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# Privilege and Property

Essays on the History of Copyright



Edited by Ronan Deazley,  
Martin Kretschmer and Lionel Bently

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# 7. *Les formalités sont mortes, vive les formalités!* Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe

Stef van Gompel\*

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## 1. Introduction

At present, the national copyright laws of most countries do not contain copyright formalities such as the registration of copyright, the deposit of copies, the affixation of a copyright notice, and so on. This is due, in particular, to the prohibition on formalities, which was introduced into the international copyright system at the 1908 Berlin Revision of the Berne Convention for the Protection of Literary and Artistic Works.<sup>1</sup> This

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1 Art. 5(2) BC (1971), previously Art. 4(2) BC (1908), reads: 'The enjoyment and the exercise of these rights shall not be subject to any formality [...]'. Except for purely national situations, the provision prohibits contracting states from imposing formalities on authors or copyright owners. Once countries began to protect foreign works automatically, i.e. without formalities, however, it made little sense to retain the same prerequisites for domestic works. For this reason, copyright formalities

prohibition on formalities is inspired mainly by pragmatic reasoning. When international copyright protection was first explored, there was a strong desire to relieve authors from the multitude of formalities with which they needed to comply in order to secure protection in different states.<sup>2</sup> Apart from that, the proceedings of the various conferences that modelled the Berne Convention do not reveal any philosophical, ideological or dogmatic arguments for their abolition. Thus, the rationale behind the proscription of formalities at the international level seems to be practical rather than idealistic.<sup>3</sup>

In the recent debate on a possible reintroduction of copyright formalities, however, it is often suggested that the absence of formalities in copyright law is attributable, to a great extent, to the ideological foundation of copyright and authors' rights.<sup>4</sup> It is generally asserted, for instance, that subjecting the enjoyment or exercise of copyright to formalities undercuts the notion of copyright as springing from the act of authorship,<sup>5</sup> and that,

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were gradually abolished, or reduced to a minimum, in virtually all countries. This effect has increased because of the incorporation by reference of Art. 5(2) BC (1971) in both the TRIPS Agreement (Art. 9(1) TRIPS Agreement) and the WIPO Copyright Treaty (Art. 1(4) WCT).

2 Illustrative, in this respect, is the opening speech which Numa Droz, president of the Berne conferences of 1884-86, held at the opening meeting in 1884, in *Actes de la Conférence internationale pour la protection des droits d'auteur: réunie à Berne du 8 au 19 septembre 1884* (Berne: Imprimerie K.-J. Wyss, 1884), p. 21: 'Une seconde question est celle des formalités à remplir pour la constatation du droit. Les écrivains et les artistes demandent sous ce rapport la plus grande simplification. Tel pays a conclu récemment vingt-cinq conventions pour la propriété littéraire et artistique. Si ses ressortissants doivent remplir vingt-cinq fois la formalité de l'enregistrement et du dépôt, cela devient tout ensemble fastidieux et coûteux'.

3 Nonetheless, some academics assume that the removal of formalities at the international level is strongly based on philosophical underpinnings. See for example Silke von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008), p. 119 (no. 5.58), and Adolf Dietz, *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with Special Reference to the Provisions of the Treaty Establishing the European Economic Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), p. 25 (no. 54), who believe that the rationale behind the prohibition on formalities lies in 'natural rights' theory.

4 The reintroduction of formalities has been called for, in copyright literature, inter alia, by Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), pp. 287-90, and Christopher Sprigman, 'Reform(aliz)ing Copyright', *Stanford Law Review*, 57 (2004), 485-568; and in economic literature, inter alia, by William M. Landes and Richard A. Posner, 'Indefinitely Renewable Copyright', *University of Chicago Law Review*, 70 (2003), 471-518 and François Lévêque and Yann Ménière, *The Economics of Patents and Copyright* (Berkeley Electronic Press, 2004), p. 105.

5 See Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolu-

similar to any other property right, authors should have property rights over their creations ‘naturally’, that is without compliance with formalities.<sup>6</sup> Because these moral claims cannot be traced back to the Berne Convention, this raises the question of whether, except for the practical reasons for prohibiting formalities at the international level, there were other – ideological or pragmatic – reasons why formalities in copyright law have generally fallen out of favour.

An investigation into the history and theory of copyright formalities in nineteenth century Europe may well unveil these reasons. Throughout the nineteenth century, the national laws of most European states subjected literary and artistic property rights to formalities of some kind. This certainly was the case in the still premature copyright or authors’ rights legislation in Europe at the beginning of that century. Yet, even as the century approached its end and the copyright laws of most countries had been better developed, only a few European states had completely done away with formalities.<sup>7</sup> Nonetheless, there was a clear tendency among more and more countries to begin to reduce their application, or to mitigate their legal effects.

This chapter will therefore examine, from a legal-historical perspective, how formalities developed in the nineteenth century literary and artistic property laws of some European states and why their attachment to literary and artistic property rights gradually weakened in the course of the century. The states that will be discussed here are France, Germany, the Netherlands and the UK. These countries are chosen because they influenced, to a greater or lesser degree, the development of the doctrine of copyright and authors’ rights in Europe. This study will focus exclusively on domestic legislation. The international protection of copyright, which started in the second part of the nineteenth century, will not be further analysed.<sup>8</sup> Also, the history of copyright formalities in the USA, which perhaps

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tionary France and America’, in *Of Authors and Origins: Essays on Copyright Law*, ed. by Brad Sherman and Alain Strowel (Oxford: Clarendon Press, 1994), pp. 131-58 (pp. 133-4, 147), who touches upon formalities in an attempt to demonstrate that in the period following the French Revolution, the goals and principles underlying the seemingly author-oriented French *droit d’auteur* system were similar to those of the utilitarian and society-oriented US copyright system.

6 See Lessig, pp. 250-1, who strongly rejects the idea that copyright would be ‘a second-class form of property’ if it were conditional on formalities.

7 See the overview in Ernst Röthlisberger, *Der interne und der internationale Schutz des Urheberrechts in den verschiedenen Ländern: Mit besonderer Berücksichtigung der Schutzfristen, Bedingungen und Förmlichkeiten* (Leipzig: Börsenverein der Deutschen Buchhändler, 1904).

8 In France, works of foreign origin were protected by the Decree of 28-30 March

can be regarded as the country of formalities par excellence, will not be considered. Since the (partial) removal of formalities in US copyright law in 1989 was based fully on making US copyright law compliant with the Berne Convention,<sup>9</sup> the history of formalities in the USA cannot explain why formalities have lost their significance for copyright and authors' rights. Moreover, whereas the history of US formalities has been frequently analysed in past studies, this study seeks to close the gap left by the sparse analysis of the history of formalities in nineteenth century Europe.<sup>10</sup>

Besides contributing to the literature on the history and theory of copyright and authors' rights, the aim of this study is to further the insight into the question of copyright formalities in general. As observed, this is particularly important in view of the increased calls for a reintroduction of copyright formalities. Because the author-centred *droit d'auteur* doctrine, which in the course of the nineteenth century was developed in continental Europe, is often seen as a great, and perhaps even unbridgeable obstacle to reintroducing formalities, it seems critical to the debate to explain whether, and to what extent, formalities were consistent with the dominant philosophies of copyright and authors' rights in Europe at different stages of the nineteenth century. This is where this study attempts to make a contribution.

For systematic reasons, this chapter will be split in two parts, covering the first and second half of the nineteenth century respectively. The first

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1852. In the UK, international copyright protection was secured by the International Copyright Act (1844), 7 and 8 Vict., c. 12, as amended, inter alia, by the International Copyright Act (1852), 15 and 16 Vict., c. 12 and the International Copyright Act (1875), 38 and 39 Vict., c. 12. In Germany and the Netherlands, on the other hand, works of foreign origin did not receive protection unless they were (first) issued by a domestic publisher and/or printed by a domestic printing house.

9 Berne Convention Implementation Act of 31 October 1988, Pub. L. No. 100-568, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 102 Stat. 2853. This act became effective on 1 March 1989. In implementing the Berne Convention, however, the US government employed a minimalist approach. At present, therefore, US federal copyright law still draws heavily on copyright formalities. For works of US origin, registration is a prerequisite for initiating an infringement action. Moreover, for works of both US and foreign origin, the recovery of statutory damages and attorney's fees is limited to instances of infringement occurring after registration. See 17 U.S.C. §§ 411 and 412.

10 Although the literature on the history of copyright and authors' rights is very rich, to the author's knowledge, it does not yet contain a comparative analysis of copyright formalities in nineteenth-century Europe. Unquestionably, there are some interesting historical accounts, but they only present an overview of the state-of-the-art of formalities in national law at a given moment in time. See for example A.W. Volkmann, *Zusammenstellung der gesetzlichen Bestimmungen über das Urheber- und Verlagsrecht: Aus den Bundesbeschlüssen, den deutschen Territorialgesetzgebungen und den französischen und englischen Gesetzen* (Leipzig: Polz, 1855), pp. 132-6.

part shall begin with a short overview of formalities in the early legislation on literary and artistic property, followed by a description of their nature and legal effects. It shall be seen that while, in the UK, formalities were relatively mild, the laws in continental Europe included rather rigorous formalities. The part shall conclude by identifying the main reasons for this divide. The second part shall look at how formalities developed in the laws of the different states in the second half of the century. While, in the Netherlands and the UK, formalities were generally retained, in Germany, there was a tendency to limit their use and, in France, to soften their nature and legal effects. These tendencies will be explained on the basis of some ideological, functional and conceptual innovations that transformed copyright and authors' rights law during the nineteenth century. Furthermore, a few reasons explaining why the same developments did not occur in the Netherlands and the UK shall be given. A short conclusion shall present the main findings of this study and link them to current debate.

## 2. Copyright Formalities in the First Half of the Nineteenth Century

### 2.1 A Short Overview of Formalities in National Copyright Law

The early legislation on literary and artistic property on the European continent involved many formalities. The French decree of 19-24 July 1793, which conferred an exclusive reproduction right in 'writings of all kind' and 'productions of the *beaux arts*', included the requirement for authors of literature or engravings to deposit two copies of their work at the National Library or the Cabinet of Prints of the Republic respectively.<sup>11</sup> The formality of legal deposit was also contained in early Dutch copyright law,<sup>12</sup> and

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11 Art. 6 of the Decree of 19-24 July 1793 on the property rights of authors of writings of all kind, of music composers, of painters and of designers. The French Decree of 13-19 January 1791 on theatrical plays, which was followed by a Decree of 30 August 1792, also included a formality. It required authors, who wished to retain a public performance right in their plays, to publicly announce this by a notice, which should be deposited with a notary and printed at the text of the play. Because the 1791 Decree was repealed by the Decree of 1 September 1793 and this formality did not reappear in later acts, however, it will not be further discussed here.

12 Art. 7(b) of the Act of the Batavian Republic of 3 June 1803; Art. 12 of the Sovereign Enactment of 24 January 1814; Art. 6(c) of the Dutch Copyright Act of 25 January 1817 ('an act establishing the rights which in the Netherlands can be exercised in relation to the printing and publication of literary and artistic works').

in the copyright laws of several German states, such as those of Bavaria, Hamburg, Holstein and Lübeck.<sup>13</sup>

Another formality that was commonly applied was the registration of works. In Saxony, for instance, registration on the Leipzig *Eintragsrolle* (entrance roll) was a general condition for the protection of works of literature and the arts.<sup>14</sup> In Prussia, on the other hand, there was no registration requirement in respect of literary and musical works. Yet, authors of a work of art needed to register a claim at the *obersten Curatorium der Künste* of the Ministry for Cultural Affairs in order to reserve an exclusive reproduction right in their works.<sup>15</sup> A similar rule was provided for in the state copyright law of Saxe-Weimar-Eisenach.<sup>16</sup>

Several laws also stipulated a notice formality of some kind. In the Netherlands, the law prescribed that the publisher's name, together with the place and date of publication, were to be imprinted on the work.<sup>17</sup> The Bavarian law also required works to be duly marked with the author's or publisher's name.<sup>18</sup> Lastly, in several copyright acts, reservation requirements were laid down for retaining specific rights, such as the translation

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13 Art. V of the Bavarian Act of 15 April 1840 concerning the protection of property in productions of literature and the arts from publication, reproduction and reprint; Art. 11 of the Decree of Hamburg of 1847; Art. II of the Letter patent of the Chancellery (*Kanzleipatent*) of 30 November 1833, whereby a Resolution from the German Federal Assembly (*Bundesversammlung*) on the reprint of books was publicly announced and carried out, for the Duchy of Holstein; Art. 7 of the Regulation of Lübeck against reprinting, as well as for the protection of musical and dramatical works from unauthorized performance of 31 July 1841. It appears that the legal deposit was also linked to the protection of literary and artistic property in Sonderhausen and Luxemburg. In other German states, it was less commonly applied. See Johannes Franke, *Die Abgabe der Pflichtexemplare von Druckerzeugnissen: Mit besonderer Berücksichtigung Preussens und des deutschen Reiches, unter Benutzung archivalischer Quellen*, Sammlung bibliothekswissenschaftlicher Arbeiten, 3 (Berlin: A. Asher and Co., 1889), pp. 72-3.

14 Act of Saxony of 22 February 1844 concerning the protection of rights in literary works and works of the arts, and the accompanying Decree of the same date to execute this act. See also Friedemann Kawohl, *Urheberrecht der Musik in Preussen (1820 - 1840)*, Quellen und Abhandlungen zur Geschichte des Musikverlagswesens, 2 (Tutzing: Schneider, 2002), p. 276, notes 61 and 62.

15 Arts 27 and 28 of the Prussian Act of 11 June 1837 for the protection of property in works of science and the arts from reprint and reproduction.

16 Arts 27 and 28 of the Act of Saxe-Weimar-Eisenach of 11 January 1839 for the protection of property in works of science and the arts from reprint and reproduction.

17 Art. 7(a) of the Act of the Batavian Republic of 3 June 1803; Art. 5 of the Sovereign Enactment of 24 January 1814; Art. 6(b) of the Dutch Copyright Act of 25 January 1817.

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

right for literary works.<sup>19</sup>

Similar formalities were in place in the UK. The 1710 Statute of Queen Anne, which was still in force at the beginning of the nineteenth century, contained a number of formalities. To acquire the protection afforded by the Statute of Anne, the recipient of the right was required, before publication, to enter the title of a literary work in the register book of the Stationers' Company.<sup>20</sup> Also, the law imposed a duty to deposit nine copies of each new book and reprint with additions, before publication, to the Stationers' Company's warehouse keeper.<sup>21</sup> In 1801, this number of copies was increased to eleven,<sup>22</sup> but lowered to five, in 1836.<sup>23</sup>

Other types of copyright, such as the copyright in engravings, prints and lithographs and in sculptures, models and casts, existed without registration. Nevertheless, the copyright in these works was generally subjected to a notice requirement. The 1735 Engravers' Copyright Act required the date of first publication and the name of the copyright owner to be truly engraved on each plate and printed on each print.<sup>24</sup> Likewise, the 1798 and the 1814 Sculpture Copyright Acts required the name of the copyright owner and the date of publication to be put on the work before it was published and exposed to sale or otherwise put forth.<sup>25</sup>

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19 See for example: Art. 4(b) of the Prussian Act of 11 June 1837; Art. 4 of the Act of Hessen-Darmstadt to secure the rights of writers and publishers of 23 September 1830; Art. 4(b) of the Act of Saxe-Weimar-Eisenach of 1839; and Art. 2 of the Act of Braunschweig of 1842 for the protection of property in works of science and the arts.

20 Sec. 2 of the Act for the Encouragement of Learning (1710), 8 Anne, c. 19.

21 Ibid., Sec. 5. The copies were destined for the use of the Royal Library (later: the British Museum); the university libraries of Oxford, Cambridge and four universities in Scotland; the library of Sion College in London; and the library of the Faculty of Advocates at Edinburgh.

22 Sec. 6 of the Copyright Act (1801), 41 Geo. III, c. 107. While extending the law of copyright to Ireland, this Act required two extra copies to be deposited for the libraries of Trinity College and the King's Inns in Dublin.

