COPYRIGHT FORMALITIES IN THE INTERNET AGE: FILTERS OF PROTECTION OR FACILITATORS OF LICENSING

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I. INTRODUCTION

In the past decade, proposals for reintroducing formalities in copyright law have been voiced on both sides of the Atlantic. While the calls seem to be strongest in the United States,[1] the suggestion to reinstitute particular types of copyright formalities is also cautiously put forward in European political debates as a way to facilitate licensing and to cure the problem of orphan works. In 2009, for example, the Intellectual Property Office of the United Kingdom discussed how copyright formalities could support authentication and management of copyright-protected works.[2] In 2011, the Greens/European Free Alliance in the European Parliament proposed requiring authors to register their works within five years after production, so as to limit the problem of orphan works in the future.[3] In the same year, the *Comité des Sages* (i.e., a committee of experts established by the European Commission to advise on bringing Europe's cultural heritage online) listed as one of its key recommendations for avoiding a future exacerbation of orphan works that:

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1. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 251–52 (Random House 2001); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 287–90 (Penguin Press 2004) [hereinafter LESSIG, FREE CULTURE], LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 260–65 (Penguin Press 2008); WILLIAM PATRY, HOW TO FIX COPYRIGHT 203–09 (Oxford University Press 2011); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 179–82 (2009); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 212–29 (2005); Kevin A. Goldman, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705 (2006); Cecil C. Kuhne, III, *The Steadily Shrinking Public Domain: Inefficiencies of Existing Copyright Law in the Modern Technology Age*, 50 LOY. L. REV. 549, 562 (2004); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477, 518 (2003) (proposing that requiring registration and renewal for copyright protection would incentivize right owners to take these steps in a system allowing indefinitely renewable copyrights); Genevieve P. Rosloff, *"Some Rights Reserved": Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37 (2009); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 562–63 (2007); Pamela Samuelson & Members of The CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1198–1202 (2010); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004); François Lévêque & Yann Ménière, *The Economics of Patents and Copyright*, CERNA, http://www.cerna.ensmp.fr/Documents/FL-YM-eBookIP.pdf (last visited June 23, 2013).

2. INTELLECTUAL PROPERTY OFFICE, © THE WAY AHEAD: A COPYRIGHT STRATEGY FOR THE DIGITAL AGE ¶ 108 (2009), http://www.ipo.gov.uk/c-strategy-digitalage.pdf (citing Sprigman, *supra* note 1).

3. THE GREENS/EUROPEAN FREE ALLIANCE IN THE EUROPEAN PARLIAMENT, CREATION AND COPYRIGHT IN THE DIGITAL ERA §§ 27, 29 (2011), http://www.greens-efa.eu/fileadmin/dam/Documents/Policy_papers/Creation_and_copyright_in_the_digital_era_EN.pdf.

> Some form of registration should be considered as a precondition for a full exercise of rights. A discussion on adapting the Berne Convention on this point in order to make it fit for the digital age should be taken up in the context of WIPO and promoted by the European Commission.[4]

Because the lack of adequate and reliable information about ownership of rights is a key cause of the orphan works problem,[5] it seems hardly surprising that these reports seek recourse to copyright formalities as a way to mitigate licensing difficulties in the future. Formalities such as registration requirements, mandatory recordation of transfers of copyright ownership, and—to a lesser extent—notice requirements have the potential of providing would-be users with useful information about the ownership of copyright in a work.[6] Having said that, it is all the more remarkable that discussions about reintroducing copyright formalities have also been revived in Europe. Unlike in the United States, where federal copyright law has always relied on formalities, in most European countries, copyright formalities have long been abolished.[7] The common perception in Europe is therefore that formalities are relics of the past. The reason why they have nevertheless gained more prominence in recent debates is that there is growing awareness that formalities may play an important role in the digital era.

Other than for the purpose of facilitating rights clearance, reintroducing copyright formalities can have the objective of enhancing the free flow of information by enlarging the public domain. My book, *Formalities in Copyright*

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4. *Comité des Sages*, *The New Renaissance*, at 5 (Jan. 10, 2011), *available at* http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf; *see also id.* at ¶¶ 5.3.3–5.3.5.

5. *See* MIREILLE VAN EECHOUD ET AL., HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING 273 (2009); BERNT HUGENHOLTZ ET AL., UNIV. OF AMSTERDAM INST. FOR INFO. LAW, THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY § 5.4.1 (2006) (reporting to the European Commission, DG Internal Market); Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 669, 672–74 (2007).

6. *Cf.* Jane C. Ginsburg, *Recent Developments in US Copyright Law: Part I – "Orphan" Works*, 217 REVUE INTERNATIONALE DU DROIT D'AUTEUR at 176–77 n.8 (2008) (indicating, however, that the public records of the U.S. Copyright Office are not necessarily accurate, since the recordation of transfers of copyright ownership is not a mandatory formality under U.S. copyright law).

7. *See* Stef van Gompel, *Les formalités sont mortes, vive les formalités! Copyright Formalities and the Reasons for Their Decline in Nineteenth Century Europe*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 180 (Ronan Deazley et al. eds., Open Book Publishers 2010) (reporting that copyright formalities were abolished in Germany in 1901, for literary and musical works, and 1907, for artistic works and photographs; in the United Kingdom in 1911; in the Netherlands in 1912; and in France in 1925).

Law, identifies these two objectives—together with the general objective of creating legal certainty about copyright claims—as the ones underlying most proposals for reinstating mandatory formalities.[8] It is also emphasized there that the degree to which copyright formalities can address these objectives would fully depend on the type of formalities that are introduced and the nature and legal effect(s) that the lawmakers confer on them.[9] Copyright can be subjected to a variety of old-style or new-style formalities, each of which can be given a specific legal effect.

Building further on these deductions, this Article examines how copyright formalities may aid in addressing these objectives. To this end, it will first map the different objectives for reintroducing copyright formalities (Part II) and provide a brief overview of the types of formalities that might be imposed, including the legal consequences that can be attached to them (Part III). Next, it will explore which formalities, in what way, can assist in accomplishing the specific objectives of enhancing the free flow of information by enlarging the public domain (Part IV) and facilitating rights clearance (Part V). Part VI concludes.

At the outset, some general remarks are in order. Overall, any regime of copyright formalities must conform to a few core principles to have a chance of successful implementation. First, it ought to be ensured that copyright formalities, if introduced today, are fit for the digital era.[10] The regime must therefore be sensible, straightforward, and easy to apply. Also, it should not impose unreasonable burdens on authors and right owners. Second, economic considerations ought to be part of the decision-making process. It would be economically sound if lawmakers would opt for the most cost-efficient regime of formalities that would fit the objective(s) that they aspire to pursue.[11] Third, any regime of copyright formalities must, as far as

8. STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE 3–8 (2011).

9. *Id.* at 15.

10. *See* Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1416 (2013) ("[T]o address twenty-first century challenges we need twenty-first century solutions. Any discussion of reformalizing copyright for the digital age cannot be stuck in time.").

11. This requires a cost-benefit analysis of copyright formalities, such as the one conducted in the United States in the mid-1980s. *See* DONALD W. KING ET AL., COST-BENEFIT ANALYSIS OF U.S. COPYRIGHT FORMALITIES (King Research 1986) (reporting to the Register of Copyrights, U.S. Copyright Office). Although this study is of course far outdated, especially since in the digital environment the costs associated with establishing and maintaining a formality-based regime seem to have fallen significantly as compared to the pre-digital era, it still provides some useful insights into the economics of copyright formalities.

possible, be standardized and interoperable with other regimes of copyright formalities,[12] both within one and the same country and between different states. This requires cooperation and coordination at the international level. Fourth, lawmakers must work within the boundaries of the law. They must realize that national and international privacy regulations may impose limitations on making personal data of authors and copyright owners accessible to the public, should that be part of the formalities regime. Also, they are bound to observe the rules of international copyright law, including the prohibition on formalities laid down in Article 5(2) of the Berne Convention and incorporated by reference into the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the World Intellectual Property Organization ("WIPO") Copyright Treaty.[13] If a regime of copyright formalities wants to stand a chance, therefore, lawmakers ought to work their way around this prohibition.[14] This is not impossible, but certainly imposes some interesting legal challenges.[15]

There is too little space in this Article to address all these issues in a thorough, systematic, and comprehensive manner, but occasionally reference will be made to them.[16] Most attention shall be given to the question whether a newly proposed regime of formalities would be compliant with the international prohibition on copyright formalities. This examination shall reveal that, under current international copyright law, reintroducing

12. *See* Paul Jessop, Panel Discussion on Technology of Registries at the Berkeley Symposium: Reform(aliz)ing Copyright for the Internet Age (Apr. 19, 2013), http://www.law.berkeley.edu/15235.htm.

13. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27, at 4 (1986), 1161 U.N.T.S. 3, 35 [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS Agreement]; WIPO Copyright Treaty art. 1(4), Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty].

14. Unless, as suggested by the Comité des Sages, the Berne Convention will be changed on this point. *See supra* note 4 and accompanying text. Doing so, however, would be very difficult, since revision of the Berne Convention requires unanimity. *See* Berne Convention, *supra* note 13, art. 27(3). Also, modification of the TRIPS Agreement and WIPO Copyright Treaty would be required, because, as observed, the Berne prohibition on formalities is incorporated by reference into these international legal instruments.

15. *See* VAN GOMPEL, *supra* note 8, at 159–214 (exploring the scope and limits of the international prohibition on copyright formalities and concluding that it does not prohibit all formalities).

