeguarded by fundamental rights. In the Netherlands, for example, it may perhaps be protected by virtue of the constitutional right to respect for a person's private life.<sup>1628</sup> Similarly, in France, the

<sup>1622</sup> See Drexl 2007, at 174 and Geiger 2008, at 112.

<sup>1623</sup> See e.g. Hugenholtz 2001, at 346 and Drexl 2007, at 167 et seq.

<sup>1624</sup> Vivant 1997, at 106-107. Copyright may also conflict with the freedom of speech, e.g., by impairing the rights of users to hold opinions and to receive and impart information. See Hugenholtz 2001.

<sup>1625</sup> See, with respect to the right of privacy, art. 12 UDHR, art. 17 ICCPR and art. 8(1) ECHR and, with respect to the right to freedom of expression, art. 19 UDHR, art. 19(2) ICCPR and art. 10(1) ECHR.

<sup>1626</sup> Torremans 2008, at 212.

<sup>1627</sup> See Van Dijk et al. 2006, at 747, concluding that 'the more far-reaching the infringement or the more essential the aspect of the right that has been interfered with, the more substantial or compelling the legitimate aims pursued must be'.

<sup>1628</sup> See art. 10(1) of the Dutch Constitution.

author's moral rights may be protected by the principle of human dignity, for which all citizens are equally eligible.<sup>1629</sup> In Germany, the Federal Supreme Court has held that moral rights are a manifestation of the general personality right, as enshrined in Article 2(1) in conjunction with Article 1(1) of the German Basic Law.<sup>1630</sup>

The protection of the author's moral rights by fundamental rights is not limitless. In the Netherlands, the constitutional right to respect for a person's private life may be subject to restrictions laid down by or pursuant to the law.<sup>1631</sup> In France, personal liberties can be exercised only to the extent that they do not harm the liberty of other citizens.<sup>1632</sup> Likewise, the personality right of Article 2(1) of the German Basic Law can be limited if it violates the rights of others or offends against the constitutional order or the moral law.<sup>1633</sup> Consequently, all these limitations are subject to a similar balancing act as that which is applied in fundamental rights regulation in general.

However, because moral rights are directly aimed at protecting authorial dignity and creativity, it seems that there is little room for limiting these rights or subjecting them to formalities. This can be concluded from the case law of the German Federal Constitutional Court. On the basis of Article 1(1) of the Basic Law, which states that human dignity is inviolable,<sup>1634</sup> the Court has consistently held that human dignity is the highest constitutional value, to which all laws and other fundamental rights must conform.<sup>1635</sup> This suggests that human dignity is at the top of the value-order of the German Basic Law.<sup>1636</sup> It follows that the stronger a personality right is linked to the human dignity protected by Article 1(1) of the Basic Law, the more compelling the public interest must be to justify a limitation of this personality right.<sup>1637</sup>

In conclusion, from a human rights viewpoint, moral rights can only be restricted in exceptional cases, since authorial dignity must be duly respected. This implies that moral rights ought to be protected independently from formalities and that their exercise must not be unreasonably limited by way of formalities. It seems advisable,

<sup>1629</sup> See arts I and VI of the French Declaration of the Rights of Man and of the Citizen of 1789.

<sup>1630</sup> German Federal Supreme Court, decision of 5 March 1971, I ZR 94/69 ('*Petite Jacqueline*'), *GRUR* 1971, 525-527, at 526, stating that: '*Auch das Urheberpersönlichkeitsrecht ist nur ein Ausschnitt und eine besondere Erscheinungsform des allgemeinen Persönlichkeitsrechts.*' See also Leinemann 1998, at 52 and Drexl 2007, at 168-169, generally following this interpretation.

<sup>1631</sup> See art. 10(1) of the Dutch Constitution.

<sup>1632</sup> See art. IV of the French Declaration of the Rights of Man and of the Citizen of 1789.

<sup>1633</sup> See art. 2(1) of the Basic Law of Germany. See also German Federal Constitutional Court, decisions of 16 January 1957, *Elfes*, BVerfGE 6, 32, at 37 et seq., and 25 August 2000, 1 BvR 2707/95, no. 10.

<sup>1634</sup> See art. 1(1) of the Basic Law of Germany: '*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*'

<sup>1635</sup> See e.g. German Federal Constitutional Court, decisions of 16 January 1957, *Elfes*, BVerfGE 6, 32, at 36 and 41, and 16 July 1969, *Mikrozensus*, BVerfGE 27, 1, at 6.

<sup>1636</sup> Eberle 2008, at 39.