23 Sec. 1 of the Copyright Act (1836), 6 and 7 Will. IV, c. 110. The reason why the number of copies was considerably reduced was to alleviate the burden for the book trade, which for long had tried to find a means of relief from the outrageous 'tax' of the deposit. See R.C. Barrington Partridge, *The History of the Legal Deposit of Books Throughout the British Empire* (London: Library Association, 1938), pp. 60-79.

24 Sec. 1 of the Engravers' Copyright Act (1735), 8 Geo. II, c. 13.

25 Sec. 1 of the Models and Busts Act (1798), 38 Geo. III, c. 71 and sec. 1 of the Sculpture Copyright Act (1814), 54 Geo. III, c. 56.

## 2.2 The Nature and Legal Effects of the Early Copyright Formalities

### 2.2.1 General Observation

The copyright formalities contained in the literary and artistic property laws of the first half of the nineteenth century differed significantly in their nature and legal effects. In general, they were either constitutive or declarative of the right. In the former capacity, formalities were initial conditions for the coming into existence of the right. They essentially operated as one-way switches between non-protection and protection: literary and artistic property rights were recognised only if the prescribed formality had been duly complied with. Therefore, the nature and legal effects of constitutive formalities were rather harsh. Works for which the prescribed formality had not been fulfilled automatically fell into the public domain. Hence, for beneficiaries of the right, this involved an assessment of whether a certain work would be commercially valuable enough to warrant protection, that is, whether the expected revenue of royalties would exceed the costs of complying with the formality.<sup>26</sup> Formalities of this kind thus ‘imposed an initial filter separating works with significant potential commercial value for which authors desired protection from other works for which protection was irrelevant’.<sup>27</sup>

By contrast, the nature and legal effects of declaratory formalities were relatively soft. In general, declaratory formalities can be characterised as means for authors to acknowledge and formally claim possession of their rights. This was considered important, inter alia, as proof in court proceedings. In view of that, the penalty for non-compliance was not the defeat of rights, but the impossibility of enforcing them (or claiming other benefits).<sup>28</sup> Yet, one may query what the rights are worth if they are unenforceable and, in effect, without a remedy if the prescribed formalities are not fulfilled.<sup>29</sup>

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26 Friedemann Kawohl and Martin Kretschmer, ‘Abstraction and Registration: Conceptual Innovations and Supply Effects in Prussian and British Copyright (1820-50)’, *Intellectual Property Quarterly*, 2 (2003), 209-28 (pp. 221-2).

27 Sprigman, p. 502.

28 Examples of declaratory formalities can still be found in US federal copyright law.

29 See for example John M. Kernochan, ‘Comments on Discussion Bill and Commentary Prepared for the April 15 Subcommittee Meeting as a Proposed Draft of Implementing Legislation to Permit U.S. Adherence to Berne’, *Columbia-VLA Journal of Law & The Arts*, 10 (1986), 693-704 (p. 703).

Failure to comply with declaratory formalities, however, did not as such prevent authors from exercising their rights (as was the case with constitutive formalities which, if not fulfilled, caused complete loss of protection). In fact, the rights could still be legally assigned, licensed, exploited, and so on. Furthermore, it will be seen that, in the course of the century, declaratory formalities were held to be curable. Any failure or imperfection in completing the formality could always be repaired before legal action was started. This significantly mitigated the – otherwise harmful – nature of these formalities.<sup>30</sup>

### 2.2.2 The Nature and Legal Effects in Practice

Interestingly, the nature and legal effects of formalities varied considerably on both sides of the Channel. While most formalities in the British copyright system were declarative rather than constitutive of the right, the opposite was true for the majority of formalities in the early-nineteenth century literary and artistic property laws in continental Europe.

The formalities contained in the laws of the Netherlands and some German states were express conditions for the coming into existence of the right. In the Netherlands, to come into possession of and claim the property right in literary works, the law stipulated a compulsory deposit of copies and required that the publisher's name, together with the place and date of publication, be indicated on these works.<sup>31</sup> Likewise, in Bavaria, copyright did not attach to works of literature and the arts without these works being duly marked with the author's or publisher's name.<sup>32</sup> Finally, in some German states, the coming into existence of literary or artistic property depended on a compulsory registration or mandatory deposit of copies.<sup>33</sup>

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30 At the same time, this greatly weakened the incentives for authors to fulfil these formalities, thus undermining the effectiveness of the system. In many countries, formalities were poorly complied with.

31 Art. 6(c) of the Dutch Copyright Act of 1817. Art. 8 of the Act of the Batavian Republic of 3 June 1803 also threatened with the loss of copyright if these formalities were not fulfilled. Art. 6 of the Sovereign Enactment of 1814, however, seemingly subjected the existence of authors' rights to compliance with the legal deposit, though not with the copyright notice. See Chris Schriks, *Het kopijrecht - 16de tot 19de eeuw: Aanleidingen tot en gevolgen van boekprivileges en boekhandelsusanties, kopijrecht, verordeningen, boekenwetten en rechtspraak in het privaat-, publiek- en staatsdomein in de Nederlanden, met globale analoge ontwikkelingen in Frankrijk, Groot-Brittannië en het Heilig Roomse Rijk* (Zutphen [etc.]: Walburg Pers/Kluwer, 2004), p. 393.

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

33 See for example: the Act of Saxony of 22 February 1844; Art. 11 of the Decree of Hamburg of 1847.

Other formalities were not constitutive of the property right, but only affected its exercise. In Bavaria, the legal deposit functioned as a condition to sue (*Prozeßvoraussetzung*): in legal action against counterfeiting, the receipt given upon the deposit of the copies needed to be presented as evidence before the court, otherwise the claim would be declared inadmissible.<sup>34</sup> In Holstein and Lübeck, on the other hand, the receipt of deposit did not serve as a condition to sue, but as legal evidence of the property and publication date of the work only.<sup>35</sup>

In France, the legal deposit also seemed to be designed as a condition for the institution of a copyright infringement proceeding. The law stated that failure to satisfy the deposit resulted in inadmissibility of an infringement claim before a court should an author want to file suit against a counterfeiter.<sup>36</sup> However, from the outset, courts repeatedly considered compliance with the deposit as constitutive of the author's property right.<sup>37</sup> It was ruled, for example, that an author who published a work without completing the legal deposit was without right vis-à-vis third parties who had later published and deposited the work.<sup>38</sup> In 1834, the Court of Cassation ruled that even though authors' rights did not exist because of the deposit, the latter at least was a formality necessary for the author to reserve its exclusive enjoyment. As the law only promised to secure the rights of those authors who had fulfilled the deposit, failure to do so would render the author's property right void.<sup>39</sup> Finally, it was held that the legal deposit was not merely a condition to sue. The Court of Rouen found that its purpose was

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

35 Art. II of the Letter patent of the Chancellery (*Kanzleipatent*) of 30 November 1833 for the Duchy of Holstein; Art. 7 of the Regulation of Lübeck of 31 July 1841.

36 Art. 6 of the French Decree of 19-24 July 1793.

37 For the situation in France until the end of the Napoleonic era, see Ginsburg, pp. 147-8. See, more generally, Eugène Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et pratique et du droit de représentation*, ed. by Georges Mailard and Charles Claro, 3rd edn (Paris: Marchal and Billard, 1908), p. 474 (no. 434). In the first half of the nineteenth century, many courts assumed that protection could only be obtained if the formalities prescribed for acquiring the authors' rights were fulfilled. See for example French Court of Cassation, 30 January 1818, *Michaud v. Chaumerot*, *Sirey* (1<sup>er</sup> Sér.) 18, 1, 222 (p. 224), which found that the plaintiff had observed 'toutes les formalités prescrites pour s'en assurer la vente exclusive'.

38 See for example Royal Court of Paris, 26 November 1828, *Troupenas*, *Gaz. trib.* 29 November 1828, which held that the author's right could not be restored by way of a deposit subsequently made.

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

essentially that the author reserve an exclusive property right over his creation by formally announcing that he had not given up his exclusive right to the benefit of the public domain.<sup>40</sup>

By contrast, in the UK, the legal effects of formalities were fairly mild. Failure to register affected the enforcement of copyright, but not the copyright as such. According to the Statute of Anne, 'nothing in this act contained shall be construed to extend to subject any [...] person whatsoever, to the forfeitures or penalties therein mentioned, [...] unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the Company of Stationers'.<sup>41</sup> Also, it provided that if registration were not completed because of a refusal or negligence by the clerk, an advertisement in the Gazette would 'have the like benefit, as if such entry [...] had been duly made'.<sup>42</sup>

Hence, unless a work was duly registered or advertised in the Gazette, a right owner could not rely on the statutory forfeitures or penalties in a copyright infringement suit. Yet, beyond this purpose, registration was not required. In *Beckford v. Hood*,<sup>43</sup> the Court of King's Bench ruled that an author whose work was pirated during the statutory term of protection might maintain an action for damages against the offending party, even though the work had not been entered at Stationers' Hall. The Court found that the statutory penalties alone were an insufficient remedy for the injury of another man's civil property, as the right of action was not given to the grieved party but to a common informer, and the penalties did not attach during the full copyright term, but only during the first fourteen years.<sup>44</sup>

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40 Court of Rouen, 13 December 1839, *Rivoire, Sirey* (2<sup>me</sup> Sér.) 1840, 2, 74. However, the court decisions in this period were very contradictory on the nature and legal effects of legal deposit. In some judgments, it was held that authors could present their case before a court even if the deposit, though posterior to the counterfeit, had been fulfilled prior to the institution of the infringement proceeding. See for example: Criminal Court of Paris, 8 fructidor XI (26 August 1803), *Bertrandet v. Lassaulx, Sirey* (1<sup>er</sup> Sér.) 4, 2, 15; Royal Court of Paris, 3 July 1834, *Jazet v. Villain, Gaz. Trib.* 28 May and 4 July 1834. See also Criminal Tribunal of Paris, 18 May 1836, *L'administration des postes v. Bohain* in Étienne Blanc, *Traité de la contrefaçon en tous genres et de sa poursuite en justice*, 4th edn (Paris: Plon, 1855), p. 142; Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger* in Blanc, pp. 35-6; and Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc, pp. 38-9.

41 Sec. 2 of the Statute of Anne (1710).

42 *Ibid.*, Sec. 3.

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

44 See, in particular, the argumentation by Justice Ashhurst (101 *Eng. Rep.* 1164 (p. 1168), 7 *T.R.* 620 (p. 628): 'The penalties to be recovered may indeed operate as a punishment upon the defender, but they afford no redress [...] for the civil injury

Therefore, the Court allowed a common law remedy to be applied, even though the work had not been registered.<sup>45</sup>

In the same ruling, the Court of King's Bench also confirmed the principle that statutory copyright in literary works was secured by publication independently of registration.<sup>46</sup> This principle was later adopted in the 1814 Copyright Act, which expressly declared that failure to register would not affect any copyright, but would only forfeit the statutory penalties.<sup>47</sup>

The same soft regime applied to the Statute of Anne's deposit requirement. A failure to deposit the prescribed number of copies of the work did not imperil the author's copyright, but the author would forfeit, besides the value of the copies, the sum of five pounds for every copy not delivered, plus the legal costs of suit for claiming the deposit.<sup>48</sup> Although in 1775 the deposit had become a condition for recovering statutory penalties (akin to the registration requirement),<sup>49</sup> the penalty of five pounds plus the value of the copy and the legal costs of suit as provided for in the Statute of Anne were reinstated by the Copyright Act of 1814.<sup>50</sup>

However, in contrast to the mild approach towards the registration and deposit for literary works, the regime for engravings, prints and lithographs was quite rigid. In the case *Newton v. Cowie*, the condition of the sustained by the author in the loss of his just profits'. See also the argumentation by Justice Grose (101 *Eng. Rep.* 1164 (p. 1168), 7 *T.R.* 620 (pp. 628-9)).

45 This was not considered to run counter to the general principle adopted in the landmark case *Donaldson v. Beckett*, 98 *Eng. Rep.* 257, 4 *Burr.* 2408; 1 *Eng. Rep.* 837, 2 *Brown's Parl. Cases* 129 (House of Lords, 1774), where the majority of the judges held that the author's property right in a published work was confined to the copyright given to him by the statute, as opposed to a copyright at common law. The forfeitures and penalties provided for in the Statute of Anne (1710) were simply considered an additional statutory remedy, accumulative to the common law remedies that the author could generally call upon for the enforcement of his right. See the argumentation by Chief Justice Lord Kenyon (101 *Eng. Rep.* 1164 (p. 1167), 7 *T.R.* 620 (p. 627)).

46 R.F. Whale, *Copyright: Evolution, Theory and Practice* (London: Longman, 1971), p. 9. This principle had also been voiced by Lord Mansfield in the case *Tonson v. Collins*, 96 *Eng. Rep.* 180; 1 *Black. W.* 321 (Court of King's Bench, 1762). He held that registration at Stationers' Hall was necessary only to enable a grieved party to institute legal action to recover the statutory forfeitures or penalties. In his opinion, registration was not required, therefore, for enjoying statutory copyright as such (96 *Eng. Rep.* 180 (p. 184); 1 *Black. W.* 321 (p. 330)).

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

48 Sec. 5 of the Statute of Anne (1710).

49 The University Copyright Act (1775), 15 *Geo. III*, c. 53, ordered that no person would be subject to the statutory penalties unless the copies were actually delivered to the Stationers' Company's warehouse keeper.

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

Engravers' Copyright Act of 1735 of marking these types of works with the date of first publication and the name of the proprietor was formulated as a 'hard' formality. The Court of Common Pleas held this notification to be not merely directory, but conditional for the vesting of the right.<sup>51</sup> If the works were not marked with the name of the proprietor and date of first publication, it would be impossible for rival publishers to know whether, and against whom, they were offending.<sup>52</sup> This may explain the radical nature of these formalities as compared to those for literary works. On the latter, the names of the author and publisher and the year of first publication were routinely inscribed. For literary works, ownership and duration of protection were thus easier to resolve than for engravings, prints and lithographs. This appears to be the main reason why the Court decided that copyright attached to artistic works only if they were duly marked with the prescribed notice. The notice requirement laid down by the 1798 and 1814 Sculpture Copyright Acts seems to have followed the same rationale.<sup>53</sup>

### 2.3 Some Important Reasons for the Different Attitude towards Formalities

The previous section reveals that, in the first half of the century, the nature and legal effects of formalities differed noticeably between the UK and the countries on the European mainland. This difference in attitude towards formalities may perhaps seem a bit odd. However, there are various circumstances with which the divergence might be explained.

First, the formalities in early continental-European literary and artistic property legislation were clearly remnants from the old system of book privileges (or letter patents) issued by the sovereign to protect the output of the book trade. The grant of a book privilege was typically conditioned on the obligation to deposit a certain number of copies of the book,<sup>54</sup> to

51 *Newton v. Cowie*, 130 *Eng. Rep.* 759, 4 *Bing.* 234 (Court of Common Pleas, 1827). This decision was upheld in *Brooks v. Cock* (1835), 111 *Eng. Rep.* 365, 3 *AD. and E.* 138 and subsequent decisions. Previously, it had been ruled that a copyright owner could maintain an action against an infringer, even if his or her name had not been inscribed on the print. See the decision in *Roworth v. Wilkes* (1807), 170 *Eng. Rep.* 889, 1 *Camp.* 94.

52 *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (p. 760), 4 *Bing.* 234 (pp. 236-7).

53 This follows from the phrasing of the Sculpture Copyright Acts, according to which the copyright was granted, 'provided always' (1798) or 'provided, in all and in every case' (1814), that the proprietor shall cause his or her name to be put on the work, together with the date of publication.