16. The pragmatic, economic, technical, and legal constraints deserve closer attention in future research, since the success of any "reformalization" of copyright law seems to depend on how well these issues are addressed.

formalities for the purpose of enlarging the public domain would meet many difficulties, but formalities could be meaningfully introduced for the purpose of facilitating rights clearance. This could improve the licensing of copyright significantly.

II. MAPPING THE OBJECTIVES

As observed in the Introduction, there are basically three objectives that inspire the proposals for reinstating formalities in copyright law. These are: (i) to create legal certainty about copyright claims, (ii) to facilitate rights clearance, and (iii) to enhance the free flow of information by enlarging the public domain. In my book, these objectives are positioned alongside each other without any distinction being made between them.[17] Yet, on closer inspection, there is a certain dynamic between the objectives in the sense that the outcomes that they attempt to realize might overlap, at least in part.

A. HIERARCHY OF OBJECTIVES

A top-level objective behind any proposal for reintroducing copyright formalities (and, more broadly, behind many other plans for copyright reform) is the need to create legal certainty about copyright claims. As Maria Pallante, the United States Register of Copyrights, said in her Keynote Address at the *Reform(aliz)ing Copyright for the Internet Age* Symposium: "Today, most anyone who spends time on the Internet will interact with the copyright system, but for many if not most, the rule of law will be more unclear than clear."[18] Indeed, in the current legal system where copyright automatically arises upon the creation of an original work of authorship, it is not necessarily clear whether copyright extends to a particular creation. And even if it may be reasonably assumed that a creation enjoys copyright protection, then it may well be difficult to establish who is the author or current copyright owner and—if it concerns an older work—whether it is still protected or has entered the public domain due to an expiration of the copyright term.[19] This threatens a smooth operation of the copyright system

17. *See* van Gompel, *supra* note 8.

18. *See* Pallante, *supra* note 10, at 1415–16.

19. The difficulties of identifying copyright owners is illustrated by the renewed urgency of the orphan works problem. *See, e.g.*, U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), http://www.copyright.gov/orphan/orphan-report-full.pdf. In practice, problems involving the calculation of copyright terms arise because the rules regarding duration of copyright are complex and may vary between different jurisdictions. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), http://www.copyright.gov/circs/circ15a.pdf (reviewing changes in copyright law affecting duration of copyright protection); *see also* Christina Angelopoulos, *The Myth of European Term*

for copyright owners and users alike and will do no good for the social acceptance and legitimacy of copyright law, which is already declining.[20]

Establishing legal certainty about works that attract copyright (and those that do not) and about authorship, ownership, and term of copyright protection is essentially also what the second objective (of facilitating the clearance of rights) and third objective (of enhancing the free flow of information by enlarging the public domain) together aspire to attain. For this reason, the latter two objectives can be perceived as specific objectives that aid in achieving the general, top-level objective of creating legal certainty about copyright claims.

B. LEGAL CERTAINTY THROUGH FACILITATION OF RIGHTS CLEARANCE AND ENLARGEMENT OF THE PUBLIC DOMAIN

The objective of facilitating rights clearance is to encourage the public disclosure of more adequate information about copyright ownership. In the current digitally networked environment, the number of occasions where the clearance of rights causes difficulties has grown exponentially. The rise in difficulties caused by the clearance of rights is due to several factors: the increased volume of works created by amateur creators;[21] the ubiquity of the Internet, which allows access to works from around the world and may therefore require rights clearance in potentially unknown foreign territories; and the expansion of the traditional copyright domain, which has aggravated licensing by granting copyright to more works, to more types of rightholders, and for longer terms.[22] Additionally, the increased demand for reusing copyright-protected content in the digital environment has further exacerbated the rights clearance problem. For example, there is large demand for reusing copyright-protected content in mass-digitization, small-scale reuse, and other transformative uses, such as mixing and mashing.[23]

Harmonisation: 27 Public Domains for the 27 Member States, 43 INT'L REV. INTELL. PROP. & COMPETITION L. 567, 569 (2012).

20. Pallante, *supra* note 10, at 1415. Pallante summarized the different problems with current copyright law as follows:

> It is difficult to make the case that authors are adequately protected, that the law provides clear guidance to courts, that it is respected by the public, that investors have a clear blueprint or sound ecosystem, or that it is flexible enough to sustain the current and projected realities of a planet consumed by technology.

Id.

21. *See* Samuelson, *Preliminary Thoughts on Copyright Reform*, *supra* note 1, at 563; *see also* Gibson, *supra* note 1, at 213–14.

22. *See* HUGENHOLTZ ET AL., *supra* note 5, at 164–66.

23. *Id.* at 163–64.

The general idea is that more adequate and reliable information about the authors and current right owners of works would become publicly available should particular copyright formalities be reintroduced. If the law would require authors and right owners to supply adequate identifying information (e.g., in a public record or on the copies of their works) and to keep this information up-to-date, then users and third parties would be able, by inquiry, to find the relevant copyright owners to arrange permission, if needed. Furthermore, it would be easier to calculate the term of protection of works if reliable information about the author were available (given that, in most countries, this term is ordinarily calculated from the date of death of the author).[24]

Enhancing the free flow of information by enlarging the public domain is an objective of an entirely different kind. The main goal is to ensure that works that do not merit copyright protection—at least not for the full term of protection—fall into the public domain and are easily recognizable as being unprotected, so as to allow anyone to freely use or build upon them. The threshold for protection is currently so low that copyright attaches to the vast majority of creations, regardless of whether authors want to avail themselves of protection.[25] This includes what Fred von Lohmann called the "dark matter of copyright": the millions of digital photos, videos, tweets, and comments that are daily uploaded and put online by ordinary people.[26] Moreover, under the current terms of protection, works are locked up in the copyright regime for the author's life plus seventy years. It is doubtful whether works really need to be protected for such a lengthy period. The scores of out-of-print works that have fallen out of the commercial chain and that remain hidden in the vaults of publishers, waiting until the day arrives that they attract a new market, illustrate this.[27]

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24. *See* VAN GOMPEL, *supra* note 8, at 45–49 (explaining that formalities can fulfill an important information and evidentiary function, by establishing a link between authors or copyright owners and works, thus providing prima facie evidence of their intellectual property right, and by offering a valuable source of information that may help the public to ascertain the subject matter, scope and term of protection, and the identities of the authors and copyright owners).

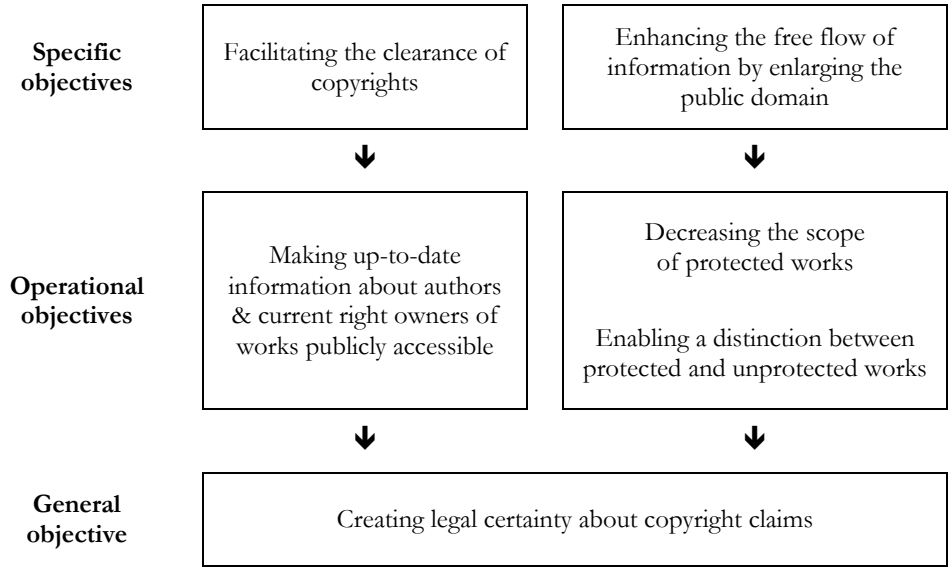
25. *See* Sir Hugh Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated?*, *in* INNOVATION, INCENTIVE AND REWARD: INTELLECTUAL PROPERTY LAW AND POLICY 1, 9 (5 Hume Papers on Public Policy, no. 3, Edinburgh University Press 1997).

26. Fred von Lohmann, Panel Discussion on Digital Ephemera and (Re)Formalizing © at the Berkeley Symposium: Reform(aliz)ing Copyright for the Internet Age (Apr. 18, 2013), http://www.law.berkeley.edu/15235.htm.

27. In Europe, a stakeholder dialogue involving publishers, authors, libraries, and collective rights management societies and supported by the European Commission resulted in the adoption of a Memorandum of Understanding stipulating not legally binding

Formalities may aid in preventing the automatic lock up of works in the copyright regime. By requiring authors and right owners to fulfill formalities as a condition for receiving or maintaining protection for their works, the law can ensure that works for which the formalities have not been completed on time will enter the public domain. This is called the "filtering function" of copyright formalities, which enables the law to separate works for which the beneficiaries desire protection from works for which they do not, or for which they unintentionally fail to complete the required formalities.[28] Formalities of this kind help to enlarge the public domain either initially, at the start of protection, or at a later stage during the period of copyright protection. If supported by an accurate signaling mechanism that allows third parties to distinguish protected from unprotected works, they would automatically also serve the purpose of establishing legal certainty.[29]

Figure 1. Hierarchy Between Objectives



principles aimed at facilitating the digitization and making available online of out-of-commerce books and learned journals in the archives of libraries and cultural institutions. *See* MEMORANDUM OF UNDERSTANDING ON KEY PRINCIPLES ON THE DIGITISATION AND MAKING AVAILABLE OF OUT-OF-COMMERCE WORKS (2011), http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf.