<sup>1637</sup> See Antoni 2003, at 46. See also German Federal Constitutional Court, decision of 31 January 1973, *Tonband*, BVerfGE 34, 238, at 245, stating that even a predominant public interest cannot justify an interference of 'the absolutely protected core of a person's self-determination of life'.

therefore, if copyright is made dependent on formalities, to confine such conditional protection to the author's economic rights, thus leaving moral rights aside.<sup>1638</sup>

## 6.5 Evaluation and Assessment

The previous sections have demonstrated that, both from a philosophical and legal-theoretical perspective, subjecting copyright to formalities is not inconceivable. The fact that copyright may arise 'naturally' upon the creation of a work does not imply that the lawmaker cannot make the enjoyment or the exercise of copyright conditional on formalities, if there is a legitimate reason for doing so.

This is particularly evident if copyright is perceived as a property right. As a rule, private property, even if it originates in natural law, can be subject to formalities if the public interest so requires. This has been emphasized by Locke, who, in addition to the labour theory of property, carefully described the regulation of property in the civil society, asserting that it can be limited, or subject to formalities, if that is required to attain public interest objectives. Also, this is in agreement with the way in which private property is regulated. The existence or the exercise of various types of property, including landed property, is conditional on formalities. This practice is accepted from the point of view of human rights. The fundamental right of property permits subjecting private property to constitutive formalities (i.e. formal conditions of title) and formalities that limit the scope or the exercise of property rights.

However, to the extent that copyright qualifies as a personality right, there is less room for subjecting it to formalities. The personality rights theory does not accept formalities as a *sine qua non* for protection. It assumes that personality rights derive from the concept of personal freedom, which people 'naturally' enjoy by birth. As a result, these rights ought to be protected without formalities. At most, their exercise can be subject to formalities, so as to avoid a conflict of rights or balance competing interests of private parties. This is consistent with the practice of regulation of other personality-related fundamental rights, such as the right to a name or the right to get married, the exercise of which may be effectuated by civil registration, although it is widely recognized that everyone automatically enjoys these rights by birth.

In view of these findings, it can be concluded that if copyright is made dependent on formalities, a distinction should be made between those aspects of copyright that are akin to property rights, i.e., the author's economic rights, and those that are akin to personality rights, i.e., the author's moral rights. Only the economic rights can be fully subject to formalities. The author's moral rights, on the other hand, ought to be guaranteed without formalities. Given that the fundamental right to human dignity is

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<sup>1638</sup> Note that, at the time of drafting of the UDHR, protecting the author's economic interests was not the central aim. The main concern was to protect the author's moral interests. See UN Committee on Economic, Social and Cultural Rights 2006, para. 12. See also Cassin 1960, at 227, articulating that the original purpose of the drafters of the UDHR '*n'était pas de définir comme droits de l'homme, les droits divers de nature pécuniaire qu'un ... auteur peut tirer de l'exploitation ... de son œuvre*'.

inviolable and that moral rights aim to protect authorial dignity, the human rights framework directs that moral rights come into being independently from formalities and that their exercise should not be unduly restricted by way of formalities.

Admittedly, the distinction here suggested between the economic and moral aspects of copyright may be difficult to adopt in countries that follow a monist approach to copyright. In contrast to countries of the dualist tradition, which make a distinction between the economic and moral rights of authors, countries of the monist tradition perceive copyright as a unitary right that protects both the author's economic and moral interests, on the reasoning that the two are 'so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the right's personality aspect'.<sup>1639</sup>

Nevertheless, it would be going too far to conclude that, because monist countries make no distinction between the economic and moral aspects of copyright, it would be inappropriate to protect moral rights from the moment of creation, while subjecting economic rights to formalities. For one thing, few states have adopted the monist tradition.<sup>1640</sup> More importantly, countries that follow the monist approach, including Germany, do not apply it fully. Following the principle that moral rights are inalienable and may not be severed from the author's economic rights, they do not permit the legal transfer of copyright ownership.<sup>1641</sup> Even so, they accept that authors may grant exclusive licences pertaining to specific exploitation rights (*Nutzungsrechte*).<sup>1642</sup> Consequently, while, *de jure*, the economic and moral rights remain in the same hands, *de facto*, the two rights can be separated. Moreover, from a constitutional point of view, the author's economic and moral rights are clearly divisible. As observed, under the Basic Law of Germany, the economic and moral aspects of copyright are protected by different fundamental rights.<sup>1643</sup> From a principled point of view, therefore, there appear to be no obstacles for subjecting only the author's economic rights to formalities.

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<sup>1639</sup> Guibault & Hugenholtz 2002, at 38 and 77-78. See also Drexl 2007, at 165-166.

<sup>1640</sup> See Guibault & Hugenholtz 2002, at 37-132.

<sup>1641</sup> Drexl 2007, at 165-166.

<sup>1642</sup> See Guibault & Hugenholtz 2002, at 37-43 (for Austria) and 75-86 (for Germany).

<sup>1643</sup> See also Drexl 2007, at 168-169.