54 It was Francis I who introduced the legal deposit in France by the Ordinance of Montpellier of 28 December 1537. Although it first only served to enrich the royal

insert a copy of the privilege (including the licence to print from the censor) and the publisher's name and place of printing inside the book<sup>55</sup> and, occasionally, to make a recording of the privilege or the title of the book in a central register.<sup>56</sup> While the old feudal order was destructed during the French Revolution,<sup>57</sup> it is most likely that the early legislation on literary and artistic property in continental Europe took the principles that were in force at the end of the *Ancien Régime* as its reference point. Since the protection of literary works hitherto had been fully dependent on compliance with formalities, this influence of old feudal principles may have been a first important reason why formalities in the early continental-European authors' rights legislation were considered constitutive rather than declarative of the right.<sup>58</sup>

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collections, it was made a formal prerequisite for the acquisition of privileges by the Royal edict of Louis XIII 7 September 1617. It would maintain this function until the end of the *Ancien Régime*. See Henri Lemaitre, *Histoire du dépôt légal: 1re partie (France)* (Paris: Picard, 1910), pp. ix-xxvii. In the Netherlands and several German states, similar systems of legal deposit were in place. See Alfred Flemming, *Das Recht der Pflichtexemplare* (München/Berlin: Beck, 1940), pp. 7-13.

55 Notice requirements of this kind could be found, inter alia, in France, in the Edict of Chateaubriant of 26 June 1551 and in the Orders of 1618, 1649, 1686 and 1723; and in Germany, in the Diets of Augsburg (1530) and Speyer (1570), the Imperial Regulation Orders (*Reichspolizeiordnungen*) of Augsburg (1548) and Frankfurt (1577) and the Imperial Edicts of 1715 and 1746. These requirements were commonly linked to censorship: the notifications enabled the authorities to better monitor the authenticity of privileges and the licences to print. For this reason, they were less commonly applied – though not completely absent – in the Dutch Republic, which was known for its liberty of thought and religion and fairly moderate censorship of books.

56 In France, both privileges and licences to print needed to be registered at the *Chambre Syndicelle* of the community of printers and book publishers of Paris. See for example the Decree of the Council of State of 13 August 1703 and Art. 106 of the Order of 28 February 1723. In Germany, the Act of Saxony concerning the mandate of the book trade of 18 December 1773 provided for a registration in a register (*Protokoll*) held at the Leipzig Books Commission. Lastly, in the Netherlands, there were some regional initiatives aimed at setting up registers. An example is the register established by Art. XII of the 'indissoluble contract' of the *Leids Collegie* of 1660.

57 On the destruction of the old feudal order during the French Revolution, see John Markoff, *The Abolition of Feudalism: Peasants, Lords, and Legislators in the French Revolution* (University Park, PA: Pennsylvania State University Press, 1996). Following the liberal ideals of the French Revolution, the Netherlands abolished the system of book privileges at the end of the eighteenth century. Germany, however, maintained the privilege system for a relatively long time. In 1856, the privileges of authors like Schiller, Goethe, Wieland and Herder were extended for the last time. They finally expired in 1867. See Schriks, p. 253.

58 See Adolphe Lacan and Charles Paulmier, *Traité de la législation et de la jurisprudence des théâtres*, 2 vols (Paris: Durand, 1853), II, p. 202 (no. 653): 'C'est dans cet

Admittedly, the early-nineteenth century British formalities were remnants from ancient times as well. Yet, book privileges played no role in their conception.<sup>59</sup> Instead, it was the stationers' copyright that provided the elements on which the British copyright system would later be built.<sup>60</sup> A condition for obtaining stationers' copyright was registration of the title of a work and the name of the copyright holder in the 'Hall Book' of the Stationers' Company.<sup>61</sup> Moreover, stationers were required to deposit copies at the Master of the Company.<sup>62</sup> Unlike privileges, which were a purely governmental grant, the stationers' copyright had a public-private character.<sup>63</sup> This is important, as it might be a primary reason for the fairly moderate stance towards formalities taken in the UK. At least it seems likely that, because of the public-private roots of formalities in the stationers' copyright, the framers of the Statute of Anne had little inclination to lay down very strict state-imposed formalities.

Another, perhaps more important, reason for the dissimilar position vis-à-vis formalities between the literary and artistic property right schemes

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esprit, d'ailleurs, que nous paraît avoir été conçue la disposition de l'art. 6 de la loi de 1793. Cette loi [...] s'est inspirée des principes qui étaient en vigueur auparavant, et qui subordonnaient l'existence même du droit des auteurs à la condition préalable d'un dépôt'.

59 In England, by the end of the seventeenth century, book privileges lost their significance, when their granting had for all practical purposes come to an end. See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), pp. 78 et seq.

60 See Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (S.J.D. Dissertation, Harvard Law School, 2005), <http://www.obracha.net/oi/oi.htm> [accessed 1/2/2009], pp. 176 et seq.

61 It is uncertain whether registration initially was a condition for acquiring the stationers' copyright. The earlier entries in the Hall Book of the Stationers' Company appeared to be receipts for the registration fees charged only. See *A Transcript of the Registers of the Company of Stationers of London, 1554-1640 A.D.*, ed. by Edward Arber, 5 vols (London: privately printed, 1875-94; repr. Mansfield Center, CT: Martino Publishing, 2006), I, pp. xvi-xvii. As time passed by, however, registration became a legal requirement. See Patterson, pp. 59-63.

62 The free library deposit had its origin in the Bodleian Agreement of 1610. See Barrington Partridge, pp. 17 et seq. The legal deposit was made a formal requirement for obtaining a licence to print from the censor by Secs IV and XXXIII of the Star Chamber Decree of 11 July 1637; Secs III and XVI of the Press Licensing Act (1662), 13 and 14 Car. II, c. 33; and Secs II and III of the Press Licensing Act (1665), 17 Car. II, c. 4.

63 The stationers' copyright essentially was a private matter of the Stationers' Company. Yet, it was officially endorsed by the Crown when it issued the Charter of the Stationers' Company (1557), Patent Rolls, 3 and 4 Philip and Mary, part 10, membrane 46. See also Confirmation Roll (1559), 1 Elizabeth, part 4, membrane 15.

in continental Europe and the UK was the position of the author. Whereas, in the UK, at the end of eighteenth century, the notion of copyright as an author's right had been firmly established,<sup>64</sup> in many continental-European countries, copyright was not yet a full author's right. Even though in several countries, the law seemingly conferred a property right on the author, it was essentially the publisher who received protection (as under the old privilege system).<sup>65</sup> This certainly was the case in the Netherlands and some German states, where copyright protected the printed work rather than the product of the mind, and the bookseller or publisher rather than the author.<sup>66</sup> Since it had not yet been fully recognised that property rights were vested in the author, it certainly was not accepted that the right automatically attached upon the author's creative act. Hence, there was ample opportunity for formalities to play a determinative role. Besides, even if the law was deemed to grant property rights to authors, statutory formalities were still considered very important. In the absence of privileges, the formalities and conditions set by law were deemed critical for establishing the title of property: it was believed that, if these formalities and conditions were not fulfilled, authors could never acquire intellectual property rights.<sup>67</sup>

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64 It was the case *Millar v. Taylor*, 98 Eng. Rep. 201, 4 Burr. 2303 (Court of King's Bench, 1769) in which the court firmly established the idea of the author as the creator and ultimate source of literary (and artistic) property rights. See Patterson, pp. 14-5 and 151-79. For a comprehensive account on the formation of the conception of authorship in eighteenth century Britain, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993).

65 Although it occurred that authors were granted book privileges, the privilege system was not primarily designed for their benefit. See F.W. Grosheide, *Auteursrecht op maat: Beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context* (Deventer: Kluwer, 1986), p. 52.

66 Schriks, p. 424. Instead of authors' rights, the Dutch Copyright Act of 1817 and most German state copyright granted a *kopijrecht* or *Verlagsrecht*. These were typical publishers' rights, similar to the old English stationers' copyright. Their origin lay in customary law of the seventeenth and eighteenth centuries. The rights arose with the sale of a manuscript from the author to the publisher. Alongside the manuscript, the publisher was believed to have acquired the exclusive 'right to copy', i.e., to have the manuscript appear in print and to distribute it to the public. See Schriks, pp. 23 and 75-82 and in the English summary, p. 511. See also Ludwig Gieseke, *Vom Privileg zum Urheberrecht: Die Entwicklung des Urheberrechts in Deutschland bis 1845* (Göttingen: Schwartz, 1995), pp. 93 et seq. However, not all German state copyright acts granted a *Verlagsrecht*. The Prussian Act of 1837, for instance, assumed protection of authors' rights instead of the old publishers' *Verlagsrecht*.

67 See for example the plea held by Mr. D. Donker Curtius at the hearing of the Dutch Supreme Court on 2 June 1840: 'dat als men een eigendom wil scheppen, men er ook kenmerken aan moet geven, welke zijn als de voorwaarden, waaronder het alleen kan worden geeërbiedigd. [...] De wet [...] wil voortaan geene privile-

Even in France, which in the second half of the nineteenth century became the cradle of the author's right (*droit d'auteur*), copyright was not consistently perceived as a right inherent to the author.<sup>68</sup> The theory that the literary and artistic property rights in a work belonged to the author 'naturally' because of the personal bond between the work and its creator, for example, had not entirely infiltrated the French legal order. It seems that, at the time, this idea was still overshadowed by the ideology that authors' rights were based on a social contract.<sup>69</sup> The idea was that, upon publication, the author dispossessed himself of his work and all the rights in the work, including the exploitation rights, passed to the public. In return, the author had a private claim against society, which allowed him to demand remuneration for the exploitation of the work. The supporters of this theory believed that this claim took the form of a privilege granted by the legislator on behalf of the public.<sup>70</sup> This is particularly evident from an 1841 report drawn up for the French government which unambiguously stated: '*La jouissance garantie aux auteurs n'est point un droit naturel, mais un privilege resultant d'un octroi bénévole de la loi*'.<sup>71</sup> This report illustrates that,

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giën meer en erkent geen kopy-regt, dan aan hem, die aan de voorwaarden, welke zij stelt, heeft voldaan', in *Het letterkundig eigendomsregt in Nederland: Wetten, trak-taten, regtspraak. Benevens de wetgeving op de drukpers in Nederland en Nederlandsch Indië*, 2 vols ('s-Gravenhage: Belinfante, 1865-7), II (1867), 109-25 (p. 117). This state-ment was upheld by the decision of the Dutch Supreme Court, 8 September 1840, *Johannes Noman en Zn. v. Staat der Nederlanden*, in *Het letterkundig eigendomsregt in Nederland*, II (1867), pp. 132-4. See also the argumentation by Serjeant-at-law Wilde in the case *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (p. 760), 4 *Bing.* 234 (p. 236): 'The statutes having given a monopoly, it is essential to the title of the party who claims the monopoly, that he comply with all the conditions attached to it'.

68 See Ginsburg, p. 157.

69 See Laurent Pfister, 'La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d'auteur au XIXème siècle', *Revue Internationale du Droit d'Auteur*, 205 (2005), 116-209, describing the two leading currents of thought on the nature of authors' rights in nineteenth-century France, i.e. the theory of authors' rights as a social contract (supported by Augustin-Charles Renouard, Edouard Calmels, Louis Wolowski, Léonce de Lavergne, Pierre-Joseph Proudhon, Charles Demolombe and others) and the theory of authors' rights as property rights (supported by Joseph Marie Portalis, Auguste Marie, Edouard Laboulaye, Eugène Pouillet and others).

70 Pfister, pp. 136-7, 144-5 and 148-9. In Germany, there also was a tendency to revert back to the privilege system to explain the position of the author as benefi-ciary of intellectual property rights. See Diethelm Klippel, 'Die Idee des geistiges Eigentums in Naturrecht und Rechtsphilosophie des 19. Jahrhunderts', in *Histori-sche Studien zum Urheberrecht in Europa: Entwicklungslinien und Grundfragen*, ed. by Elmar Wadle, *Schriften zur europäischen Rechts- und Verfassungsgeschichte*, 10 (Berlin: Duncker & Humblot, 1993), pp. 121-38 (p. 133).

71 Édouard Romberg, *Compte rendu des travaux du Congrès de la propriété littéraire*

at the time, authors were considered beneficiaries of the right not because they had a natural right in their intellectual creations, but because they were granted a right by virtue of the statute. Thus, where copyright was deemed a statutory grant,<sup>72</sup> a greater importance may have been attached to copyright formalities.<sup>73</sup>

Lastly, as Ginsburg has clearly demonstrated in her inspiring 'A Tale of Two Copyrights', the French copyright law of 1793 was not just motivated by authors' personal claims of rights in their intellectual works, but also by concerns of public welfare and social utility.<sup>74</sup> In general, it was thought that the rights and interests of authors needed to be established in accordance with those of the public domain. Gastambide, for example, held the opinion that the primary objective of legal deposit was neither to establish *prima facie* evidence of the ownership of a work, nor to enrich national libraries (further discussed below). He found that its purpose was principally to enable authors to inform the public about their intention as to whether or not they would want to enjoy and exercise their rights. While abstaining from depositing, he believed, authors gave evidence of a voluntary abandonment of their property rights to the public domain.<sup>75</sup> He therefore argued that the moment a work was published, it needed to be deposited or else it would be in the public domain. If authors were allowed *et artistique*, 2 vols (Bruxelles/Leipzig: Flatau, 1859), I, p. 68.

72 In the UK, copyright in published works was also limited to the statutory terms and conditions. Nevertheless, because registration was a condition to claim statutory remedies only, common law remedies could still be called upon during the statutory term, even without a prior registration.

73 In this respect, an interesting comparison can be made with the United States of America where the Supreme Court in the famous case of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) held that in passing the Federal Copyright Act of 1790, Congress 'instead of sanctioning an existing right, as contended for, created it' (pp. 657-61). These considerations formed the basis for a strict construction of the Act and the formalities contained therein. Where the copyright in published works was believed to exist only by virtue of the Act, the Court ruled that 'when the legislature are about to vest an exclusive right in an author, [...] they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law' (pp. 663-4). As a corollary, the Court held that copyright came into being only if the mandatory conditions of the Copyright Act had in fact been complied with.

74 Ginsburg, pp. 143 et seq.

75 Gastambide argued that by dedicating the work to the public domain, the author would satisfy himself with the advantages of a honourable publicity. Such thoughts were not uncommon at the time. It appears that several commentators found that 'writers and authors should not be guided by the reckless pursuit of profit and money' but should rather feel rewarded by the glory and honour of the public. See Pfister, pp. 128-9.

to perform the deposit at a later stage, this would oppose the presumed intention of authors abandoning their property rights and destroy the rights devoted to the public domain.<sup>76</sup>

There were also commentators who followed the opposite line of thought. Renouard, for instance, did not consider the absence of deposit to constitute evidence of the author's consent to his work entering the public domain: '*Dire que l'auteur est censé [...] avoir personnellement contracté avec le domaine public, et avoir stipulé l'abandon de ses droits, c'est une exagération inadmissible*'.<sup>77</sup> He reasoned that, if legal deposit was interpreted as involving the absolute loss of rights in case of disobedience, this was a transgression of the law. The law did not declare the author's right void in case of absence of deposit; it only extinguished the possibility of litigation.<sup>78</sup> Accordingly, Renouard considered the formality of legal deposit to be declarative rather than constitutive of authors' rights. In his opinion, neither the text nor the spirit of the law would justify another interpretation.<sup>79</sup> This reasoning would foreshadow the developments in the second half of the nineteenth century, although the constitutive nature of formalities would, at that time, be rejected on other, more philosophical, grounds.

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76 Adrien-Joseph Gastambide, *Traité théorique et pratique des contrefaçons en tous genres* (Paris: Legrand and Descauriet, 1837), pp. 150 et seq (no. 124-5). See also Lacan and Paulmier, II, pp. 201-2 (no. 653), arguing that if the simultaneity of deposit and publication were given up, the existence of authors' rights could only be established arbitrarily and retroactively, thus causing legal uncertainty for third parties relying on the supposition that works not deposited are dedicated to the public domain. In their view, this would be '*un piège que la loi ne peut comporter, et qu'une sage jurisprudence ne peut admettre*'. In support of their opinions, both Gastambide and Lacan and Paulmier used examples of industrial property rights (industrial designs; patents), which for their coming into existence also depended on formalities (deposit of a sample; patent application).