28. Sprigman, *supra* note 1, at 502; *see also* VAN GOMPEL, *supra* note 8, at 31–35; PATRY, *supra* note 1, at 203.

29. *See* VAN GOMPEL, *supra* note 8, at 43–45.

Accordingly, there is a hierarchy between the three objectives for reintroducing copyright formalities. That is, independently of each other, the objectives of facilitating rights clearance and enhancing the free flow of information by enlarging the public domain operate towards achieving the general objective of creating legal certainty about copyright claims. Figure 1 illustrates this scheme.

What follows from this scheme is that, for the purpose of implementing copyright formalities, lawmakers essentially have three policy options at their disposal. Since the specific objectives of facilitating rights clearance and enhancing the free flow of information by enlarging the public domain can be combined and are not mutually exclusive, they can adopt formalities for the purpose of achieving either of these objectives separately or both at the same time. Parts IV and V examine which formalities fit the objectives of enlarging the public domain and facilitating rights clearance. The option of pursuing both objectives at the same time will not be further considered. Nonetheless, it can generally be said that formalities that aim to enlarge the public domain can also significantly serve the objective of facilitating rights clearance, but not the other way around.[30]

30. There is an interesting body of literature that proposes a two-tiered copyright law, effectively creating two distinct copyright regimes: one giving full protection subject to compliance with formalities, and the other granting limited protection without formalities. *See, e.g.*, Marco Ricolfi, *Consume and Share: Making Copyright Fit for the Digital Agenda*, *in* THE DIGITAL PUBLIC DOMAIN: FOUNDATIONS FOR AN OPEN CULTURE 49, 54–57 (Melanie Dulong de Rosnay & Juan Carlos De Martin eds., Open Book Publishers 2012); Rosloff, *supra* note 1; Samuelson & Members of the CPP, *supra* note 1, at 1200–01; Martin Skladany, *Unchaining Richelieu's Monster: A Tiered Revenue-Based Copyright Regime*, 16 STAN. TECH. L. REV. 131 (2012), *available at* http://stlr.stanford.edu/pdf/richelieusmonster.pdf; Sprigman, *supra* note 1, at 554–68. By allowing more or less unrestricted use of works for which copyright formalities have not been fulfilled, these proposals may come close to enhancing the public domain. *Cf.* Séverine Dusollier, *(Re)introducing Formalities in Copyright as a Strategy for the Public Domain*, *in* OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE 75, 78 (Lucie Guibault & Christina Angelopoulos eds., Amsterdam University Press 2011) (distinguishing between a "structural" and a "functional" public domain). The question remains, however, to what extent these proposals are compatible with the international copyright treaties. *Compare* Sprigman, *supra* note 1, at 556 (arguing that his proposed system of voluntary formalities and default licenses would comply with the "better reading of the Berne [Convention]"), *with* Skladany, *supra*, at 140 (arguing that the implementation of a tiered, revenue-based copyright regime would require the United States to withdraw from the Berne Convention), *and* Ricolfi, *supra*, at 57 (stating that the two-tiered copyright system that he proposes would require "chang[ing] hundreds of laws and a few international conventions (including Berne and TRIPs)"). In general, answering this question is complex because it not only depends on whether the international minimum protection is granted to works for which the formalities have not been completed, but also on whether the obligation to extend national treatment to non-domestic works without subjecting them to formalities is duly satisfied. *Cf.* Rosloff, *supra* note 1, at 59–60 (questioning whether "new-style formalities" would be "Berne-

III. THE DIFFERENT FLAVORS OF COPYRIGHT FORMALITIES

Copyright formalities exist in a wide variety of kinds. Since different types of formalities have different characteristics and different legal implications,[31] the degree to which they might achieve the desired objectives and comply with the international prohibition on copyright formalities may vary accordingly. Therefore, this Part introduces the different flavors of copyright formalities by distinguishing between the types in which they appear (Section III.A), their voluntary or mandatory nature (Section III.B), and the legal effects that lawmakers can confer on them (Section III.C).

A. TYPES OF FORMALITIES

A first distinction is that between different types of formalities. In general, formalities can be classified as old-style or new-style. Old-style formalities are formal requirements that are traditionally known in copyright law, such as registration, renewal, recordation, deposit, and the requirement to mark all copies of works with a copyright notice. Except for renewal, the U.S. Copyright Act still contains all these formalities,[32] although over the last forty years their legal effects have been relaxed considerably.[33] New-style formalities are modern variants of the traditional old-style formalities and include a possibly wide variety of—existing or yet to be invented—digital tools that establish a link between works, their creators, and/or the current copyright owners.

Traditionally, registration, renewal, recordation, and deposit involve a state authority, such as the U.S. Copyright Office, in the process of their completion. This makes them more labor- and cost-intensive than a notice requirement, which involves no state body intervention but can easily be satisfied by authors and right owners themselves.[34] For the purpose of conveying reliable and current rights management information, however, registers provide major benefits over copyright notices, at least if regularly

compatible"); VAN GOMPEL, *supra* note 8, at 166–68 (explaining that the Berne "prohibition on formalities does not merely apply to the minimum treaty standards, but also to the protection to be granted under the rule of national treatment.").

31. VAN GOMPEL, *supra* note 8, at 17–31.

32. *See* 17 U.S.C. § 205 (2012) (governing recordation of transfers and other documents); 17 U.S.C. §§ 401–12 (2012) (governing copyright notice, deposit, and registration).

33. *See generally* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010) (describing the history of copyright formalities in U.S. copyright law, including their relaxation after the adoption of the 1976 Copyright Act).

34. *See* KING ET AL., *supra* note 11, at 35–36.

updated (e.g., by requiring copyright to be periodically renewed and transfers of ownership to be duly recorded). Copyright notices, by contrast, are fixed and record facts (e.g., about ownership of rights) at a precise point in time. This means that, once a copy of a work is marked with a copyright notice and publicly distributed, the information automatically travels with it, even if it may have subsequently changed due to a transfer of ownership of rights and therefore has become outdated. Accordingly, copyright notices cannot really be relied upon for establishing facts about copyright ownership, especially if they concern older works.[35]

New-style formalities include requirements on metadata-tagging of digital works, the storage of rights management information in digital depositories, and virtually all digital tools that, in one way or another, create a link between right owners and their works.[36] Outwardly, these formalities may resemble old-style notice and registration requirements, but in a modern, digital fashion. There are a few key differences, however. The industry and private sector play a more important role in creating digital tools and repositories than the government.[37] Moreover, while metadata tagged to a digital object may seem as vulnerable of becoming obsolete as the old-style copyright notice, in a digital environment, it is technically feasible to create a fixed link between the digital object and an online database, ensuring that the metadata tagged to the digital object is immediately updated once the copyright owner alters a relevant fact in the database.[38] Finally, it must be emphasized that, presently, new-style formalities are purely private initiatives and not yet imposed by any law.[39] As we shall see in Section V.A, however, they can be

35. Art. 46 of the U.S. Copyright Act (1909) and 17 U.S.C. § 32 (1976) explicitly held that an assignee of a copyright may substitute his name in place of the original copyright owner's name that appeared in the copyright notice if the copyright was assigned and recorded in the U.S. Copyright Office. Yet, this obviously did not address copies that had already been distributed to the public containing the old, outdated information.

36. In this respect, Creative Commons licenses can perhaps also be perceived as being new-style formalities. *See* Dusollier, *supra* note 30, at 97.

37. The U.S. Copyright Office's online filing system is also a new-style formality, but is still intertwined with the old-style registration requirement. *See eCO Online System*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/eco/ (last visited Feb. 12, 2013).

38. In practice, this probably means that the metadata is not really tagged to the digital object, but rather that the metadata represents a (hidden) link which redirects the user to the database.

39. In 2010, however, the German Federal Supreme Court held that copyright owners, who make a work available on the Internet without technically disabling it from being indexed and stored by search engines, give exculpatory consent to search engines to display it as a thumbnail image. *See* Bundesgerichtshof (BGH) [German Federal Court of Justice], Apr. 29, 2010, I ZR 69/08, 1 J. INTELL. PROP. INFO. TECH. & E-COMMERCE L. 190 (2010). Scholars have criticized this for being "a formality in disguise." *See* Lucie Guibault, *Why*

part of future legislative initiatives aimed at reformalizing copyright law for the purpose of facilitating licensing.

B. VOLUNTARY VERSUS MANDATORY FORMALITIES

Another distinction must be made between voluntary and mandatory formalities. The former are requirements to which authors or right owners voluntarily submit themselves. The statute can attach advantages to complying with such formalities, such as a legal presumption that copyright subsists in the work or that the person whose name is registered owns the copyright.[40] Nevertheless, non-fulfillment of voluntary formalities does not result in a defeat of protection. This is different with mandatory formalities. Such formalities are imposed on authors or copyright owners by law and function as necessary prerequisites for securing or maintaining copyright protection or enforcing copyright before the courts.[41] Nonobservance of these formalities leads to a loss of protection or renders it impossible to start a legal court proceeding against possible infringers.[42]

In practice, authors and right owners repeatedly submit themselves to voluntary formalities. Authors and publishers typically include a copyright notice and statement in the editorial pages of a book even though (except for securing international protection under the Universal Copyright Convention) this is not a legal requirement.[43] Moreover, several countries have voluntary registration systems that allow national or foreign authors and copyright

Cherry Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC, 1 J. INTELL. PROP. INFO. TECH. & E-COMMERCE L. 55, 57 (2010). Guibault also contends that the BGH decision "is contrary to Article 5(2) of the Berne Convention." *Id.* The latter is questionable, however. Failure to block works from being indexed does not mean that the authors can no longer enjoy or exercise their rights, but only limits them in a specific instance. *Cf.* VAN GOMPEL, *supra* note 8, at 190–92 (arguing that "situation-specific formalities" that limit the exercise of a specific right in particular circumstances appear to be compatible with the Berne prohibition on formalities, provided that they do not affect the enjoyment or the exercise of copyright altogether).