77 See Augustin-Charles Renouard, *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux-arts*, 2 vols (Paris: Renouard, 1838-9), II (1839), p. 374 (no. 218), underscoring that the negligence that consisted in omitting the deposit was often ascribable to the publisher rather than the author.

78 See Renouard, II (1839), pp. 374-5 (no. 218), who considered the legal deposit to be nothing but a law enforcement measure and a tax established in the interest of libraries.

79 Thus, Renouard based himself primarily on the text of the law. This is consistent with the positivist character of the social contract theory. See Pfister, pp. 150-1. Alfred Nion, *Droits civils des auteurs, artistes et inventeurs* (Paris: Joubert, 1846), pp. 128-9 and Blanc, pp. 140-1 also relied strongly on the text of the law. Nevertheless, these last two commentators rejected the idea of legal deposit being constitutive of literary or artistic property rights because they believed that authors' rights were born with the creation of the work.

### 3. Copyright Formalities in the Second Half of the Nineteenth Century

In the second half of the century, the different formalities were generally maintained. Yet, a few important developments can be witnessed, which, at least in some of the countries that we consider here, caused a fundamental change of perspective vis-à-vis copyright formalities. In this section, a number of key developments shall be identified. But first, the question of how copyright formalities evolved in the laws of the various countries examined shall be considered.

#### 3.1 The Development of Formalities in National Copyright Law

While in the second half of the nineteenth century formalities were continued in the national laws on literary and artistic property in virtually all countries, the attitude towards formalities changed radically. In several continental-European states, the nature of formalities softened. There was a growing belief that the *existence* of literary and artistic property rights should not depend on compliance with formalities. In France, for example, the deposit formality was not as strictly construed as had previously been the case. From the mid-century onwards, courts increasingly ruled that this formality was not a condition for the coming into being of authors' rights.<sup>80</sup> They began to see the legal deposit purely as a law enforcement measure or a tax established in the interest of literature and the arts. Therefore, they held that an omission to deposit was not to be regarded as an abandonment of authors' rights in the interest of the public domain.<sup>81</sup> Moreover, they found that authors could satisfy the deposit at any time which they deemed appropriate for taking advantage of their rights: claims were admissible in court as long as the deposit was fulfilled before legal action against a counterfeiter was started.<sup>82</sup> Thus, there was broad consensus that the legal deposit was not constitutive, but only declarative of authors' rights. This

80 Pouillet, pp. 473-4 (no. 433).

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

82 Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger* in Blanc, pp. 35-6; Civil Tribunal of the Seine, 21 November 1866, *Franck, Pataille* 1866, 394; Court of Paris, 28 March 1883, *Roussin et Duvoir v. Arpé, Pataille* 1884, 84; Civil Tribunal of the Seine, 14 December 1887, *Enoch et autres v. Bruant et autres, Pataille* 1890, 59; Court of Pau, 31 May 1878 and 6 December 1878, *Latour v. Cazaux, Dalloz* 1880, 2, 80; Court of Paris, 12 June 1885, *Decauville, Pataille* 1886, 129; Court of Paris, 25 March 1903, *Bernier v. Desvignes, Pataille* 1904, 93.

opinion also became prevalent in French legal doctrine.<sup>83</sup>

The notion that authors' rights should exist independently from formalities was taken even further by the German legislator. The Federal Copyright Acts of 1870 and 1876,<sup>84</sup> which were adopted after the unification of Germany,<sup>85</sup> were based on the assumption that formalities needed to be avoided as much as possible and could only be justified to the extent that a true public need existed.<sup>86</sup> Except for photographs, the protection of which depended on the indication of the name and place of residence of the photographer or publisher and the year of first publication on each copy of the work,<sup>87</sup> no formalities were required for the coming into existence of authors' rights. The German legislator only required a registration of certain facts for which it believed adequate public knowledge should exist to enable users to determine whether a particular work was still subject to protection or could yet be freely used.<sup>88</sup>

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83 See for example: E. Delalande, *Étude sur la propriété littéraire et artistique* (Paris: Marescq Ainé, 1880), p. 123; R. Garraud, *Traité théorique et pratique du droit pénal français*, 2nd edn, 5 vols (Paris: Larose et Forcel, 1888-94), V, pp. 554-5 (no. 530); Léon Poinard, *Études de droit international conventionnel* (Paris: Librairie Cotillon, 1894), p. 491; Gustave Huard, *Traité de la propriété intellectuelle*, 2 vols (Paris: Marchal and Billard, 1903), I, pp. 94-5; Pouillet, pp. 471-3 (no. 432).

84 Act concerning the authors' rights in writings, illustrations, musical compositions and dramatic works of 11 June 1870; Act concerning the authors' rights in works of the visual arts of 9 January 1876; Act concerning the protection of photographs from unauthorized reproduction of 10 January 1876.

85 Art. 4(6) of the Constitution of the North German Confederation of 26 July 1867 instructed the government to draft national copyright legislation. This resulted in the Federal Copyright Act of 1870. In 1871, this Act was also made applicable to the southern German states which had united with the North German Confederation and together formed the German Empire. Later, the Federal Copyright Acts of 1876 were established.

86 Robert Fischer, *Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11. Juni 1870* (Gera: Griesbach, 1870), pp. 33-4; Otto Dambach, *Die Gesetzgebung des Norddeutschen Bundes betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken* (Berlin: Enslin, 1871), pp. 205-7.

87 Art. 5 of the Act concerning the protection of photographs of 1876. An inaccurate or incomplete notification caused the loss of protection from unauthorized reproduction. See R. Klostermann, *Das Urheberrecht an Schrift- und Kunstwerken, Abbildungen, Compositionen, Photographien, Mustern und Modellen nach deutschem und internationalem Rechte* (Berlin: Vahlen, 1876), p. 190.

88 See Fischer, p. 33; Dambach, p. 207; Oscar Wächter, *Das Autorrecht nach dem gemeinen deutschen Recht* (Stuttgart: Enke, 1875), p. 136. The registration included (a) the reservation of the translation right for literary or dramatic works (which was subject to statutory maximum terms); (b) the names of authors of anonymous or pseudonymous works that were revealed before the term of protection for these works ended (which caused the works to be protected longer); and (c) the titles of works that were still pro-

In other countries, on the other hand, the nature of formalities remained largely unchanged. In the Netherlands, for example, the formality of legal deposit – which was fully maintained under the 1881 Copyright Act – continued to be constitutive by nature.<sup>89</sup> Although the Dutch legislator had underscored that authors' rights arose with the act of creation and not with the act of deposit,<sup>90</sup> any failure to deliver the copies within one month after publication would signify forfeiture of the rights.<sup>91</sup> This resulted in a somewhat remarkable situation, whereby, while in theory the formality of legal deposit was not constitutive for the author's right, in practice, the rights perished and the work fell into the public domain, if the deposit was not fulfilled within one month. Any failure to deposit, therefore, meant that the exercise of authors' rights would be impossible and, in all probability, the rights themselves would not actually come into existence.<sup>92</sup>

Likewise, in the UK, the formalities of the first half of the century were all maintained and their nature and legal effects remained unaffected. Thus, for literary works, the 1842 Copyright Act laid down a registration and a deposit requirement. The latter requirement was left completely unchanged. Like before, failure to deposit involved a fine, but the copyright was not forfeited as a result.<sup>93</sup> In contrast to registration under the earlier British copyright laws, however, the 1842 Copyright Act made registration a technical condition to *any* suit for infringement of law or in equity, thus avoiding the previous distinction between statutory and common law remedies. At the same time, the rule was maintained 'that the omission to make such entry shall not affect the copyright in any book'.<sup>94</sup> Failure to register only affected the right to sue in respect of a copyright infringement. Nonetheless, the courts held that, once registration was effected, authors

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tected under a privilege issued before the Federal Copyright Acts of 1870 and 1876 took effect. See Arts 6, 11, 52 and 60 of the Federal Copyright Act of 1870; Arts 9 and 19 of the Federal Act concerning the authors' rights in works of the visual arts of 1876.

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

90 See for example the Explanatory Memorandum and the Memorandum in Reply, in *Auteurswet 1881: Parlementaire geschiedenis wet 1881 - ontwerp 1884* (Zutphen: Walburg Pers, 2006), pp. 94-6.

91 This rule was based on the assumption that the author did not want to avail himself of his rights, if the copies were not delivered within the first month of publication. See for example: J.D. Veegens, *Het auteursrecht volgens de Nederlandsche wetgeving* ('s-Gravenhage: Belinfante, 1895), p. 119; Johannes van de Kastele, *Het auteursrecht in Nederland* (Leiden: Somerwil, 1885), p. 159.

92 See: Veegens, pp. 119-20; Van de Kastele, p. 160.

93 Secs 6 to 10 of the Copyright Act (1842), 5 and 6 Vict. c. 45.

94 *Ibid.*, Sec. 24.

could proceed even in respect of infringements made before the registration date. In view of that, there was no need to register until a violation occurred. As long as authors had registered before issuing the writ, their cases were admissible before a court.<sup>95</sup> Apart from the registration of copyrights, the 1842 Copyright Act also opened the possibility for registering assignments and licensing agreements.<sup>96</sup> This was an absolute novelty in comparison with the earlier British copyright laws.

In contrast to literary works, registration became compulsory for the vesting of copyright in paintings, drawings and photographs. The Fine Art Copyright Act of 1862 provided that, until registration, the copyright owners of these works were not entitled to the benefits of this Act. Furthermore, no action would be sustainable and no penalty would be recoverable in respect of 'anything done before registration'.<sup>97</sup> Yet, this latter rule was weakly interpreted. It was held that after the registering of a drawing, damages could be obtained for the illegitimate sale of copies of that drawing, even if these copies were made prior to the registration date.<sup>98</sup>

Lastly, for engravings, prints and lithographs and for sculptures, models and casts, the rule remained in place that copyright attached only if these works were marked with the notice prescribed by the 1735 Engravers' Copyright Act and the 1814 Sculpture Copyright Act.

In addition, and this concerns a development that can be witnessed in most of the countries under consideration, the latter part of the nineteenth century also saw the introduction of new formalities. As will be demonstrated later, these new formalities were established in response to an extended protection granted to authors. In order to retain a public performance right in musical compositions or dramatic (musical) works,<sup>99</sup> a transla-

95 See for example *Goubard v. Wallace*, 36 L.T. (n.s.) 704, W.N. 130 (1877) and *Warne v. Lawrence*, 54 L.T. 371, 34 W.R. 452 (1886). Especially this latter decision displayed a case of an extremely late registration: the entrance in the register was made earlier in the day on which the plaintiff had issued the writ.

96 Sec. 11 of the Copyright Act (1842).

97 Sec. 4 of the Fine Arts Copyright Act (1862). It followed from Sec. 1 of the Fine Arts Copyright Act (1862) that when a painting, drawing, or negative of a photograph was first sold or disposed of, this sale or disposition also needed to be accompanied by a written agreement between the artist and purchaser as to whom the copyright would belong, otherwise the copyright in the painting, drawing, or photograph would be lost altogether. See Thomas Edward Scrutton, *The Law of Copyright*, 4th edn (London: Clowes, 1903), pp. 192-3.

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

99 See for example: Art. 50 of the German Federal Copyright Act of 1870; Art. 12 of the Dutch Copyright Act of 1881; Sec. 1 of the British Copyright (Musical Compositions) Act (1882), 45 and 46 Vict., c. 40. Although not expressly stated by the

tion right in literary works<sup>100</sup> or a reproduction right in (short) articles, in newspapers or periodicals,<sup>101</sup> the legislature in several countries began to require that authors mark all copies of these works with an explicit notice of reservation. Hence, authors could claim specific rights that they did not previously enjoy, but only if they attached a prescribed notice to all copies of their works. Therefore, these new formalities are sometimes referred to as 'specifying formalities'.<sup>102</sup> Systematically, they can be grouped in neither the category of constitutive nor of declaratory formalities. While the latter types of formalities have general application and thus relate to authors' rights as a whole, specifying formalities only affect the enjoyment of the particular type of right to which they pertain. Hence, failure to comply with these formalities did not cause entire works to enter the public domain, as did constitutive formalities, but only rendered a specific right void. Further in the chapter it will be explained why, concurrently with the removal or softening of constitutive and declaratory formalities, new specifying formalities were adopted.

Ultimately, in the early twentieth century, we observe the end of copyright formalities in the European states under discussion. In Germany, all statutory formalities were abolished even before this was required by the Berne Convention (that is, for literary and musical works, in 1901 and, for artistic works and photographs, in 1907).<sup>103</sup> Following the introduction of the prohibition on formalities in the Berne Convention in 1908, the British and Dutch lawmakers also decided to eliminate all domestic copyright formalities.<sup>104</sup> France, however, remained an exceptional case. It retained the legal deposit as a prerequisite to suit until 1925.<sup>105</sup>

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latter Act, it was held in *Fuller v. Blackpool Winter Gardens* [1895], 2 Q.B. 429 (Court of Appeal, 1895), that the failure to print the notice of reservation prevented the copyright owner, or his assignee, from asserting the public performance right.

100 See for example: Art. 6(c) of the German Federal Copyright Act of 1870; Art. 5(b) of the Dutch Copyright Act of 1881. A notice of reservation to retain a right to make translations in literary works was also prescribed by several earlier German state copyright acts.

101 See for example: Art. 7(b) of the German Federal Copyright Act of 1870; Art. 7 of the Dutch Copyright Act of 1881.

102 See Kawohl and Kretschmer, pp. 221 et seq, who introduced the term 'registration as specification'.

103 Act concerning the copyright in literary and musical works of 19 June 1901, *RGBl.* 1901, 227; Act concerning the copyright in artistic works and photographs of 9 January 1907, *RGBl.* 1907, 7.

104 See, for the UK, the Copyright Act (1911), 1 and 2 Geo. V, c. 46 and, for the Netherlands, the Act of 23 September 1912 containing new regulation for copyright, *Stb.* 1912, 308.

105 By the Act of 19 May 1925, *Journal Officiel*, 27 May 1925 the French legisla-

### 3.2 Some Important Reasons for the Change of Perspective Vis-à-vis Formalities

The preceding section demonstrates that, while the Netherlands and the UK retained formalities on almost the exact same level as in the first half of the century, formalities began to be perceived differently and their nature and legal effects softened in France and Germany. At the same time, the second half of the century also saw the introduction of new formalities. This raises several questions. What caused the change of perspective towards formalities in France and Germany? Why were formalities nevertheless continued in these countries? And what was the reason for the introduction of new sets of formalities? It will be seen that these questions are closely related to some ideological, functional and conceptual innovations in nineteenth century copyright law.<sup>106</sup> These innovations, upon which this section will touch, concern (i) the increased focus on the person of the author and the corresponding idea that the author's creation is the ultimate source from which copyright emerged, (ii) the growing idea that for a good functioning of the copyright system formalities are not necessary per se; and (iii) the awkwardness of formalities in the context of the new concept of abstract authored works and some newly protected categories of works. The reason why these innovations exerted little influence in the Netherlands and the UK shall be explained below.

#### 3.2.1 The Increased Person-oriented Nature of Authors' Rights

In the course of the nineteenth century, the position of authors on the European mainland had gradually become stronger. This was attributable, in particular, to an increased belief that the person of the creator was the very foundation of the property in the work.<sup>107</sup> In France, the idea that the

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tor finally disconnected the legal deposit requirement from French authors' rights legislation. Previously, in Tribunal de Commerce de la Seine, 13 November 1913, *Magalhaès et Moniz v. Muroz Escamoz*, in *Le Droit d'Auteur*, 27 (1914), pp. 38-40, it was already ruled that legal deposit was not required for foreign works for which protection was claimed under the Berne Convention, as this was inconsistent with the Berne prohibition on formalities.

106 See Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), who draw a general distinction between 'pre-modern' and 'modern' intellectual property law, the transformation of which, at least in the UK, took place around the middle part of the nineteenth century.