40. In Canada, for example, the law confers several evidentiary benefits on voluntary registration. *See* Copyright Act, R.S.C. 1985, c. C-42, art. 53 (Can.).

41. VAN GOMPEL, *supra* note 8, at 12.

42. For this reason, mandatory formalities are sometimes labeled as "confiscatory formalities." *See* Ginsburg, *supra* note 33, at 313. Other scholars find this an erroneous statement, because mandatory formalities have nothing to do with "government seizure of private property," but with legal demarcation of rights. *See* PATRY, *supra* note 1, at 206.

43. *See* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 225 (Oxford University Press 3d ed. 2013).

owners to record claims to copyright in a work, although the right is not dependent on the act of registration.[44]

The main advantage of voluntary formalities over mandatory formalities is that they will not cause any conflict with the international prohibition on copyright formalities in Article 5(2) of the Berne Convention. Voluntary formalities do not impinge on the enjoyment or the exercise of the rights of authors in their works.[45] A major downside is, however, that compliance with voluntary formalities relies purely on good will and proactivity on the part of copyright owners.[46] Therefore, voluntary formalities may produce limited effects only, unless lawmakers manage to find the right kinds of legal incentives for copyright owners to voluntarily comply with them.[47]

C. LEGAL EFFECTS OF FORMALITIES

A last important distinction concerns the legal effects that lawmakers can attach to formalities. This essentially determines whether the formalities will be compliant with the Berne prohibition on formalities. Generally speaking, copyright formalities can have a constitutive, maintenance, or declaratory effect.[48] Constitutive formalities are those establishing ownership titles, thus operating as a *sine qua non* for protection. No protection is established unless the formalities are completed in accordance with statutory conditions and cutoff dates.[49] Maintenance formalities are necessary prerequisites for the continuation of protection. If these formalities are not fulfilled on time, the

44. *See, e.g.*, STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, WIPO, SURVEY OF NATIONAL LEGISLATION ON VOLUNTARY REGISTRATION SYSTEMS FOR COPYRIGHT AND RELATED RIGHTS, SCCR/13/2 (2005), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_2.pdf; *see also* WIPO, SECOND SURVEY ON VOLUNTARY REGISTRATION AND DEPOSIT SYSTEMS (2010), http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html.

45. *See* SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY § 5.61 (2008).

46. *See* Sprigman, *supra* note 1, at 518.

47. *See* 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND §§ 6.107–6.108 (Oxford University Press 2d ed. 2006).

48. VAN GOMPEL, *supra* note 8, at 27–31 (differentiating situation-specific formalities, which for reasons of space will not be considered in this Article).

49. An example of a constitutive formality is publication with copyright notice, which was the sole condition for securing copyright in the United States until 1978, when the Copyright Act of 1976 took effect. *See* U.S. Copyright Act of 1909, arts. 9, 18–20, Pub. L. No. 60-349, 35 Stat. 1075; U.S. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; *see also* 17 U.S.C. §§ 10, 19–21 (1947).

protection will lapse.[50] Declaratory formalities, by contrast, have nothing to do with the coming into being or continuation of protection, but rather help to establish that existing rights are legal and protected by law. Legal consequences can be attached to nonobservance of these formalities. The law can reward right owners who complete declaratory formalities with certain procedural or evidentiary advantages,[51] but it can also sanction noncompliance by not permitting right owners to enforce their copyright before the courts unless the formalities have been fulfilled.[52]

Pursuant to article 5(2) of the Berne Convention, formalities are prohibited as far as they affect the enjoyment or the exercise of copyright. This means, first of all, that the Convention prohibits all formalities that are prerequisites for protection or that entail the loss of protection during the existence of copyright.[53] This basically rules out the possibility of subjecting copyright to constitutive and maintenance formalities, at least with respect to works of nondomestic origin.[54] Moreover, it bans formalities that are conditions to sue for infringement.[55] This explains why the United States government, when implementing the Berne Convention, abolished registration as a requirement to instituting legal action for copyright infringement for works of foreign origin.[56]

50. The prime example of a maintenance formality is renewal registration, which was part of U.S. copyright law until the 1976 Act abolished it. *See* U.S. Copyright Act of 1909, § 23; 17 U.S.C. § 24 (1947).

51. *See, e.g.*, 17 U.S.C. § 412 (2012) (limiting the recovery of statutory damages and attorney's fees to instances of infringement occurring after registration); 17 U.S.C. §§ 205(c), 410(c) (conferring particular evidentiary weight on certificates of registration and recordation).

52. In the United States, registration was—and for works of domestic origin still is—a prerequisite for initiating a copyright infringement action. *See* U.S. Copyright Act of 1909 § 12; 17 U.S.C. § 13 (1947); 17 U.S.C. § 411 (2012).

53. *See* VAN GOMPEL, *supra* note 8, at 194–200 (discussing formalities relating to the enjoyment of rights).

54. *See* Section IV.A; CLAUDE MASOUYÉ, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) § 5.6 (WIPO Publication No. 615(E) 1978) (stating that the Berne prohibition on formalities applies to international situations only).

55. *See* VAN GOMPEL, *supra* note 8, at 201–02.

56. Registration as a precondition to sue was believed to conflict with the Berne Convention, as it subjected the "exercise" of copyright to compliance with formalities. *See, e.g.*, *Final Report of the Ad Hoc Working Group on US Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 565–74 (1986); Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 12–13 (1988).

The Berne Convention permits formalities as long as the enjoyment and exercise of copyright is not at stake.[57] Declaratory formalities comply with international copyright law if they only carry evidentiary weight (e.g., to offer rebuttable evidence about the validity of copyright claims[58] or to provide constructive notice of a transfer of rights)[59] or if they grant procedural advantages (e.g., the possibility to recover statutory damages and attorney's fees[60] or to preclude innocent intent defenses in mitigation of damages)[61] to copyright owners who complete them on time.

IV. ENLARGING THE PUBLIC DOMAIN

Now that the various capacities in which copyright formalities appear have been presented, it is time to link them to the objectives that need to be addressed. For the purpose of enhancing the free flow of information by enlarging the public domain, constitutive or maintenance formalities are obviously the ones that first spring to mind despite their incompatibility with the Berne Convention. This will be further explained in Section IV.A. Next, we will discuss two proposals that aim to advance the moment at which works would enter the public domain. These proposals would require right

57. MIHÁLY FICSOR, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS 41 (WIPO Publication No. 891(E) 2003).

58. 17 U.S.C. § 410(c) (2012). If courts would dismiss cases over missing registration certificates, however, it would be a de facto formality. *See* FICSOR, *supra* note 57, at 41.

59. 17 U.S.C. § 205(c) (2012). Other countries require an instrument in writing to be able to prove a transfer of copyright against the author. *See, e.g.*, Loi relative au droit d'auteur et aux droits voisins art. 3(1) [Law on Copyright and Neighboring Rights] of June 30, 1994, as amended by the Law of April 3, 1995, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 27, 1994, 19,297; Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle, art. L 131-3 [Law 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1992 (amended by Loi 97-283 du 27 mars 1997 [Law No. 97-283 of March 27, 1997]), *available at* http://www.wipo.int/wipolex/en/details.jsp?id=5563; Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, part 12 [Law of 18 April 2001 on Copyright, Neighboring Rights, and Databases], May 3, 2001, *available at* http://www.wipo.int/wipolex/en/details.jsp?id=2932.

60. 17 U.S.C. § 412 (2012). This provision was considered to satisfy the Berne standards because it only affects remedies and not the loss of copyright. *See* H.R. REP. NO. 100–609, at 40–41 (1988) (explaining the Copyright Act induces registration by making the award of statutory damages and attorney fees contingent upon registration before the infringement occurs); *see also* S. REP. NO. 100–352, at 14–15 (1988).

61. 17 U.S.C. §§ 401(d), 402(d) (2012). *But see* Ginsburg & Kernochan, *supra* note 56, at 12 (querying whether these formalities would still be compliant with the Berne Convention "[w]ere the actual damages awarded to notice-omitting copyright proprietors significantly reduced").

owners to register their interests fifty years after the author's death (Section IV.B) and incentivize voluntary abandonment of copyright (Section IV.C). As will be seen, both proposals raise problems of their own and consequently are not really fit to achieve the objective of enhancing the free flow of information by enlarging the public domain in a meaningful way.

A. MAKING COPYRIGHT CONDITIONAL ON MANDATORY FORMALITIES

The previous section clearly demonstrates that subjecting copyright to constitutive formalities would conflict with the Berne Convention as it would make the enjoyment of rights conditional on their compliance. Although countries can opt to only subject domestic works to constitutive formalities—which is permitted by the Berne Convention, but for obvious reasons is not generally favored by national legislators[62]—this would not truly improve the situation. Domestic authors can relatively simply circumvent national formalities by publishing their works in another country that imposes no formalities.[63] Manipulating a work's country of origin is easy, especially in the online environment.[64] More importantly, as contracting states must protect foreign works independent of formalities, works entering the public domain due to a failure to fulfill constitutive formalities in their own country of origin would still be protected in all other contracting states (provided, of course, that they satisfy the national originality standard). From an international perspective, the country of origin would thus be "an unprotected island in a sea of copyright protection" with regard to works for which the national formalities have not been completed.[65] National constitutive formalities consequently have little effect, especially on the Internet, which is international by default.[66]

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62. Although contracting states to the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty are free to impose formalities on works of which they are the country of origin, there is a clear and understandable antipathy to the idea of granting a better protection to foreign authors than to national authors. *See, e.g.*, JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996, at 60 (Butterworths 2002); 1 RICKETSON & GINSBURG, *supra* note 47, §§ 6.91–6.92.