107 Pfister calls this a process of '*personalising* literary and artistic property', which was particularly fruitful for the development of the French *droit d'auteur*. This pro-

creation of a work was a service which the author rendered to society, in return for which society assured the author certain exclusive rights, faded. Instead, the justification for the protection of authors' rights was increasingly found to exist in their identification as property rights. Expanding on the theory of 'intellectual property' developed in the eighteenth century under the influence of natural law,<sup>108</sup> and in particular on John Locke's labour theory, holding that man has a natural right to property which exists in his own person and which he originally acquires by appropriating the commons through his labour,<sup>109</sup> the proponents of the theory of literary and artistic property emphasised the inextricable bond between the work and the person of its creator.<sup>110</sup> By regarding the person of the creator as 'the natural law basis of literary and artistic property',<sup>111</sup> they believed

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cess was a prelude to and preceded the recognition of the authors' moral right. As a consequence, "the person-oriented nature of *droit d'auteur*" was not "discovered" by Morillot in the 1870s when he framed the notion of the moral right'. See Pfister, pp. 126-7 and 152-3.

108 On the evolution of the theory of intellectual property (*'geistigen Eigentum'*) in eighteenth-century Germany, see Gieseke, pp. 115 et seq. This theory also found support in France. Already in 1725, Louis d'Héricourt pleaded that the author should be recognized as the owner of the work he created. D'Héricourt did not question the ownership of the tangible work, but found that the author deserved to be accepted as a proprietor of a work because of the act of intellectual creation. See the text of his *Mémoire* in Éd. Laboulaye and G. Guiffrey, *La propriété littéraire au XVIIIe siècle: Recueil de pièces et de documents* (Paris: L. Hachette, 1859), pp. 21-40.

109 John Locke, *Two Treatises of Government* (London, 1690), pp. 245-6 (Sec. 27). Locke's labour theory appears to have been quite popular among nineteenth-century liberal thinkers in France. See for example Nion, pp. 127-8: 'Nous avons déjà eu l'occasion de déclarer que pour nous le principe de la propriété littéraire et artistique était le travail de l'auteur, la création. De même avons-nous dit, que l'homme qui le premier s'est emparé d'un champ n'ayant jusqu'alors appartenu à personne, se l'est approprié en le cultivant, de même celui qui s'empare des idées tombées dans le domaine public et les marque de cachet de sa personnalité en en composant un ouvrage, devient propriétaire de ce produit de son activité'.

110 For instance, during the parliamentary debates of 1839, Joseph Marie Portalis maintained that the author's right constituted a 'propriété par nature, par essence, par indivision, par indivisibilité de l'objet et du sujet'. In 1879, Eugène Pouillet affirmed that the author's work consisted 'dans une création, c'est-à-dire dans la production d'une chose qui n'existait pas auparavant et qui est tellement personnelle qu'elle forme comme une partie [de son auteur]'. The quotations are taken from Pfister, pp. 156-7 and 158-9.

111 Pfister, pp. 158-9. *Ibid.*, pp. 124-5 and 156-7: 'For the proponents of literary and artistic property, the work was all the more its creator's own as it proceeded immediately from an original and natural property of man: his person'. Authors' rights were increasingly perceived as a natural right. In a case involving the operas of Verdi, for example, the French Court of Cassation fully acknowledged that authors' rights derived from natural law. See French Court of Cassation, 14 Decem-

that authors' rights emanated directly from the quality of the authors' own intellectual creations.<sup>112</sup> The law was seen as merely recognising the existence, and regulating the exercise, of authors' rights.<sup>113</sup> This idea also became widespread among German academics and intellectuals. As in France, authors' rights were progressively regarded more as rights of intellectual property ('*geistigen Eigentum*').<sup>114</sup> The foundation of authors' rights was seen to reside in the very nature of things: '*Der Mensch hat [...] ein aus seinem "Urrecht" entspringendes "ursprüngliche(s) Recht auf die Erzeugnisse seiner Geistes- und Körperkräfte"*'.<sup>115</sup> Hence, it was not the laws that created authors' rights: these rights were believed to have always existed in the legal conscience of men.<sup>116</sup>

In parallel, another theory evolved in Germany which gave even more prominence to the person of the author as creator of his work. This was the personality theory, which was based largely on the philosophies of Kant and Fichte. Kant regarded authors' rights not as property rights, but as personal rights. In his view, books are not just material objects capable of being owned, but also means through which authors speak to their readers.<sup>117</sup> Kant believed that it is a man's innate right to communicate his thoughts to the public. Therefore, authors should be vested with some right to control when, how and by whom these thoughts, as expressed in their writings, are

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ber 1857, *Verdi et Blanchet v. Calzado*, *Dalloz* 1858, 1, 161: 'Attendu que si la propriété des œuvres littéraires, musicales et artistiques dérive du droit naturel [...] (p. 164). See also Blanc, p. 139: 'la propriété littéraire était une création [...] du droit naturel et des gens'.

112 See Blanc, p. 138: 'La propriété, c'est-à-dire la qualité d'auteur [...]'.  
 113 See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc, pp. 38-9: 'Considérant que la création d'une œuvre littéraire ou artistique constitue au profit de son auteur une propriété dont le fondement se trouve dans le droit naturel et des gens, mais dont l'exploitation est réglementée par le droit civil'.

114 German natural law and legal philosophy assumed a fairly broad concept of property, included property of physical goods, property of the human body and property of man-made commodities. See Klippel, pp. 126 et seq. Intellectual property thus was also generally accepted, as it constituted '*durch Arbeit mit der Persönlichkeit verbundene geistige Eigentum*' (ibid., p. 135). Here again, we see the influence of the labour theory of Locke.

115 Klippel, p. 125.  
 116 See Francis J. Kase, *Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy* (South Hackensack: Rothman, 1967), p. 8, who concludes that under the theory of authors' rights as intellectual property rights, '[copyright] is thus a natural right growing out of natural law'.

117 I. Kant, 'Von der Unrechtmäßigkeit des Büchernachdrucks', *Berlinische Monatsschrift*, 5 (1785), pp. 403-17, in *Primary Sources*, p. 406: 'In einem Buche als Schrift redet der Autor zu seinem Leser [...]'.  
 118 See Klippel, p. 125.

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publicly disseminated. Kant thus recognised that, in parallel to a property right in the book as a physical object (*'ius in re'*), authors have an innate right vested in their own person (*'ius personalissimum'*).<sup>118</sup> This idea was expanded by Fichte who, instead of two forms of existence, differentiated between three, that is, (1) the book as a tangible object, to which the normal rules of property apply; (2) the thoughts or ideas in the book, which cannot be exclusively owned, but are the common property of all; and (3) the form of these thoughts or ideas, that is, the way in which they are expressed in the book (the combination with which they appear, their phrasing, their wording, and so forth), which is the inalienable and exclusive property of the author.<sup>119</sup> This last differentiation between freely usable content and the protected form of the author's thoughts and ideas provided an even stronger justification for copyright to be vested in the author. It assured protection not only against a straightforward reproduction of the author's writings, but against any taking of the personal and unique form in which the author had expressed his thoughts or ideas. Thus, this new abstract concept linked everything done to the work back to the personality of the author.<sup>120</sup> This laid the groundwork for a few German scholars to develop the theory of a largely personal author's right.<sup>121</sup> By accentuating the per-

118 Kant, p. 416: 'Der Autor und der Eigenthümer des Exemplars können beide mit gleichem Rechte von demselben sagen: es ist mein Buch! aber in verschiedenem Sinne. Der erstere nimmt das Buch als Schrift oder Rede; der zweite bloß als das stumme Instrument der Überbringung der Rede an ihn oder das Publicum, d. i. als Exemplar. Dieses Recht des Verfassers ist aber kein Recht in der Sache, nämlich dem Exemplar (denn der Eigenthümer kann es vor des Verfassers Augen verbrennen), sondern ein angebornes Recht in seiner eignen Person, nämlich zu verhindern, daß ein anderer ihn nicht ohne seine Einwilligung zum Publicum reden lasse [...]'.

119 J.G. Fichte, 'Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Raisonement und eine Fabel', *Berlinische Monatsschrift*, 21 (1793), pp. 447 et seq, in *Primary Sources*.

120 Friedemann Kawohl and Martin Kretschmer, 'Johann Gottlieb Fichte, and the Trap of *Inhalt* (Content) and *Form*: An Information Perspective on Music Copyright', *Information, Communication & Society* (special issue on *Copyright, and the Production of Music*, ed. by Martin Kretschmer and Andy C. Pratt), 12 (2009), 205-28 (pp. 210-6).

121 See Johann Caspar Bluntschli, *Deutsches Privatrecht*, 2 vols (Munich: Literarisch-artistische Anstalt, 1853-54), I (1853), pp. 191-2: 'Das Werk als Geistesproduct gehört zunächst dem Autor an, der es erzeugt hat, [...] als eine Offenbarung und ein Ausdruck seines persönlichen Geistes. Zwischen Autor und Werk besteht ein natürlicher Zusammenhang, wie zwischen Schöpfer und Geschöpf, und jener hat ein natürliches Recht, dass dieses Verhältnis geachtet werde'; and p. 186: 'Heutzutage gehört das Autorrecht zu den allgemein anerkannten menschlichen Rechten'. See also Otto Gierke, *Deutsches Privatrecht*, 3 vols (Leipzig: Duncker & Humblot, 1895-1917), I (1895), p. 756: 'Das Urhebberecht ist ein Persönlichkeitsrecht, dessen Gegenstand ein Geisteswerk als Bestandtheil der eignen Persönlichkeitsphäre bildet'.

sonal element in the author's creation, they claimed that authors' rights arise directly from the authorship of a work.<sup>122</sup> Hence, they considered these rights to come into being through the very act of creation ('*die geistige Schöpfungsthat*') and through the act of creation alone.<sup>123</sup>

This had some important consequences for the way in which formalities were perceived. In general, the idea that authors' rights were born with the creation of a work did not correspond with the notion of formalities being constitutive of these rights. Moreover, as the legitimation of protection was seen in the very nature of the author's personal creation, it was considered unreasonable that authors could lose protection due to a failure in the process of completing a formality. This was especially the case if the failure was not attributable to the author (for example, if the formality could also be legally complied with by the publisher),<sup>124</sup> if a formality was not fulfilled because of the intricacy and costs involved (for instance, if the facilities where the formality must be completed were located too far away) or if it concerned mere technical failures (for example, innocent mistakes or late submissions of applications).<sup>125</sup> In the nineteenth century, it was not uncommon for authors to lose protection as a result of any of these practicalities.

Accordingly, there was a growing consensus that the *existence* of authors' rights should not be conditional on formalities and that failure to comply with formalities should never be the occasion of a defeat of authors' rights. In France, it was argued, both in jurisprudence and legal doctrine, that legal deposit was neither constitutive of nor formed the legal basis for literary or artistic property.<sup>126</sup> Decisions appeared in which it was ruled that authors' rights emerged with the creation of a work and that legal deposit was a formality necessary for the exercise of their rights only.<sup>127</sup> Courts also held

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122 See Bluntschli, p. 199: '[Das Autorrecht] entsteht aus der Urheberschaft [...]'; and Gierke, p. 755: 'durch die Schöpfung eines Geisteswerkes [entsteht] in der Person seines Schöpfers ein gutes Recht'.

123 Gierke, pp. 766, 787-8: 'Das Urheberrecht entsteht durch die geistige Schöpfungsthat, [...] wird unmittelbar durch die Schöpfungsthat begründet [und] wird nur durch geistige Schöpfungsthat begründet'.

124 This was the case, for example, with respect to the legal deposit requirement in France.

125 See for example Henri Louis de Beaufort, *Het auteursrecht in het Nederlandsche en Internationale recht* (Utrecht: Den Boer, 1909; repr. Amsterdam: Buma, 1993), p. 263.

126 See Blanc, p. 137: 'Le dépôt ne constitue pas la propriété, et n'en est pas le point de départ'.

127 See for example Tribunal of Paris, 10 July 1844, *Escudier v. Schonenberger*, in Blanc, pp. 35-6.

that even if a counterfeiter deposited a work before the author did, the author's right would remain unharmed, since this right found its origin in the creation of the work and not in the deposit.<sup>128</sup> Thus, authors' rights were believed to appear directly, automatically and exclusively with the creation of a work.<sup>129</sup> This also became the general opinion in Germany and other continental-European states.<sup>130</sup> Moreover, the idea that authors' rights came into being independently of formalities figured prominently at both the 1858 International Conference on Literary and Artistic Property in Brussels<sup>131</sup> and the 1878 International Conference on Artistic Property in Paris.<sup>132</sup>

At the same time, however, it was acknowledged that the protection of literary and artistic works was not unconditional, but should always be established in accordance with the public interest and societal order. In 1857, the French Court of Cassation ruled that the *exercise* of authors' rights could always be restricted if that would be in the interest of the public.<sup>133</sup> This was equally the case for all other property rights.<sup>134</sup> Proprietors of real property, for example, were also obliged to sacrifice a portion of their rights if the public interest so required, for instance, for the exploitation of (mineral)

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128 See for example Court of Paris, 12 June 1863, *Mayer et Pierson, Pataille* 1863, 225.

129 See Blanc, p. 138: 'Ce droit découle directement, nécessairement et exclusivement du fait de la conception et de la création de l'œuvre. La propriété [...] est antérieure au dépôt et le précède. Il y a plus, elle en est indépendante et peut exister même en son absence [...]'. See also Nion, p. 129.

130 See for example Klostermann, pp. 103 et seq and 185 et seq: 'die Erwerbung des Urheberrechts [erfolgt] durch die Hervorbringung des Geisteswerkes und [ist] nicht an die Erfüllung von Förmlichkeiten gebunden'.

131 See Resolution, part II, no. 7: 'Il n'y a pas lieu d'astreindre les auteurs d'ouvrages de littérature ou d'art à certaines formalités, à raison de leur droit. [...] [Leur] inobservation ne peut et ne doit jamais entraîner la déchéance du droit'; and Resolution, part IV, no. 4: 'Des formalités particulières ne doivent pas être exigées pour les œuvres d'art, pas plus que pour les productions littéraires, comme condition absolue de l'acquisition et de la conservation de la propriété', in Romberg, I, pp. 175-8.

132 See Resolution no. 7: 'L'auteur d'une œuvre d'art ne doit être astreint à aucune formalité pour assurer son droit', in *Congrès International de la Propriété Artistique: Tenu à Paris du 18 au 21 septembre 1878* (Paris: Imprimerie Nationale, 1879), pp. 115-7.

133 French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado, Dalloz* 1858, 1, 161: 'Que des considérations d'ordre et d'intérêt public ont dû déterminer le législateur à en régler et modifier l'exercice' (p. 164).

134 See Art. XVII of the Declaration of the Rights of Man and of the Citizen of 1789, which speaks of property as 'an inviolable and sacred right, that no one shall be deprived of except where the public interest, legally defined, shall evidently require it [...]'.

resources or for road construction.<sup>135</sup> Likewise, because of their cultural importance and social utility, it was deemed completely normal that authors' rights at a certain moment would enter the public domain, and thus were of a limited duration, and that their exercise could be subject to particular formalities.<sup>136</sup> In Germany and other continental-European states the laws were based on a comparable 'balancing act' between the protection of authors, on the one hand, and the interest of the public, on the other hand.<sup>137</sup>

Thus, while literary and artistic property was believed to *exist* independently of formalities, there was a general understanding that the *exercise* of authors' rights could always be restricted if that were to be in the public's interest.<sup>138</sup> This explains to a great extent why, despite the increased person-oriented nature of authors' rights and the ensuing belief that authors' rights were born with the creation of a work, formalities were nevertheless continued. In France in particular, formalities were thought to fulfil some important functions for the exercise of authors' rights. This does not seem to be at odds with the labour theory and natural rights approaches underlying the theory of literary and artistic property, which focus on the acquisition of property rights and thus on their enjoyment (that is, the existence of the rights) rather than their exercise.<sup>139</sup> As long as they left the title of ownership of works unharmed, formalities were not believed to contradict the literary and artistic property theory on which authors' rights were based.<sup>140</sup>

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135 See Étienne Blanc at the 1858 International Conference in Brussels, in Romberg, I, p. 69.

136 See the very interesting debate on the duration of the literary and artistic property rights at the 1858 International Conference in Brussels in Romberg, I, pp. 69 et seq and 95 et seq. In this debate, a clear appraisal of the interests of authors and the public domain was made.