63. *Cf.* 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 275 n.38 (Macmillan 1938) (explaining that if some countries had not abolished formalities, authors "might [be] compel[led] . . . to publish their works in another country of the Union and then claim the protection of the Convention in their own country").

64. Graeme W. Austin, *Symposium: Metamorphosis of Artists' Rights in the Digital Age: Keynote Address*, 28 COLUM. J.L. & ARTS 397, 416–17 (2005).

65. VAN GOMPEL, *supra* note 8, at 213.

66. In general, unless a content provider limits access to the Internet based on geographic location (geoblocking), works that are made available to the public online will be accessible all over the world.

But even putting all legal objections aside, making the existence of copyright conditional on constitutive formalities would also be undesirable from a social-economic perspective, at least if failure to fulfill them could not be "cured" within a certain grace period.[67] Overall, it seems that formalities are easier to bear for copyright industries than for individual authors and certainly less likely to be omitted by professionals than by amateurs.[68] In a digital world, where everyone creates, disseminates, and shares content, and where there is an enormous demand for immediate access to news and information, it would be unfair and socially unacceptable for amateur creators to lose protection due to a failure to complete formalities before posting things online. For example, it seems unfair for someone to capture sensational news on a photo, post it online to share it with friends, and then see her photo being (commercially) exploited by various kinds of news services.[69] Moreover, scholarly evidence suggests that, if the coming into being of copyright would depend on an overly costly formality requirement, this could have negative effects on content production.[70]

Therefore, it seems sensible to continue protecting copyright from the moment of creation as in current copyright law.[71] However, this does not mean that it is irrational to consider imposing formalities at a later point in time, thus requiring right owners to take affirmative steps to prevent their works from passing into the public domain. In the United States, a few

67. In the United States, between January 1, 1978 (when the 1976 Copyright Act took effect) and March 1, 1989 (when the Berne Convention Implementation Act became effective), copyright—while attaching upon fixation of a creative work in tangible form—could still be lost by publication without notice. An omission of notice could always be cured, however, by registration within a five-year grace period. *See* 17 U.S.C. § 405(a)(2) (1976).

68. *See* Austin, *supra* note 64, at 416; *see also* Ginsburg, *supra* note 33, at 342; Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 454–55 (2009).

69. *See* Niva Elkin-Koren, Panel Discussion on *Rethinking Formalities in a Digital Ecosystem* at the Berkeley Symposium: Reform(aliz)ing Copyright for the Internet Age (Apr. 18, 2013), http://www.law.berkeley.edu/15235.htm (illustrating this point by referring to the case where an amateur photo of the bombing during the Boston Marathon on April 15, 2013, taken by Dan Lampariello, was reproduced by various newspapers and shown on many television channels).

70. *See* David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 681, 705–25 (2012) (arguing that "the creation of many highly socially valuable works" would be precluded if copyright vesting would cost as much as acquiring a valid patent, i.e., approximately $22,000). It would be interesting to see how the outcomes would differ if the same analysis were done using a less costly "screen," but this has been deliberately omitted. *Id.* at 708 n.104.

71. *See generally* Brad A. Greenberg, *More than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028 (2012).

scholars have suggested automatically protecting copyright upon creation of the work, but only for a limited term of protection of twenty to fifty years from first publication. To extend this protection, right owners would have the possibility of renewing this term a number of times, upon the requirement of registering the work.[72] One such proposal made it into a bill, the Public Domain Enhancement Act, but not into law.[73] A major obstacle is obviously that, unless the formalities apply only to purely domestic situations,[74] these proposals would not pass the test of the Berne Convention. In particular, they would violate the minimum obligations concerning the term of protection and the prohibition on formalities.[75] Even so, the proposals are attractive as they allow a differentiation of the length of copyright according to the perceived value of works.[76] This has major benefits over the current system, which protects all works that satisfy the minimum threshold of originality until seventy years after the author's death, whether these works merit such protection or not.[77]

72. *See, e.g.*, Landes & Posner, *supra* note 1, at 473 (proposing a system of "indefinitely renew[able]" copyright, but recognizing that such system can also have an "upper bound" by laying down an initial term of twenty years plus a maximum of six renewal terms of ten years each); Kuhne, *supra* note 1, at 562 (suggesting to grant initial copyright term of thirty years plus a maximum of seven renewal terms of ten years each); LESSIG, FREE CULTURE, *supra* note 1, at 248–56 (advocating a regime in which the author is required to register his work fifty years after first publication and to renew it every ten years thereafter in order to gain the full term of copyright).

73. Public Domain Enhancement Act (PDEA), H.R. 2601, 108th Cong. § 3 (2003); *see also* PDEA, H.R. 2408, 109th Cong. § 3 (2005).

74. For this reason, the Public Domain Enhancement Act, *supra* note 73, would apply to works first published within the United States only. *See* H.R. 2601 § 3; H.R. 2408 § 3.

75. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 215 n.15 (2003) (admitting that their proposal "would require the United States to withdraw from the Berne Convention").

76. *See, e.g.*, Landes & Posner, *supra* note 1, at 503–07 (articulating that, since the commercial life cycle of works such as books, musical, and graphic arts may vary greatly, renewal registration can lead to more differentiated terms of protection for different kinds of works); Sprigman, *supra* note 1, at 521–23 (examining the effect of renewal registration on the real term of copyright).

77. *See* Roderick Chalmers Hoynck van Papendrecht et al., Dutch Group of AIPPI (International Association for the Protection of Intellectual Property), *Q235: Term of Copyright Protection* 5–7 (2013), http://www.aippi.nl/nl/documents/Q235_ReportofDutchGroup_final.pdf (arguing that introducing a differentiated term seems more rational than discussing what the optimal term of copyright is, thereby proposing a regime that automatically grants copyright protection upon creation, subject to registration within twenty years after publication and the possibility to renew protection every ten years thereafter, until seventy years after the author's death).

B. MANDATORY REGISTRATION AFTER LIFE-PLUS-FIFTY YEARS

So are there no other available options under international copyright law that would enable lawmakers to introduce a system of formalities for the purpose of advancing the date at which works for which copyright protection is no longer desired enter the public domain? Maybe there are. In March 2013, the United States Register of Copyrights, Maria Pallante, presented her plans for "The Next Great Copyright Act" during the Twenty-Sixth Horace S. Manges Lecture delivered at Columbia University,[78] and later that month, during testimony before members of the House Judiciary Committee.[79] Among the suggestions she submitted was the proposal to require copyright owners (heirs or successors in title) to register their interests with the Copyright Office fifty years after the author's death, so as "to assert their continued interest in exploiting the work" in the last twenty years of copyright.[80] Works would enter the public domain if not registered on time. The Register argues that this plan would aid in "alleviating some of the pressure and gridlock brought about by the long copyright term" and "injecting some balance into the equation."[81]

While this proposal deserves support from the viewpoint of a timelier casting into the public domain of works whose right owners refrain from asserting their copyright interests, from an international law perspective, it is not at all certain that it is permissible.[82] Admittedly, national lawmakers are not obliged to grant a copyright term exceeding the minimum term of life-plus-fifty years laid down in Article 7(1) of the Berne Convention.[83] However, if they confer longer terms of protection on national works, they are also obliged to grant such terms to foreign works enjoying protection under the Berne Convention.[84] This is the rule of national treatment,[85] which

78. Maria A. Pallante, *The Next Great Copyright Act*, 37 COLUM. J.L. & ARTS 315 (2013).

79. *The Register's Call for Updates to U.S. Copyright Law: Statement before the S. Comm. on Courts, Intellectual Property and the Internet, Committee on the Judiciary,* 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights), http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf.

80. Pallante, *supra* note 78, at 337.

81. *The Register's Call for Updates to U.S. Copyright Law*, *supra* note 79, at 2; Pallante, *supra* note 78, at 337.

82. *See* VAN GOMPEL, *supra* note 8, at 175–76. *But see* Pallante, *supra* note 78, at 337 n.108 (arguing that the proposed model of registration after life-plus-fifty years does not seem to "present insurmountable problems under international law").

83. *See* 1 RICKETSON & GINSBURG, *supra* note 47, § 9.54 (pointing at art. 7(6) of the Berne Convention, which provides that contracting states may grant a term of protection in excess of the minimum term of protection).

84. Due to the incorporation by reference of the Berne minimum requirements, the same applies to works protected under the TRIPS Agreement and WIPO Copyright Treaty.

also applies to the term of protection.[86] If a foreign country provides a shorter term of protection for its own works, however, another country may apply material reciprocity and grant those foreign works only the same term of protection they would have received in their home country.[87]

The prohibition on formalities not only applies to the Berne minimum requirements, but it also prevents contracting states from subjecting the rights that must be granted pursuant to the rule of national treatment to formalities.[88] This means that, if the copyright owners of a Dutch work seek protection in the United States, they need to be offered the maximum term of protection of life-plus-seventy years without having to comply with formalities, since life-plus-seventy years is also the term of protection in the Netherlands (and all other countries in Europe).[89] By contrast, if the copyright owners of a Canadian work seek protection in the United States, they only need to be granted protection for life-plus-fifty years, which equals the term of protection in Canada.[90] If the U.S. Copyright Act voluntarily extends protection to Canadian works for life-plus-seventy years, it can subject the added term of twenty years to formalities.[91] Accordingly, the proposal to require registration at life-plus-fifty years as a condition to prolong protection until life-plus-seventy years can only be imposed on domestic works and foreign works that are subject to material reciprocity (through a comparison of terms) and are voluntarily granted additional protection.[92]

C. ENCOURAGING THE VOLUNTARY ABANDONMENT OF COPYRIGHT

Another model would be to endow authors or copyright owners with the right incentives to abandon their copyrights voluntarily before the copyright term expires. One such proposal is put forward by Edward Lee, who advises

85. *See* Berne Convention, *supra* note 13, art. 5(1).

86. GOLDSTEIN & HUGENHOLTZ, *supra* note 43, at 293.

87. Berne Convention, *supra* note 13, art. 7(8) (establishing the rule of comparison of terms).

88. *See* VAN GOMPEL, *supra* note 8, at 166–68.

89. Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht [Copyright Act], art. 37 (Neth.). In Europe, the term is harmonized at life-plus-seventy years by art. 1 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006 O.J. (L 372) 12, 13–14.

90. Copyright Act, R.S.C. 1985, c. C-42, art. 6 (Can.).

91. *See* David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions: Part 1*, 17 INT'L REV. INTELL. PROP. & COMPETITION L. 577, 596 (1986) (explaining that the application of the rule of national treatment does not extend to additional protection that contracting states voluntarily grant to foreign works).

92. *Cf.* VAN GOMPEL, *supra* note 8, at 176.

using tax law as a tool to fix problems and inefficiencies in current copyright law, including the lack of registration.[93] He suggests that Congress could offer a special tax break to copyright owners who "abandon their copyrights or donate their works to the public domain" voluntarily.[94] The earlier in the copyright term they would do so, the higher the tax break would be.[95] A prerequisite for obtaining this tax advantage would be that copyright owners must register their works within a short window—of, for example, five years—after their creation.[96]

At first sight, this proposal looks pretty attractive because it does not in any way conflict with the Berne Convention.[97] However, on further consideration, it seems to address only a fairly small part of the problem, as the bulk of "dark matter" that attracts copyright but is not created for generating revenue will probably never be registered by their copyright owners for the purpose of getting a tax break. Hence, the model provides no incentives for the copyright owners of these works to voluntarily abandon their rights. Also, for individual authors and small firms that earn relatively little from exploiting their copyrights, it is uncertain whether the proposal would provide enough incentive.[98] Only for successful works could tax breaks make a huge difference, as Lee's example of *The Blair Witch Project* shows.[99] However, for copyright owners of such works, abandoning their rights also comes with a cost. The question is whether, in the long run, the benefits of a tax break would outweigh the costs of a lesser income due to an absence of protection. Perhaps this is the case for short-term success stories with little prospect of future windfalls, but certainly not for works that seem to have everlasting popularity, such as various Disney productions.

Another concern is that the proposed model may perhaps be effectively applied in the United States, where copyright owners can voluntarily end

93. Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1 (2012).

94. *Id.* at 26.

95. *Id.* at 27–28.

96. *Id.* at 23–24.

97. *Id.* at 3–4, 24, 28–29 (asserting correctly that solving copyright problems by tax measures does not violate international copyright treaties).

98. *Cf.* Samuelson & Wheatland, *supra* note 68, at 454 (explaining that, for individual authors and small firms, "[t]he prospect of enhanced damages if their copyright is infringed . . . is too remote to induce prompt registrations" for the purpose of recovering statutory damages and attorney's fees under 17 U.S.C. § 412 (2012)).

99. Lee, *supra* note 93, at 29–31. The example shows that Lee's model also comes at a price, as tax breaks directly affect state revenues (which is especially discouraging in times of economic crisis), but he debunks this argument by showing that the proposal may also inspire follow-on creations and derivative works that can generate significant income. *Id.* at 36–40.

their rights,[100] but not in other countries where abandonment of personal property, including copyrights, is not possible.[101] From an international perspective, therefore, the model has its limits.

V. FACILITATING THE CLEARANCE OF RIGHTS

Pursuing the objective of facilitating rights clearance does not necessarily require imposing a mandatory system of formalities. What must be accomplished is the creation of an adequate and reliable set of copyright management information that is publicly accessible. There are different ways in which the law can facilitate this. First, it can create rules for encouraging the metadata-tagging of digital content (Section V.A); second, it can prompt registries and private entities to make more rights management information publicly available (Section V.B); and third, it can require—or incentivize—assignees or exclusive licensees to record their claim to ownership (Section V.C). Together or alone, these measures can contribute to improving copyright licensing in the Internet age.

A. ENHANCED METADATA-TAGGING OF DIGITAL CONTENT

One way of advancing the availability of adequate rights management information is to foster the use of and improve tools for metadata-tagging of digital content. Equipping digital recording devices such as digital photo and video cameras with preprogrammed software enabling users to mechanically insert personalized digital tags or watermarks to captured photos and videos is fairly easy.[102] If such tags or watermarks, by default, would include reliable information linking the work to its creator (as well as information about the date of creation, etc.), then this would significantly ease rights clearance,[103]

100. *See* Nat'l Comics Publ'ns v. Fawcett Publ'ns, 191 F.2d 594, 597–98 (2d Cir. 1951); *see also* Robert A. Kreiss*, Abandoning Copyrights to Try to Cut Off Termination Rights,* 58 MO. L. REV. 85 (1993); Matthew W. Turetzky*, Applying Copyright Abandonment in the Digital Age,* 2010 DUKE L. & TECH. REV. 19 (2010).

101. *See, e.g.*, Emily Hudson & Robert Burrell, *Abandonment, Copyright and Orphaned Works: What Does it Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?*, 35 MELB. U. L. REV. 971 (2011); WIPO Committee on Development and Intellectual Property, Scenarios and Possible Options Concerning Recommendations 1c, 1f and 2a of the Scoping Study on Copyright and Related Rights and the Public Domain, WIPO doc. CDIP/9/INF/2 Rev. Annex, 1–3 (2012), http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_2_rev.pdf.

102. *See* Gary L. Friedman, *The Trustworthy Digital Camera: Restoring Credibility to the Photographic Image*, 39 IEEE TRANSACTIONS ON CONSUMER ELECTRONICS 905–06 (1993) (already describing how digital watermarks can link images to the digital camera with which they were taken so as to prove image authenticity).

103. *See* HUGENHOLTZ ET AL., *supra* note 5, at 179.

provided that the information is machine-readable, freely accessible to users, and not encrypted.[104] Also, it is conceivable that word processors, PDF-makers, web-building tools, and other software aimed at creating digital content would allow personalized digital watermarks and tags to be attached to works.[105] Finally, online platforms where content is uploaded could offer users the possibility, before uploading a work, to submit relevant copyright information.

Despite the many opportunities for metadata-tagging and watermarking of digital content, it has not yet generated a universal toolkit for copyright clearance.[106] This is mostly caused by the lack of standardization and the principally voluntary character of metadata-tagging. For authors and copyright owners, it is a completely voluntary choice whether to attach metadata to digital objects, and if so, what information to include. There is no uniform standard for metadata.[107]

First of all, this raises challenges for industries and policymakers worldwide to cooperate in developing standardized and interoperable metadata. But there is also a need for further legislative support to increase uniformity and encourage right owners to add metadata. Presently, the laws of many countries protect copyright management information against removal or tampering.[108] This includes not only information identifying the work, the author, and the copyright owner, but also information about terms

104. *Cf.* Michael W. Carroll, *Creative Commons as Conversational Copyright*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 445, 456–59 (Peter K. Yu ed., Praeger 2007) (discussing the potential of metadata in a machine-readable and machine-interpretable form for making rights management information better traceable, indexable, and usable on the Internet).

105. *Cf. Applications Using CC*, CREATIVE COMMONS, http://wiki.creativecommons.org/Applications_Using_CC (last modified May 8, 2013) (offering a practical example of the list of software applications with built-in Creative Commons licensing).

106. *Cf.* BARBARA DIERICKX & DIMITRIOS TSOLIS, OVERVIEW OF COLLECTIVE LICENSING MODELS AND OF DRM SYSTEMS AND TECHNOLOGIES USED FOR IPR PROTECTION AND MANAGEMENT 121 (2009) (concluding that "an off-the-shelf solution for DRM does not exist" and that developing a "balanced, successful DRM system" that combines "technological, business and legal concerns in a functional, open and acceptable framework . . . is inevitably one of the greatest challenges for content communities.").

107. *Cf.* Beth Goldsmith & Frances Knudson, *Repository Librarian and the Next Crusade: The Search for a Common Standard for Digital Repository Metadata*, 12 D-LIB MAGAZINE (Sept. 2006), *available at* http://www.dlib.org/dlib/september06/goldsmith/09goldsmith.html. This is a random example of an attempt at standardization within a specific context. Illustrative for the lack of uniformity in metadata standards is that different stakeholders use metadata for entirely different purposes.

108. *See, e.g.*, VAN EECHOUD ET AL., *supra* note 5, at 133–36 (giving an overview of the protection of rights management information in European Union Member States); 17 U.S.C. § 1202 (2012).

and conditions of use and numbers or codes representing such information.[109]

As a rule, the law protects metadata regardless of the combination of information it includes. To enhance uniformity and improve licensing, a first possible measure would be to subject the protection of copyright management information to the requirement to provide, as a minimum, a set of basic information about the work, the author, and copyright owner.[110] Second, to stimulate the use of metadata, it would also be feasible to specify that copyright management information obtains protection only if it has been deposited in a publicly accessible database.[111] A provision of such kind may give the necessary stimulus for copyright owners to supply copyright management information, thus enhancing efficiency in the licensing of works. Moreover, if a technical link can be established between the database and the tagged metadata, as has been suggested in Section III.A, then it may also aid in keeping the supplied information reliable and up-to-date.