137 See for example: Bluntschi, p. 193 ; Gierke, p. 755 ; and Klippel, p. 135.

138 See Resolution, part II, no. 7: 'Si des formalités particulières peuvent être utiles, soit comme mesure d'administration et d'ordre, soit comme moyen de constater et de prouver le droit de propriété [...]'; and Resolution, part IV, no. 4: 'dans un cas comme dans l'autre, des formalités peuvent être désirables comme mesure d'ordre et pour faciliter l'exercice régulier du droit' of the 1858 International Conference on Literary and Artistic Property in Brussels in Romberg, I, pp. 175-8.

139 For the late nineteenth century French legal terminology of the 'enjoyment' and 'exercise' of a property right, see Marcel Planiol, *Traité élémentaire de droit civil: conforme au programme officiel des facultés de droit*, 5th edn, 3 vols (Paris: Pichon etc., 1908-10), I (1908), p. 161 (no. 431): 'Avoir la jouissance du droit de propriété, c'est avoir l'aptitude nécessaire pour devenir propriétaire' (referring basically to the acquisition of the right and thus to the title of property); and: 'en avoir l'exercice [du droit de propriété], c'est pouvoir user de son droit de propriété' (referring to the ability to use the right, i.e. to legally enforce it, assign it, license it, etc.).

140 In general, all limitations to authors' rights were considered permissible by

### 3.2.2 The Functions of Copyright Formalities

In the nineteenth century, copyright formalities were thought valuable for a variety of reasons. They were considered to play an important role, both within the copyright system (internal functions) and without the copyright system (external functions). In general, this approbation of formalities fits the general mind-set of this period. At the time it seems that formalities, and registration in particular, were seen as a panacea that could cure nearly all problems, at least those concerning title and assurances of property.<sup>141</sup> Moreover, because of technological and administrative innovations in the earlier nineteenth century, such as the improvement of the postal services and transport infrastructures, registration had become much easier.<sup>142</sup> In the UK and elsewhere, this prompted a great interest in different types of registries, those for land, deeds and mortgages,<sup>143</sup> and for designs, patents and trade marks,<sup>144</sup> probably being the most noteworthy examples. Registration was thus assumed to be good. This may well explain the continuation of formalities in nineteenth century copyright law.<sup>145</sup>

#### 3.2.2.1 Internal Functions

Within the copyright system, formalities performed several key functions. First, they fulfilled an imperative evidentiary function.<sup>146</sup> In France, for the proponents of literary and artistic property, provided that they did not affect the authors' title of ownership and thus the property rights in their works, during the statutorily prescribed terms of protection. See Pfister, pp. 166-7.

141 See for example J.E.R. de Villiers, *The History of the Legislation Concerning Real and Personal Property in England during the Reign of Queen Victoria* (London: C.J. Clay and Sons, 1901), p. 11, who mentions that, in 1830, the UK Real Property Commissioners found compulsory registration of real property '[the] great and sovereign remedy [...] to cure all evils; to render titles secure, fraud impossible, and loss of deeds harmless'.

142 See Lionel Bently, 'Requiem for Registration? Reflections on the History of the UK Registered Designs System', in *The Prehistory and Development of Intellectual Property Systems*, ed. by Alison Firth, Perspectives on Intellectual Property Series, 1 (London: Sweet & Maxwell, 1997), pp. 1-46 (p. 35).

143 See A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986), pp. 280-3.

144 Systems of registration were introduced by the Designs Registration Act (1839), 2 Vict., c. 17, the Patent Law Amendment Act (1852), 15 and 16 Vict., c. 83 and the Trade Marks Act (1875), 38 and 39 Vict., c. 91.

145 See Bently, pp. 34 and 35 (note 38), quoting one commentator who assumed that registration in the Fine Arts Copyright Act (1862) was nothing but a knee-jerk response to the alleged cure-all effect of registration.

146 See Sherman and Bently, p. 184, emphasizing the role of registration in establishing proof and authenticity in the nineteenth-century copyright registration sys-

example, the receipt that was given upon deposit constituted *prima facie* proof of the property right on the work deposited.<sup>147</sup> Although always subject to be rebutted by other evidence,<sup>148</sup> legal deposit was an important means of proving the anteriority of authorship and, thus, the priority of a claim to the title.<sup>149</sup> Moreover, because of the legal deposit, the authenticity of a work could easily be resolved. An identical function was attached to the legal deposit in several German states.<sup>150</sup> Equally, in the UK, the facts stated in an entry of registration gave a legal presumption in favour of the registered person. This concerned not only initial ownership. Ever since transfers of ownership could be entered on the registers, they served as *prima facie* evidence of the ownership, assignment or licensing of the right.<sup>151</sup> As a result, because of the evidentiary weight attached to formalities, they were capable of assisting in providing low-cost and quick resolution of disputes.<sup>152</sup>

Second, formalities fulfilled an important publicity function. The registration requirements in the various British copyright acts, for example, served ‘as notice and warning to the public’ not to infringe ignorantly another man’s literary or artistic property.<sup>153</sup> This would establish legal certainty and, in addition, facilitate the regular exercise of rights. The idea was that the copyright owner of a work, as well as the identity and tem in the UK.

147 See Art. 9 of the French Ordinance of 24 October 1814.

148 See for example: French Court of Cassation, 19 March 1858, *Hache et Pepin-Lehaulleur v. Goupil*, *Dalloz* 1858, 1, 190; Court of Paris, 29 November 1869, *Placet v. Yvon*, *Dalloz* 1871, 2, 59.

149 See Blanc, pp. 137-8, who speaks of a ‘presumption of paternity’ in favour of the depositor.

150 See for example: Art. II of the Letter patent of the Chancellery (*Kanzleipatent*) of 30 November 1833 for the Duchy of Holstein; Art. V of the Bavarian Act of 15 April 1840; Art. 7 of the Regulation of Lübeck of 31 July 1841.

151 In case of an unsettled dispute on the ownership of a work, however, courts could order that an entry was worthless as evidence at trial. See for example: *Chappell v. Purday*, 152 *Eng. Rep.* 1214, 12 *M. and W.* 303 (1843); *Ex parte Davidson*, 118 *Eng. Rep.* 884, 2 *El. and Bl.* 577 (1853).

152 See Bently, p. 33, who indicates that this was the main reason for the Select Committee on Arts and their Connection with Manufactures (1836) to propose a registration system in respect of designs.

153 The Statute of Anne (1710), for instance, stated explicitly that registration should prevent that people ‘through ignorance offend against this act.’ See also the argumentation by Lord Kenyon in *Beckford v. Hood* (1798), 101 *Eng. Rep.* 1164 (p. 1167), 7 *T.R.* 620 (p. 627): ‘there was good reason for requiring an entry to be made at Stationers’ Hall, which was to serve as notice and warning to the public, that they might not ignorantly incur the forfeitures or penalties before enacted against such as pirated the works of others’.

boundaries of the property right, should easily be ascertainable if permission was sought for the (re)utilisation of that work.<sup>154</sup> For that reason, it was commonly ordered that the register book be open for public inspection ‘at all seasonable and convenient times’.<sup>155</sup> By enabling the title of ownership and the identity of the work to be established before (re)utilising that work, registration was to provide prospective users with adequate legal certainty.<sup>156</sup> After the law had opened the possibility for registering assignments and licensing agreements and formalised the layout of the registration scheme, the identity and whereabouts of the owner of a copyright could be better scrutinised.<sup>157</sup> The same functions of publicity and legal certainty were connected to the various notification requirements. This is perfectly illustrated by the British case *Newton v. Cowie*, where it was held that ‘for the protection of the public, it is most material that the day of publication of the print [as well as the name of the right owner] should appear, otherwise it is impossible for a rival publisher to know whether he offends or not’.<sup>158</sup> Other formalities served as important indicators for the public to know whether the author had reserved a certain right,<sup>159</sup> or simply, whether the author had fulfilled a certain formality and, thus, if the formality was constitutive of the right, whether authors’ rights attached to the work.<sup>160</sup> The latter function was displayed visibly in the Dutch Copyright Act of

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154 Sherman and Bently, p. 185.

155 See for example Sec. 2 of the Statute of Anne (1710).

156 See for example Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999), p. 237, note 38.

157 Sec. 13, plus appendix, of the Copyright Act (1842). An entry should include the title of a book, the date of first publication and the names and places of residence of the publisher and copyright owner (or assignee). Although a small error could be fatal to the registration, any inaccuracy could be repaired by a later entrance. See *Low v. Routledge* (1865-6), LR 1 Ch. App. 42 (Court of Appeal in Chancery, 1865).

158 *Newton v. Cowie* (1827), 130 *Eng. Rep.* 759 (p. 760), 4 *Bing.* 234 (pp. 236-7).

159 An example is the translation right in respect of literary works.

160 In the Netherlands, for example, Art. 14 of the Sovereign Enactment of 1814 and Art. 6(c) of the Copyright Act of 1817 required a listing of deposited works in the *Staatscourant* (the Government Gazette), but only if the deposit was carried out in conformity with the law. Likewise, in France, an advertisement of deposit was typically inserted in the *Journal de la librairie*. In the German state Lübeck, Art. 7 of the Regulation of 31 July 1841 required each copy of a work to be marked by a notice that the deposit had been complied with, together with the day and year of delivery of the copies. Finally, in the UK, Sec. 3 of the Statute of Anne (1710) provided that if the registration was not completed because of a refusal or negligence by the clerk, an advertisement in the Gazette would ‘have the like benefit, as if such entry [...] had been duly made’.

1881, which required a public registration and monthly publication in the Government Gazette of all deposited works.<sup>161</sup> This allowed anyone to ascertain whether a work had been duly deposited and, therefore, assuming that it met the originality standard, was copyright protected or had entered the public domain.<sup>162</sup>

Third, formalities were considered an important instrument for establishing the duration of protection of works in those cases where the law laid down a fixed term.<sup>163</sup> This was the case, for example, in the UK where fixed terms, to be calculated from the date of first publication, were prescribed in respect of both artistic and literary works.<sup>164</sup> Hence, without some visible evidence of the date of first publication, either on the work itself or in a public register, it was almost impossible to ascertain when the term of protection commenced and, thus, when the copyright in a work expired.<sup>165</sup> This was equally the case in a few German states where the terms of protection were calculated from the date of first publication and where the receipt of deposit, besides a presumption of the title of ownership, provided proof of the publication date of works.<sup>166</sup> Lastly, in the Netherlands, the relation between formalities and the duration of protection also became an issue when, in 1881, the legislator moved away from a term of protection *post mortem auctoris* and changed it for a fixed term, which was also calculated from the officially recorded date indicated on the receipt of deposit.<sup>167</sup>

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161 Art. 11 of the Dutch Copyright Act of 1881.

162 See: Veegens, p. 125; De Beaufort, pp. 265 et seq.

163 De Beaufort, pp. 257-8; F.W.J.G. Snijder van Wissenkerke, *Het auteursrecht in Nederland: Auteurswet 1912 en herziene Berner Conventie* (Gouda: Van Goor Zonen, 1913), p. 59.

164 The Engravers' Copyright Act (1735) laid down a copyright term of fourteen years from publication, which was extended to twenty-eight years by the Engravers' Copyright Act (1766). Under the 1798 and 1814 Sculpture Copyright Acts, the term was fourteen years from publication (1798) plus an additional fourteen years if the author was still living after the initial term (1814). The Fine Arts Copyright Act (1862) stipulated a term of the author's life plus seven years. For literary works, the Statute of Anne (1710) fixed the copyright term at fourteen years plus an additional fourteen years if the author survived the first term. The Copyright Acts of 1814 and 1842 increased the term of protection to twenty-eight years or 'the residue of his natural life' if the author survived this term and forty-two years or the life of the author plus seven years if that proved to be the longer.

165 *Report of the Royal Commission on Copyright* [C.2036], XXIV (London: HMSO, 1878), p. xxiii (para. 134).

166 See for example: Art. II of the Letter patent of the Chancellery (*Kanzleipatent*) of 30 November 1833 for the Duchy of Holstein; Art. 7 of the Regulation of Lübeck of 31 July 1841.

167 While Art. 3 of the Dutch Copyright Act of 25 January 1817 laid down a copy-

By the end of the century, however, the importance of formalities for the internal operation of the copyright system had gradually weakened. First, formalities were increasingly replaced with legal presumptions. In Germany, for example, the Copyright Act of 1870 laid down a general presumption of authorship, stipulating that without proof to the contrary, the person who was named as author on the work was deemed to be the actual author.<sup>168</sup> This was considered to give authors greater latitude for the assertion of their rights.<sup>169</sup> While legal presumptions were less onerous for authors, they were believed to achieve generally the same outcome as formalities.<sup>170</sup> As a consequence, formalities started to lose out to legal presumptions. This was clearly manifested in the Berne Convention, which contained legal presumptions of authorship from its early inception.<sup>171</sup> Second, formalities increasingly lost their significance for the calculation of the term of protection as the duration of copyright became increasingly linked to the author's lifespan. In France, the term of protection being that of the life of the author plus a limited period thereafter already existed since the revolutionary decrees of 1791 and 1793.<sup>172</sup> In Germany, a term of protection *post mortem auctoris* was also adopted in the Copyright Act of 1870.<sup>173</sup> Later, a term based on the author's life plus a fixed term thereafter would become the standard in the Berne Convention as well.<sup>174</sup> Following

right term of twenty years after the author's death, Art. 13 of the Dutch Copyright Act of 1881 prescribed a term of fifty years from publication. If the author outlived the term of fifty years, the copyright term would extend to the remainder of his life.

168 Art. 28 of the Federal Copyright Act of 1870.

169 See Dr. Dambach, in *Actes de la Conférence internationale réunie à Berne 1884*, p. 36.

170 See: Fischer, pp. 33-4; Dambach, pp. 205-9. Since most formalities established *prima facie* evidence only, legal certainty could equally be established by a set of legal presumptions. Because the facts recorded by these formalities usually were not verified *ex ante*, their correctness could always be contested. In principle, therefore, these formalities only proved that a fact was recorded at a certain time.

171 See Art. 11 BC (1886). Nowadays, legal presumptions of authorship are contained in Art. 15 BC (1971).

172 The decrees of 1791 and 1793 fixed the term of protection at the life of the author plus five and ten years, respectively. In 1810, the latter term was extended, for the author's widow, to her lifetime and, for his children, to twenty years after the author's death. Finally, in 1866, a term of protection of life plus fifty years was adopted.

173 Art. 8 of the Federal Copyright Act of 1870 set the term at thirty years after the author's death. The same term was adopted in the German Federal Act concerning the authors' rights in works of the visual arts of 1876.

174 While the 1886 Berne Convention set no minimum term of protection, Art. 7 BC (1908) laid down a term of the life of the author plus 50 years. Yet, this term was not mandatory and contracting states with a shorter term were permitted to retain

this, the UK and the Netherlands also stopped calculating the term of protection from the date of publication.<sup>175</sup>

Nonetheless, several legal commentators and practitioners maintained that formalities were important for the internal functioning of literary and artistic property rights. French lawyers, especially, were convinced of the necessity of formalities for facilitating the regular exercise of rights.<sup>176</sup> Even in 1878, when in Germany the laws had already contained legal presumptions for a number of years, Pataille, *avocat* at the Court of Appeals in Paris, argued that there were good reasons to subject the exercise of authors' rights to formalities. In infringement suits he had experienced many problems in proving priority of authorship, especially where works of small authors were concerned.<sup>177</sup> Therefore, Pataille believed that it was in the authors' own interest to complete a formality enabling them to provide evidence of their property rights in court.<sup>178</sup> In addition, formalities were still considered an important means of enhancing publicity and legal certainty. Thus, formalities were thought to play a key role in ensuring an appropriate balance between the protection of authors' rights and the public interest. This may well explain why, in France, the legislator persisted until 1925 in requiring legal deposit as a condition to suit.

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their existing terms. Ultimately, in 1948, the term of the life of the author plus 50 years was made mandatory for all contracting states. See also the current Art. 7(1) BC (1971).

175 The 'life plus 50' term was introduced into British law for the first time by the Copyright Act of 1911. In the Netherlands, the same term was adopted in the Copyright Act 1912.

176 At the 1858 International Conference on Literary and Artistic Property in Brussels, the importance of formalities for the exercise of rights was emphasized, *inter alia*, by Étienne Blanc, *avocat* at the Imperial Court in Paris. See Romberg, I, p. 210. The same was done by Jules Pataille, *avocat* at the Court of Appeals in Paris, at the 1878 International Conference on Artistic Property in Paris. See *Congrès International de la Propriété Artistique*, pp. 53 et seq. For an account from Germany, see the *Mémoire* of Prof. Warnkönig and Dr O. Wächter in response of the questions proposed by the 1858 Committee of Organization, in Romberg, I, pp. 268-74 (p. 269).

177 See Jules Pataille in *Congrès International de la Propriété Artistique*, p. 53, where he stated that in four out of five lawsuits which he had to plea, he had great difficulties in proving anteriority.

178 *Congrès International de la Propriété Artistique*, pp. 53 et seq. In general, Pataille did not seem to have any problem with copyright formalities. He questioned: why should authors not register the birth of their works like a father will declare his child and have it registered on the Registry of Births, Deaths and Marriages? *Ibid.*, p. 54.

### 3.2.2.2 External Functions

Except for internal functions, formalities also performed a few key roles outside the copyright system. The legal deposit of copies, for example, undoubtedly was also designed to enrich the collections of national libraries. Accordingly, as part of a general social-cultural programme aimed at creating a national cultural depositary, the legal deposit fulfilled an important goal of general utility.<sup>179</sup> In addition, formalities played a role in economic procedure. The registers of copyright, for instance, may have also operated as trade registers and, thus, as instruments for the economic ordering of the market for books or other protected subject matter.<sup>180</sup> Finally, formalities were sometimes used as an instrument of governmental control. Although this was especially the case in the old book privilege system, when censorship and formalities commonly went hand in hand,<sup>181</sup> the nineteenth century also witnessed a few occasions where the two were tied up together. In France, for example, Napoleon reinstated in 1810 the legal deposit as a measure of administrative monitoring.<sup>182</sup> He demanded that every publisher deposit five copies of each printed work,<sup>183</sup> one of which

179 Lemaitre, pp. xxxvii-xxxviii.

180 It is likely that this function was attached to the registration in Saxony, where the early literary (and artistic) property legislation was still primarily aimed at protecting the Leipzig book trade. See Kawohl, pp. 24-5. The registers in the old system of stationers' copyright in England played a similar role: as indexes for ascertaining who owned the rights for which book, the registers at the same time provided important evidence of the segmentation of the book market among the different publishers.

181 See for example: Ulrich Eisenhardt, *Die kaiserliche Aufsicht über Buchdruck, Buchhandel und Presse im Heiligen Römischen Reich Deutscher Nation (1496-1806): Ein Beitrag zur Geschichte der Bücher- und Pressezensur*, Studien und Quellen zur Geschichte des deutschen Verfassungsrechts, 3 (Karlsruhe: Müller, 1970); Cyndia Susan Clegg, *Press censorship in Elizabethan England* (Cambridge: Cambridge University Press, 1997).

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

183 Interestingly, while Art. 6 of the 1793 French Decree placed the duty to deposit on the author, the Decree of 5 February 1810 makes the publisher responsible for depositing. Yet, this must be understood correctly. In theory, the publisher's obligation was separate from that of the author. Both were equally responsible for performing the duty imposed on them. This also manifests itself in the legal consequences of non-compliance. For authors, an omission to deposit resulted in the inadmissibility of their claims before a court. For publishers, it gave rise to a fine and confiscation of the copies that were not deposited. In practice, however, it was unnecessary for both the publisher and author to deposit. A deposit carried out by the publisher exempted the author from his obligation. See Pouillet, pp. 465-6 (no. 425). Consequently, the deposit performed by the printer was sufficient to ensure

was meant for censorship control.<sup>184</sup> This lasted until 1829, when Martignac, the French Minister of the Interior, abandoned the idea of legal deposit as a measure of state censorship.<sup>185</sup> Equally, in the second half of the century, the British applied formalities as an instrument of imperial surveillance of colonial literature. Following the 1857 uprising in India, for instance, they issued the 1867 Press and Registration of Books Act, which required publishers, within one month after publication, to submit three copies of every book to the local government, along with information regarding the book and the payment of a small fee.<sup>186</sup> Publishers who failed to comply with these formalities could be confronted with severe fines and imprisonment. In addition, non-compliance resulted in the inability to acquire copyright protection under the domestic Indian Act of 1847.<sup>187</sup>

In essence, however, the different purposes for which formalities, in the above cases, were used, concerned clear external matters. While linked to the copyright system, the belief grew that they could be regulated as well, separately from one another. This was the case, first of all, with censorship rules. After the fierce struggle for freedom of the press during the French Revolution, press regulation and authors' rights protection generally developed in two distinct directions during the nineteenth century. The instances where the two were connected became increasingly sporadic.<sup>188</sup> The same the preservation of the author's rights. See the rulings of the Court of Cassation of 1 March 1834, *Thiéry v. Marchant*, *Dalloz* 1834, 1, 113 ; *Sirey* (2<sup>me</sup> Sér.) 1834, 1, 65; of 20 August 1852, *Bourret et Morel v. Escriche de Ortéga*, *Dalloz* 1852, 1, 335; and of 6 November 1872, *Garnier v. Lévy*, *Dalloz* 1874, 1, 493. But see Court of Cassation, 30 June 1832, *Noël et Chapsal v. Simon*, *Dalloz* 1832, 1, 289, ruling in the opposite direction.

184 Art. 4 of the Ordinance of 24 October 1814. See Lemaitre, pp. xxxvi-xxxvii.

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

186 Act no. XXV of 22 March 1867, An Act for the Regulation of Printing-Presses and Newspapers, for the Preservation of Copies of Books Printed in British India, and for the Registration of Such Books. The aim was to register any relevant piece of information that could be harmful for the political situation in India and to create annual statistical reports on the state of colonial literature. See Robert Darnton, 'Book Production in British India, 1850-1900', *Book History*, 5 (2002), 239-62.

187 Act no. XX of 1847, An Act for the Encouragement of Learning in the Territories Subject to the Government of the East India Company. See Lionel Bently, 'Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries', *Chicago-Kent Law Review*, 82 (2007), 1181-240 (pp. 1183-5, notes 8 and 11).

188 In many European countries, the link between censorship and copyright loosened after the French Revolution and disappeared entirely during the nineteenth century. See for example Ludwig Gieseke, 'Zensur und Nachdruckschutz in deutschen Staaten in den Jahren nach 1800', in *Historische Studien zum Urheberrecht in Europa*, pp. 21-31, who marks the year 1835 as the date on which the two finally

was true of national cultural depositaries. If states wished to enrich their national libraries, there was no need to establish a legal deposit formality inside the copyright framework. They could also create a system of legal deposit without depending authors' rights upon it.<sup>189</sup> Finally, to the degree that copyright registers also functioned as trade registers, more and more alternative sources from which data about the economic ordering of the market could be deduced, began to appear, including general book trade indexes (which were voluntarily continued) and national and international bibliographic information systems.<sup>190</sup> In general, these sources proved much more accurate than copyright registers, which were often incomplete, especially if the existence of copyright did not rely on the act of registration.

### 3.2.3 Some Important Conceptual Innovations and Transformations

Lastly, the second half of the nineteenth century saw some important conceptual innovations in copyright and authors' rights law which also affected the notion of copyright formalities. Throughout the century the scope of protection was significantly extended. More and more new categories of works found protection under copyright law. This included subject matter like sculptures, paintings, drawings and photographs. In addition, protection became independent from the specific mode or form of expression of a work. Instead of mere printed matter (such as books, maps, charts, journals and sheet music) or pre-fixed works of art (such as drawings, paintings, sculptures and engravings), protection was conferred on works *qua abstractum*; that is, the protection of authors' rights in literary

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separated in Germany.

189 This was, for example, the critique that some people expressed regarding the continuation of the legal deposit as a condition to suit in France. See Ernst Röthlisberger, 'Gesamtüberblick über die Vorgänge auf urheberrechtlichem Gebiete in den Jahren 1904, 1905 und 1906', *Börsenblatt für den Deutschen Buchhandel*, 74 (1907), 1688-91 (p. 1689): 'An dieser Einrichtung der Pflichtexemplare, die ganz gut als presspolizeiliche oder bibliothekarische massregel neben dem Schutz des Autorrechts bestehen kann, aber auf diesen absolut keinen Einfluss ausüben sollte, wird beständig herumgedoktert, ohne nennenswerten Erfolg'.

190 A noteworthy example was the 'Universal Bibliographic Repertory' which in 1895 was set up by the *Institut International de Bibliographie* (IIB), in 1932 renamed to *Fédération Internationale de Documentation* (FID). This database, which by 1912 contained nearly nine million entries, was considered to render an invaluable service. See *Actes de la Conférence de l'Union internationale pour la protection des oeuvres littéraires et artistiques: réunie à Paris du 15 avril au 4 mai 1896* (Berne: Bureau international de l'Union, 1897), p. 178.

and artistic works was severed from the physical object in which they were embodied or manifested.<sup>191</sup> This gave even more prominence to the intangible character of copyright protected works. Moreover, it finally led to the recognition of copyright protection of the multiple ways in which a work could be exploited. Instead of being granted a mere right to print and reprint, which had been the essence of copyright hitherto, authors were increasingly conferred exclusive rights of reproduction (in a broad sense), of public performance and, occasionally, of making translations and adaptations.<sup>192</sup> These transformations seem to have had a great impact on the development of copyright formalities.

First, in respect of the increased focus on the intangible, formalities may, on the one hand, have been thought valuable to provide some sense of legal certainty. From the late eighteenth century onwards, when, at least in the UK, the idea of property in the intangible had been firmly established, the idea that a property right could exist solely in the intangible had raised many concerns.<sup>193</sup> One of the most prominent concerns was that it was difficult to manage and shape the limits of intangible property.<sup>194</sup> Formalities may well have contributed to alleviating such concerns. As Bently concludes in respect of the nineteenth century design registration scheme in the UK: 'A registration system operated as a functional equivalent of possession of title deeds – fixing ownership in and marking boundaries of a particular asset. Registration thus made the whole idea of intangible property much less threatening'.<sup>195</sup> Hence, by making more explicit the intangible assets which formed the subject matter of protection, formalities may have played a key role in rationalising this strange concept of intangible property.<sup>196</sup>

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191 Kawohl and Kretschmer, pp. 214 et seq.

192 For example, under the Prussian act of 1837, restricted acts did not only include the simple reprinting, publication and distribution of writings (Arts 2 and 9), but also the transcription of lectures and sermons (Art. 3), the translation of writings for which the translation right was reserved by a notice (Art. 4), the adaptation or rearrangement of musical compositions (Art. 20), the creation of derivative works of drawings, paintings or sculptures (Art. 23) and the public performance of dramatic and musical works (Art. 32).

193 See John Feather, 'The Publishers and the Pirates: British Copyright Law in Theory and Practice, 1710-1775,' *Publishing History*, 22 (1987), 5-32 (p. 25), who states, in respect of the 1774 decision in *Donaldson v. Beckett*: 'Despite all the distrust of the idea of incorporeal property, such property was now deemed to exist'.

194 For a comprehensive account of the various concerns raised, see Sherman and Bently, pp. 19-42.

195 Bently, pp. 35-6. See also Sherman and Bently, pp. 182-3.

196 Arguments of this kind were voiced as late as 1878. See *Report of the Royal Commission on Copyright*, p. xxiii (para. 136): 'copyright is a species of incorporeal

On the other hand, the abstraction implicit in the new notion of authors' rights contradicted with formalities to a large extent. As Kawohl and Kretschmer have explained, formalities like registration, deposit and notice undermine the presumption that works merit protection *qua abstractum*: 'If the emerging rationale of copyright derives from the character of abstract, identical authored works (as opposed to the earlier incentive in the creation or dissemination of useful products), protection should coincide with the moment of creation'.<sup>197</sup> Also, abstract work identities are not easily captured in formalities, especially if they are not fixed in some tangible medium.<sup>198</sup> It is hard to imagine the registration of a performed musical work or the deposit of an oral lecture, speech or sermon (not to think of marking these works with a notice of some kind).<sup>199</sup> Hence, there was some tension between the abstraction and existing formalities.<sup>200</sup>

In addition, formalities did not fit easily with each and every new category of works. In particular for works of art, such as sculptures, paintings, drawings and photographs, registration and deposit proved very difficult. For this reason, representatives of artists and photographers campaigned strongly against these formalities,<sup>201</sup> arguing that the situation in relation to artistic works was different from that of literary works.<sup>202</sup> Unlike the property, of which some visible evidence is desirable'.

197 Kawohl and Kretschmer, p. 221.

198 Although fixation was not an express condition in the early British Copyright Acts, protection was granted only in respect of published works, which implied their fixation in a tangible medium. According to the current Sec. 3(2) UK Copyright, Designs and Patents Act 1988 (c. 48), on the other hand, 'copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise'.

199 J. Heemskerk Az., *Voordragten over den eigendom van voortbrengselen van den geest*, 2nd edn (Amsterdam: Beerendonk, 1869; repr. Amsterdam: De Kloof, 2000, with introduction by R.J.Q. Klomp), pp. 81-2.

200 Furthermore, there is the practical difficulty of when a formality would need to be completed for securing the protection in an abstract work which only has been performed or publicly recited. This problem is illustrated by Sec. 5 of the Lecturers Copyright Act (1835), 5 and 6 Will. IV, c. 65, where copyright protection was denied for oral lectures, unless a specific formality was fulfilled. This formality consisted in a two days' previous notice in writing to be given to two justices living within five miles of the place where the lecture would be held.

201 See the interesting debates regarding the necessity of formalities to ensure the protection of artistic property rights, in *Congrès International de la Propriété Artistique*, pp. 52-9. In respect of the registration of artistic works in the UK, see also *Minutes of the Evidence Taken before the Royal Commission on Copyright in Parliamentary Papers 1878* [C.2036-1], XXIV, questions 3957-4035 (pp. 212-8).

202 This was particularly the case for artistic works that were not reproducible *ad infinitum* (like paintings, drawings and sculpture). Yet, for works which were

situation with design, patent and trade mark rights, the registration or deposit of which depended on a representative description or a sample of the protected object rather than the object itself, in the case of copyright, it was considered elementary to reproduce the intangible work in its full physical appearance. In an attempt to identify the object of protection, all characteristic – subjective and original – elements that made the work eligible for protection needed to be captured.<sup>203</sup> However, artistic works did not lend themselves easily to reproduction. A description of the essence of artistic works was hard to give.<sup>204</sup> Moreover, even if a simple registration of the description of the work could be produced, it was questioned whether this would adequately provide *prima facie* evidence of the property: in the absence of a deposit of the work (or a photograph or sketch thereof), would it not give rise to problems if a similar description had been registered by another person?<sup>205</sup> Lastly, if artistic works were technically reproducible, it would be inapt to demand the deposit of a replica, since the cost of reproduction would often be prohibitively high.

Yet, even for literary works, for which reproduction was technically easier, reproduction costs could present too much of a barrier to performing the legal deposit, especially where a special or limited edition of the work was concerned.<sup>206</sup> Moreover, registration and deposit of literary works often proved unsatisfactory for accurately defining the nature and limits of the intangible property. Consequently, where it proved increasingly problematic to define *ex ante* the essence and the boundaries of literary and artistic property via formalities, it was left more and more to the legislature to find legal techniques to enable the identification of works, and to the courts to

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intended to be reproduced (like engravings, prints and photographs), there was less resistance against formalities. See Jules Pataille in *Congrès International de la Propriété Artistique*, p. 53 and, for the UK, *Report of the Royal Commission on Copyright*, p. xxvi (para. 157).