However, there is one caveat. Pursuant to Article 3 of the WIPO Copyright Treaty, the Berne prohibition on formalities must be applied *mutatis mutandis* to "the protection provided for" in the WIPO Copyright Treaty. This raises the question of whether the mandatory deposit of copyright management information would not violate international law, given that the protection of rights management information is covered by Article 12 of the WIPO Copyright Treaty.

On the surface, the reference to "the protection provided for" in the WIPO Copyright Treaty seems to suggest that the Berne prohibition on formalities would also apply to the protection of rights management information under Article 12 of the WIPO Copyright Treaty.[112] However, the Agreed Statement on Article 3 of the WIPO Copyright Treaty clearly shows that, in the context of the Treaty, the prohibition on formalities only concerns the rights that are to be granted under the rule of national treatment and "the rights specially granted by the Berne Convention and the WIPO Copyright Treaty" with respect to "works . . . protected under the

109. *See, e.g.*, 17 U.S.C. § 1202; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 18, art. 7.

110. *See* 2 RICKETSON & GINSBURG, *supra* note 47, § 15.39 (asserting that contracting states to the WIPO Copyright Treaty are free "to condition the protection of *rights management information* on compliance with the national law definition of what that information is to include").

111. *See* HUGENHOLTZ ET AL., *supra* note 5, at 179–80; van Gompel, *supra* note 5, at 682–83; VAN EECHOUD ET AL., *supra* note 5, at 274–76.

112. *See* REINBOTHE & VON LEWINSKI, *supra* note 62, at 61 (arguing in that direction).

Berne Convention and the WIPO Copyright Treaty."[113] This implies that the prohibition on formalities only relates to the protection of copyright and not to the ancillary forms of protection under the WIPO Copyright Treaty, such as the protection of technical protection measures against circumvention (Article 11) or the protection of rights management information against removal or tampering (Article 12).[114] These provisions simply do not create a new right of authors in their works, but rather constitute enforcement rules.[115] Hence, this ancillary protection can be subject to formalities, provided that it does not in any way affect the protection of copyright in the accompanying works.[116]

B. MAKING OPTIMAL USE OF EXISTING REGISTRIES AND DATABASES

In general, when considering reintroducing formalities for the purpose of facilitating licensing, it must not be forgotten that, in practice, there already exists a large body of registries, databases, and private entities that hold a gigantic amount of copyright management information.[117]

The problem is, however, that the relevant information is held by many different actors in the field and is therefore immensely dispersed. First, there is a wide variety of registers and databases of rights management information at the national level.[118] Second, there is an increasing number of private copyright registration and documentation systems, especially in the online environment.[119] Third, more and more metadata is collected and created by libraries and archives in the course of clearing rights for mass-digitization.[120] Fourth, lots of information about rights is arguably held by private entities like Google, Amazon, and Microsoft, or by licensing bodies with which they

113. *See* VAN GOMPEL, *supra* note 8, at 173–74.

114. *See, e.g.*, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 72–73 (2001); HUGENHOLTZ ET AL., *supra* note 5, at 179–80; Dusollier, *supra* note 30, at 94–95. *But see* Robert C. Denicola, *Fair's Fair: An Argument for Mandatory Disclosure of Technological Protection Measures*, 11 MICH. TELECOMM. TECH. L. REV. 1, 20 (2004) (arguing that subjecting the protection of technical protection measures to formalities might well be prohibited under the WIPO Copyright Treaty).

115. *See* REINBOTHE & VON LEWINSKI, *supra* note 62, at 142, 152–53.

116. *See* 2 RICKETSON & GINSBURG, *supra* note 47, § 15.39 (stating that contracting parties to the WIPO Copyright Treaty may not go as far as requiring copyright owners to provide rights management information as a condition to enjoy copyright protection).

117. *See* Michael W. Carroll, *A Realist Approach to Copyright Law's Formalities*, 28 BERKELEY TECH. L.J. 1511, 1527–32 (2013).

118. *See* sources cited *supra* note 44.

119. *See* MARCO RICOLFI ET AL., SURVEY OF PRIVATE COPYRIGHT DOCUMENTATION SYSTEMS AND PRACTICES (2011) (reporting to the WIPO Secretariat).

120. *See* COMITE DES SAGES, *supra* note 4, ¶ 4.1.6.

cooperate.[121] Fifth, rights management information is clearly also available from right owners (e.g., publishers, record companies, broadcasting organizations) directly, or from collective rights management societies that traditionally hold large catalogs of rights management information relating to their repertoire. Since all these actors hold specific information necessary for their own specific purpose, an initial challenge is to combine and integrate the rights management information that is available from such a wide variety of sources into a meaningful structure.

Intriguingly, in the United Kingdom, attempts have been undertaken to create a Copyright Hub that precisely aims at building "a portal with intelligent connections to a wide range of websites, digital copyright exchanges and databases in the UK and around the world, with the focus on making copyright licensing easier and cheaper for and in the digital age."[122] Following a recommendation by Ian Hargreaves to set up a Digital Copyright Exchange,[123] the UK government appointed Richard Hooper to lead a feasibility study on developing such an exchange.[124] He advocated the creation of a UK-based, not-for-profit, industry-led Copyright Hub in which partners of different creative sectors, including museums and archives, work together to create a licensing framework for high volume, low monetary value transactions in particular.[125] This Copyright Hub is now in a start-up phase after receiving funding from the UK Government.[126] This shows how governments can help to promote the creation of a one-stop marketplace for copyright licensing.

A further problem is that relevant information is often not publicly accessible. Evidently, the information held by private entities such as

121. *See, e.g.*, Patrick Sullivan, Panel Discussion on *RightsFlow by Google* at the Berkeley Symposium: Reform(aliz)ing Copyright for the Internet Age (Apr. 19, 2013), http://www.law.berkeley.edu/15235.htm.

122. COPYRIGHT HUB, http://www.copyrighthub.co.uk (last visited June 11, 2013).

123. IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 3–4, 8, 28–35 ¶¶ 4.14–4.39 (2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf.

124. The report of the Digital Copyright Exchange Feasibility Study was published in two parts. RICHARD HOOPER, RIGHTS AND WRONGS: IS COPYRIGHT LICENSING FIT FOR PURPOSE FOR THE DIGITAL AGE? (2012), http://www.ipo.gov.uk/dce-report-phase1.pdf; RICHARD HOOPER & ROS LYNCH, COPYRIGHT WORKS: STREAMLINING COPYRIGHT LICENSING FOR THE DIGITAL AGE (2012), http://www.ipo.gov.uk/dce-report-phase2.pdf.

125. *See* HOOPER & LYNCH, *supra* note 124, ¶¶ 7–8.

126. Press Release, Department for Business, Innovation & Skills and Intellectual Property Office, Government Gives £150,000 Funding to Kick-Start Copyright Hub (Mar. 25, 2013), http://www.gov.uk/government/news/government-gives-150-000-funding-to-kick-start-copyright-hub.

publishers is not freely available.[127] Likewise, collective rights management organizations are regularly accused of being "black boxes" that do not publicly share rights management information.[128] Even EU-funded projects like ARROW, which aims to "to integrate information on rights, right holders and rights status (thus facilitating their search and retrieval), with a focus on orphan works, therefore building a European wide orphan works registry,"[129] will not result in a publicly accessible database. Although it "is neutral as to who uses its services," ARROW's business model reveals that it aims to serve public or private institutions that engage in digitizing books, in particular.[130] A second challenge is thus to ensure that relevant information held by different players is made publicly accessible in an adequate way.

In Europe, some recent initiatives attempt to make existing information on the management of rights more widely and freely available. First, in the recently adopted Orphan Works Directive, a provision is made for the creation of a single publicly accessible online database, where relevant information on the use of orphan works by cultural institutions must be recorded.[131] This includes the results of unsuccessful diligent searches for copyright owners of works and any change of the orphan work status of works.[132] Earlier, the *Comité des Sages* recommended conferring a much more far-reaching duty on cultural institutions to make all metadata they create in relation to digitized objects widely and freely available for reuse.[133] Second, the proposal for a Directive on collective rights management and multi-territorial licensing for online music services includes some rules on transparency and exchange of data.[134] It would require collective rights management organizations, upon request, to make available to users

127. There simply is no public record of the rights held by publishers, record companies, broadcasting organizations, etc. Contracts or agreements by which they have acquired the rights are normally only available to them and the transferors of the rights.

128. *Cf.* Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services 2005/737/EC, art. 6, 2005 O.J. (L 276) 54, 56 (urging collective rights management organizations to "inform right-holders and commercial users of the repertoire they represent," so as to enhance transparency).

129. ARROW's mission statement, *in* ARROW, BUSINESS MODEL 3 (2011), http://www.arrow-net.eu/sites/default/files/ARROW_Business_Model.pdf.

130. *Id.* at 3, 7–11.

131. Directive 2012/28/EU, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, art. 3(6), 2012 O.J. (L 299) 5, 9.

132. *Id.* art. 3(5), at 9.

133. *See* COMITE DES SAGES, *supra* note 4, at 5, 14 ¶ 4.5.1, 15.

134. *Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market*, art. 18(1)(b), COM (2012) 372 final (July 11, 2012).

information about the repertoire and rights they manage and for which territories.[135] Collective rights management organizations providing multi-territorial licenses for online rights in musical works would be expected to do so by default, without an explicit request to that effect.[136] When processing data, the latter organizations would also be required to use unique identifiers to identify right owners and musical works, based as much as possible on voluntary industry standards and practices.[137]

It is evident, however, that these initiatives do not primarily aim to improve the availability of rights management information for the purpose of facilitating licensing, but rather to effect a legislative model for orphan works and enhance the transparency of collective rights management organizations. Moreover, they offer only piecemeal approaches that cannot improve licensing in a significant way. If the aim is to make more rights management information available to the public, then lawmakers should address the topic in a more systematic and coherent manner.