203 Sherman and Bently, pp. 183 et seq.

204 See for example the remark on this point by Mr Meissonier, president of the 1878 International Conference on Artistic Property in Paris, in: *Congrès International de la Propriété Artistique*, p. 56. Others, however, questioned the impracticability of registration for artistic works. See for example the response by Eugène Pouillet, *ibid.*, pp. 56-7.

205 See Alexandre Beaume, *avocat* at the Paris Court, in *Congrès International de la Propriété Artistique*, p. 58.

206 In addition, for those copyright owners holding large catalogues of rights for works with low individual value (for example, musical scores), formalities like registration and deposit often also appeared too costly and impracticable. See Lord Thring, quoted by Lord Monkswell (24 April 1899) in Sherman and Bently, p. 183 (note 38).

demarcate the nature of works *ex post*.<sup>207</sup> In this respect, copyright varied considerably from other intellectual property rights, the documents of registration of which became increasingly more important for establishing the property status.<sup>208</sup> For these latter types of rights, this seems to have also been more essential than for copyright. Due to the very personal nature of literary and artistic works, the chances of *Doppelschöpfung* (that is, the coincidental parallel and independent creation of two or more unique or highly similar works by two or more different authors) are very small, at least if compared with designs and patents law.<sup>209</sup> Thus, while for other intellectual property rights, systems of registration were deemed of great importance for establishing priority and avoiding difficulties of proof regarding independent production,<sup>210</sup> formalities seemed less indispensable for an efficient protection of authors' rights.<sup>211</sup>

Accordingly, while copyright law 'moved from the concrete to the abstract',<sup>212</sup> many of the old formalities started to lose their significance. At the same time, however, new formalities were introduced in response to the extended protection of the various modes of exploitation of abstract authored works. While copyright used to grant exclusivity regarding the printing or reprinting of works in their original manifestation only, with the new conception of abstract authored works, the scope of protection was extended and copyright began to include the rights of making translations and adaptations, public performance and recitation.<sup>213</sup> Still, there were great concerns about the economic implications of these previously unprotected acts being brought under the scope of protection. Therefore, national legislators often began to impose specifying formalities as threshold requirements. Before authors received protection for these new forms

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207 Sherman and Bently, p. 192.

208 Ibid., pp. 185 et seq.

209 J.J. Wijnstroom and J.L.A. Peremans, *Het auteursrecht* (Zwolle: Tjeenk Wilink, 1930), pp. 16-17.

210 Bently, pp. 38, 41.

211 The possibility to prove the author's identity by means other than formalities was stressed by John Leighton, a British artist, at the 1878 International Conference on Artistic Property in Paris. He maintained that registration was redundant because the author of a work could always be recognized by experts, either by his writing, his drawing, his brushstroke, or the manner of painting. See *Congrès International de la Propriété Artistique*, p. 57.

212 See Sherman and Bently, pp. 55 et seq, for an account of how 'the law [...] moved from the concrete to the abstract' due to the 'shift from the surface of the text to the essence of the creation'.

213 Kawohl and Kretschmer, pp. 214 et seq.

of exploitation, they were repeatedly required to mark their works with an explicit notice of reservation (as discussed above).<sup>214</sup> This is intended to uphold the balance between the limited exclusivity granted to authors and the common interest in the public domain. As the general attitude towards formalities changed and the Berne Convention adopted the principle of no formalities, many specifying formalities were abolished as well. However, some continued to exist and, even today, can still be found in the copyright law of various countries.<sup>215</sup>

### 3.3 The Absence of Concomitant Developments in the Netherlands and the UK

Before concluding the chapter, a final note should be made about why the Netherlands and the UK retained formalities on a more consistent and ongoing basis and, consequently, why the above innovations exerted little influence in these two countries. In the Netherlands, the second part of the nineteenth century was characterised by a pragmatic rather than ideological thinking on copyright law. It was generally believed that there was no higher legal principle which forced the state to secure the rights of authors to the fruits of their labour.<sup>216</sup> Instead, there was general accord that the law should grant authors certain exclusive rights solely in the public interest: protection was needed to ensure that authors continued creating works.<sup>217</sup> Dutch copyright law thus appears to be one of opportunity rather than of deliberate, principled choices.<sup>218</sup> This also fits the spirit of the time, which

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214 Kawohl and Kretschmer, p. 221, argue that the early copyright registration in Prussian and British copyright already needs to be considered as ‘an indicator of political and economic uneasiness about the [extended] locus of protection, regarding both subject matter and exclusive rights provided’.

215 See for example the reservation requirement in respect of the exclusive reproduction right for newspaper articles, which is expressly allowed by Art. 10bis(1) BC (1971) and which can be found for example in Art. 49 of the present German Copyright and Neighbouring Rights Act 1965 and in Art. 15(1) of the current Dutch Copyright Act.

216 See Mr. J. Fresemann Viëtor in *Handelingen der Nederlandsche Juristen-Vereeniging*, 1877, 8, 2 vols (’s-Gravenhage: Belinfante, 1877), I, 34-49 (p. 44): ‘er is geen rechtsbeginsel dat den Staat kan nopen schrijvers en kunstenaars de rechten van hun arbeid te verzekeren. Zij kunnen daarop geen rechten doen gelden’.

217 *Handelingen der Nederlandsche Juristen-Vereeniging*, 1877, II, 69-71 (p. 71): ‘dat in het algemeen belang door de wet een recht tot uitsluitende reproductie moet worden gegeven’ (voted in favour by 36 votes to 10).

218 See Herman Cohen Jehoram, ‘Urheberrecht: eine Sache des Rechts oder der Opportunität? Eine alte, aber unvollendete Debatte in den Niederlanden’, in *Historische Studien zum Urheberrecht in Europa*, pp. 115-20.

portrayed a general resistance against another intellectual property right: the patent right. There was a growing belief that for small countries with open economies, the net benefits of granting property in inventions were few and that free trade in inventions should prevail.<sup>219</sup> This 'patent controversy' led to the abolition of the Dutch patent system for over forty years (1869-1910).<sup>220</sup> Against this backdrop, it becomes evident that the time was not yet ripe for a major liberal reform of Dutch copyright law.<sup>221</sup>

Likewise, in the UK, little reform of domestic copyright law took place in the second half of the century. While the need for reform and consolidating legislation was widely recognised, it would take until 1911 before copyright law was modernised and codified in a single Act.<sup>222</sup> This delay in the reorganisation of British domestic copyright law seems to have been caused primarily by imperial and colonial matters, which made it increasingly difficult to maintain uniformity of copyright law throughout the British Empire.<sup>223</sup> During a general review of the British copyright law between 1875 and 1878, a Royal Commission on Copyright made quite a number of recommendations for reform,<sup>224</sup> including the idea of making registration compulsory for literary works, publicly performed dramatic works and musical compositions that were not printed or published, works of fine art (not including paintings and drawings) and engravings, prints and photographs.<sup>225</sup> Although these recommendations found their way into a number of bills,<sup>226</sup> these attempts to revise British copyright law all proved unsuccessful.<sup>227</sup>

219 Eric Schiff, *Industrialization Without National Patents: The Netherlands, 1869-1912; Switzerland, 1850-1907* (Princeton, N.J.: Princeton University Press, 1971).

220 Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century', *Journal of Economic History*, 10 (1950), 1-29.

221 On the contrary, with reference to the abolishment of the Dutch patent system, voices were raised to do away with Dutch copyright law altogether. See for example Mr. S. Katz, quoted in De Beaufort, p. 75.

222 Bently, p. 3.

223 See Sherman and Bently, pp. 136-7, describing how imperial and colonial affairs generally resulted in inactivity on the part of the British legislator.

224 *Report of the Royal Commission on Copyright* [C.2036], XXIV (London: HMSO, 1878).

225 *Ibid.*, pp. xxii-xxvi (paras 128-59). Note that not all recommendations received the unanimous support of all Commissioners. In respect of the recommendation for compulsory registration, see in particular the Dissent from the Report of the Commissioners as to Paragraphs 153 and 154, respecting the Registration of Books, by Mr. Anthony Trollope (pp. lix-lx); and the Note appended to the signature of Mr. Frederick Richard Daldy (p. lx).

226 See Sherman and Bently, p. 136 (note 32).

227 See Benjamin Kaplan, 'The Registration of Copyright', Study no. 17 (August

Despite the initial inactivity on the part of the Dutch and British lawmakers, the principle of no formalities was accepted without much resistance when the two countries had to change their domestic copyright law to allow adherence to the revised 1908 Berne Convention. While the Convention prohibited imposing formalities on authors of foreign works only, the Netherlands and the UK chose to abolish formalities even as to domestic works.<sup>228</sup> In the UK, for example, the standing registration requirements were characterised as ‘anomalous, uncertain, and productive of great disadvantage and annoyance to authors with little or no advantage to the public’.<sup>229</sup> In addition, it appears that in both countries, formalities were poorly complied with. In the Netherlands, few books were in fact being deposited,<sup>230</sup> and in the UK, entries were not generally made and few books were registered until the copyright had been infringed.<sup>231</sup> This was not uncommon in the late nineteenth and early twentieth centuries, as

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1958), in *Studies on copyright - Arthur Fisher Memorial Edition* (South Hackensack, NJ: Rothman, 1963), 325-91 (p. 333).

228 There are obvious reasons for contracting states not just to abolish formalities for foreign works, but to grant unconditional protection to all works, irrespective of their origin. Besides the clear and understandable antipathy to grant foreign authors more rights than domestic authors, it would make little sense to require national authors to continue with formalities, because they could always choose to publish their works in another Berne Union country which had eliminated formalities. This would allow them to claim protection in their own country under the Berne Convention without the need to comply with the own domestic formalities. See Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, 2 vols. (New York: Macmillan, 1938), I, p. 275.

229 *Report of the Committee on the Law of Copyright* [Cd.4976] (London: HMSO, 1909), p. 12. Only one of the 16 members of the committee expressed a dissenting opinion. See the Note appended to the Signature of Mr. E. Trevor Ll. Williams, *ibid.*, pp. 32-5 (pp. 32-3).

230 See § 2 of the 1912 Parliamentary Report of the Dutch Lower Chamber (Memorandum in Reply) in L. de Vries, *Parlementaire geschiedenis van de Auteurswet 1912, zoals sedertdien gewijzigd*, loose-leaf, 3 vols. (Den Haag: Sdu, 1989), III, 6-10 (p. 9). See also Snijder van Wissenkerke, p. 58.

231 Evidence taken before the Royal Commission on Copyright of 1875-8 reveals that the practical incentive to register was weak. See *Minutes of the Evidence taken before the Royal Commission on Copyright*, questions 340 (p. 21), 1958-9 (p. 97) and 5501-2 (p. 301); and *Report of the Royal Commission on Copyright*, p. xxiii (para. 133). See also Justice North in *Cate v. Devon & Exeter Constitutional Newspaper Co.* (1889) LR 40 Ch. D. 500 (Chancery Division, 1889), p. 506: ‘It is well known that registration is only necessary as a condition precedent to suing; and the almost universal practice on the part of large publishers notoriously is that they do not register until just on the eve of taking some proceeding: then they take care to register their copyright, and sue upon it’.

other examples show.<sup>232</sup> As a result, it seems that in the Netherlands and the UK, at the time of their removal, formalities were not really embraced as essential and critical features of copyright law.

#### 4. Evaluation and Conclusion

The evolution of formalities in nineteenth century Europe is one of steady decline. Literary and artistic property generally developed from a system based fully on formalities at the dawn of the century, to a system with much less reliance on formalities at the end of the century. Besides reasons of intricacy and expense, we saw that the connection between formalities and literary and artistic property rights gradually weakened because of ideological, functional and conceptual innovations that changed the contours of copyright and authors' rights law.

Unsurprisingly, the decreasing reliance on copyright formalities is attributable, to a great extent, to the development of the authors' rights doctrine in France and Germany. Unlike the situation in the first half of the century, when literary and artistic property rights were often perceived as publishers' rights or as 'privileges' granted by the legislator by virtue of a social contract, in the middle part of the century, it became well established that the foundation of copyright existed solely in the quality of the author's personal creation. Under the influence of natural property and personality rights theories, copyright was believed to automatically arise with the author's creation. This proved fatal for constitutive formalities. They were either removed altogether (Germany) or were held to be merely declarative of the right (France).

However, the general decline of formalities cannot be explained by ideological changes alone. Despite the general mind-set shifting in favour of automatic protection, there was no absolute resistance against copyright formalities. Overall, they were still believed to fulfil a few important functions in relation to the exercise of authors' rights. In France in particular, formalities were thought valuable for proving priority of authorship, enhancing publicity and establishing legal certainty. This explains why the legal

<sup>232</sup> In Italy, for example, it was calculated that, between 1887 and 1891, only 5.5 per cent of all published literary works had actually been deposited. See 'La question des formalités en Italie', *Le Droit d'Auteur*, 10 (1897), 63-6 (p. 65). Also in France, while the number of copies deposited was fairly high (ranging from 17,000 literary works in 1884 to 21,700 literary works in 1908), there were constant complaints that for many works, the copies deposited were incomplete or in bad condition, or that no copies were deposited at all. See Lemaitre, pp. l-liv.

deposit was continued as a declaratory formality. Furthermore, in order to uphold the balance between authors' rights and the public interest, specifying formalities were increasingly imposed as threshold requirements in reply to an extended protection for new forms of exploitation. Both of these formalities are consistent with the - at that time widely accepted and prevalent - idea that while authors' rights should well be secured, this must always be done with due regard for the public interest.

Nevertheless, by the close of the century, these formalities also began to lose their practical significance. This was caused by some key conceptual changes. First, copyright formalities did not fit well with the new concept of abstract authored works. Because formalities were typically connected with the outside appearance of a work, they were incapable of capturing the essence of the author's expression in order to define the nature and limits of protection. Moreover, formalities could not be fulfilled unless a work was fixed in a tangible medium. This clashed with the idea that authors' rights exist in a work irrespective of the mode or form of its expression. Also, for some newly protected categories of works, completing formalities proved either immensely difficult or overly costly. In addition, formalities were rendered ever more redundant by the availability of alternative legal techniques for establishing authorship (for instance, legal presumptions), by the calculation of the term of protection *post mortem auctoris* and by the idea that, to the extent that formalities fulfilled external functions, they could also be imposed outside the copyright framework. Lastly, it appears that the registration and deposit systems of the late nineteenth century were very inefficiently organised and, in fact, poorly complied with. Therefore, there may have been little inclination to retain these formalities.

These observations are particularly relevant to the present debate. They at least show that, from a historical perspective, a formality-free protection of copyright and authors' rights must not be thought of as a 'sacred cow', as copyright lawyers - especially those in the continental-European *droit d'auteur* tradition - currently are often inclined to do. From a principled point of view, there is no real conflict between formalities and the natural rights theory underlying the authors' rights doctrine. This theory by no means dictates the absolute removal of copyright formalities, but merely opposes the reliance on formalities as prerequisites for the coming into existence of the right. Furthermore, the various pragmatic reasons that added to the growing irrelevance of formalities in the nineteenth century do not fundamentally oppose formalities either. Rather, they must be

understood in their historical context. In the present digital age, many of the nineteenth century concerns over formalities appear to no longer exist or, at least, may be easier to overcome. Today, registration and deposit can be organised quite efficiently and made applicable to virtually any type of work. This is due to modern digital reproduction technologies, which allow a work to be easily and cost-effectively reproduced verbatim so as to capture its distinctive – subjective and original – features. Many practical objections against formalities therefore no longer apply in the current digital networked environment.

Finally, it seems that there is another important lesson to learn from the nineteenth century conception of copyright and authors' rights. The whole nineteenth century is characterised by the constant will to establish a fair balance between the protection of authors' rights and the public interest. This is precisely what the present calls for a reintroduction of formalities aim to achieve. In current copyright law, the balance has generally tipped too far in favour of protecting the author. Formalities are believed to help with restoring this copyright imbalance. The history of formalities in nineteenth century Europe reveals that formalities can indeed play an important role in this respect. From their historical roots, copyright and authors' rights certainly were not absolute and unconditional rights. Their exercise could always be restricted, or made subject to formalities, if the societal order or the public interest so required.