C. MANDATORY RECORDATION OF TRANSFERS OF RIGHTS

Since the lack of reliable information about ownership of rights arising from the transferability and divisibility of copyright is one of the main causes of current licensing difficulties,[138] lawmakers could consider making timely recordation of transfers of ownership a compulsory act.[139] Under current U.S. copyright law, recordation of transfers and other documents is a purely voluntary act that merely provides constructive notice of the recorded facts and priority in case of conflicting assignments.[140] As no other legal consequences are attached to it, the law does not really provide an incentive for assignees or licensees to record transfers of copyright.[141] By contrast, many other countries have no recordation system, but the law sometimes lays down other requirements, such as mandating that transfers of copyright must

135. *Id.*

136. *Id.* art. 23(1).

137. *Id.* art. 22(2)(c).

138. *See, e.g.*, HUGENHOLTZ ET AL., *supra* note 5, at 164; VAN EECHOUD ET AL., *supra* note 5, at 268–69; van Gompel, *supra* note 5, at 675–76.

139. *See* Jane C. Ginsburg, *"With Untired Spirits and Formal Constancy": Berne-Compatibility of Formal Declaratory Measures to Enhance Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1613–20 (2013) (putting forward a detailed proposal for a mandatory recordation of transfers, thereby addressing (and debunking) some practical concerns that such an obligation might engender).

140. 17 U.S.C. § 205 (2012).

141. *See* Ginsburg, *supra* note 33, at 341–42.

be in writing or drawn up in certificates.[142] Without up-to-date public records of contracts or documents effectuating a transfer of rights, third parties must find other ways to trace the chain of title to be able to ascertain copyright ownership.

For the purpose of improving title searching and enhancing clarity about ownership of rights, the law could make recordation mandatory by giving legal effect to transfers of copyright only if they are recorded in a public register or database. That would make recordation a prerequisite for effectuating a transfer of rights. If not recorded, the right is not legally transferred and therefore remains with the transferor.[143] Alternatively, the law could also provide that transferred rights will revert to the grantor if they are not recorded within a certain period.[144] Such provisions would be permissible under the Berne Convention, because they merely address "who may assert copyright ownership" without affecting the existence or enforcement of copyright.[145]

Other than requiring recordation as a condition for the validity of a transfer of rights, the law could also incentivize recordation, for example, by rewarding subsequent copyright owners who record transfers with procedural advantages, such as the possibility to recover statutory damages and attorney's fees.[146] Because national procedural requirements are excluded from Article 5(2) of the Berne Convention,[147] such a rule would be Berne-compliant. Another possibility, which runs more risk of falling afoul of the Berne Convention, is to make recordation a condition to sue for copyright

142. *E.g.*, Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht [Copyright Act], art. 2(2) (Neth.) (requiring that the assignment of rights be effected by written deed); Código do Direito de Autor e dos Direitos Conexos, Decreto-Lei n.º 63/85 [Copyright and Related Rights Act], art. 41(2), 43(2) and 44 (Port.) (requiring an instrument in writing for licensing of copyright, a written document bearing signatures for partial assignment of copyright, and a public deed (*escritura pública*) for complete assignment of copyright).

143. *Cf.* VAN GOMPEL, *supra* note 8, at 204–05, 213, 289.

144. Ginsburg, *supra* note 33, at 345–46.

145. *Id.* at 317, 345; *see also* VAN GOMPEL, *supra* note 8, at 203–05.

146. *See* Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459, 1491 (2013).

147. *Cf.* WILHELM NORDEMANN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW: COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY 78 (VCH 1990) (explaining that the Berne Convention does not impact the "procedural status of a plaintiff in a civil litigation" under the German Code of Civil Procedure); 1 RICKETSON & GINSBURG, *supra* note 47, § 6.105; VAN GOMPEL, *supra* note 8, at 202.

infringement.[148] United States copyright law included a provision of this kind between 1978 and 1989.[149] Being a prerequisite for initiating a copyright infringement suit for persons claiming to be the right owner by virtue of a transfer of rights, it was believed to violate Article 5(2) of the Berne Convention and therefore abolished.[150] Requiring recordation as a condition to file suit appears to be permissible only if does not effectively preclude enforcing the copyright before the courts (e.g., by still allowing the author or transferor to start an infringement proceeding).[151]

If the law would provide sufficient incentives for transferees to record transfers of ownership of copyright, then this could ease title searching and licensing to a significant degree. However, if the law were to make recordation a true prerequisite for the validity of transfers of rights, then this would have the advantage that, by consulting the relevant register or database, third parties could easily ascertain who owns the copyright in a work. The copyright owner would be the person who is last recorded as the transferee of the right. If nothing is recorded, then it would be assumed that copyright resided with the author or other person who, by operation of the law, was the initial owner of the right.[152] In any event, it would be sufficiently clear from the recorded facts to which work the transfer pertains, who the subsequent owners in the chain of title are, and what the scope of the transfer is.[153] To this end, the law should indicate precisely what information must be recorded.[154]

148. *See* Ginsburg, *supra* note 33, at 315 (explaining that the Berne Convention does not only bar "State-imposed preconditions on the coming-into-being of the author's rights," but also "any provision in member-State law that . . . made the bringing of proceedings to enforce these rights subject to a formality").

149. 17 U.S.C. § 205(d) (1976) as abolished by the Berne Convention Implementation Act, Pub. L. No. 100-568, § 5, 102 Stat. 2857 (1988).

150. *See* S. REP. NO. 100-352, *supra* note 60, at 25–26 ("[A] transferee claiming under an unrecorded document is effectively precluded from enforcing his or her claim, and thus from enjoying and exercising his or her rights, within the meaning of Article 5(2) of Berne.").

151. *See* Ginsburg, *supra* note 33, at 345 (arguing that 17 U.S.C. § 501(b) (2012) might provide an escape, as it also allows "beneficial" right owners, such as authors who "retain a continuing royalty interest," to start an action for copyright infringement).

152. VAN GOMPEL, *supra* note 8, at 204–05.

153. *See* Ginsburg, *supra* note 33, at 346 (suggesting that, to address the latter point, "Congress might further provide that any ambiguities in the scope of the recorded grant will be interpreted against the grantee").

154. *See* Gervais & Renaud, *supra* note 146, at 1491 (defining the first modality); *see also* Samuelson & Members of the CPP, *supra* note 1, at 1201 (suggesting that copyright owners must keep the records up-to-date by also supplying the registry with information about the death of the author).

Mandatory recordation thus provides significant advantages while keeping up with the Berne Convention. This makes it an interesting policy option, which policymakers by now also seem to realize. In the United States, the Register of Copyrights has indicated that the Copyright Office is investigating how "to improve the public record of copyright ownership."[155] It could perhaps find inspiration in proposals for making recordation of transfers of rights mandatory to urge Congress to enact legislation along these lines. If Governments of other countries would do the same, then this could give an enormous boost to enhancing the production and public accessibility of rights management information.[156] This is urgently needed to facilitate licensing today.

VI. CONCLUSION

Copyright formalities come in many different varieties, each with their own distinctive flavors and characteristics. To start a meaningful discussion on reintroducing formalities for the purpose of adapting copyright law to the digital era, therefore, it must first be properly established which types of formalities fit what objectives. In this Article, two specific objectives for reinstituting formalities have been discussed. These are the objectives of facilitating rights clearance and enhancing the free flow of information by enlarging the public domain. Together they establish more legal certainty about copyright claims. This Article has explored which formalities best contribute to achieving these objectives and whether such formalities would comply with the prohibition on formalities enshrined in Article 5(2) of the Berne Convention (and incorporated by reference into the TRIPS Agreement and the WIPO Copyright Treaty). It has been observed that many regimes of formalities are incompatible with the Berne Convention, but certainly not all.

Reintroducing formalities for the purpose of enhancing the free flow of information by enlarging the public domain would undoubtedly encounter the most problems. Because the Berne Convention prohibits subjecting the enjoyment of copyright to formalities, it would be unfeasible to impose constitutive or maintenance formalities, except on a purely national level. Even if a country would subject the protection of domestic works to mandatory formalities, failure to fulfill them would only cause these works to enter the public domain in their home country, not in other parts of the world. From an international point of view, this would not really improve the

155. Pallante, *supra* note 78, at 329; *see also* Pallante, *supra* note 10, at 1418–20.

156. This would be especially so if, perhaps in the longer run, the national registers or databases could be integrated into a meaningful structure, as suggested in Section V.B above.

free flow of information. Moreover, because the Berne prohibition on formalities also applies to rights that contracting states must grant pursuant to the rule of national treatment, requiring formalities to be completed after the Berne minimum term of protection of life-plus-fifty years has expired, so as to enjoy an additional term of protection of twenty years, would also conflict with this Convention. Such a regime could only be imposed on domestic works and foreign works that are subject to material reciprocity by virtue of the rule of comparison of terms. A model that would be compatible with Berne is to incentivize voluntary abandonment of copyright for timely registered works. For most copyright owners, however, this model does not seem to provide the right incentives to donate their works to the public domain voluntarily. Also, because voluntary abandonment of copyright is not possible in all countries, the model is not universally applicable. At most, therefore, it can offer only partial relief.

By contrast, it appears that current international copyright law presents several opportunities for reintroducing formalities with the aim to facilitate rights clearance. First, given that the Berne prohibition on formalities is copyright-specific, it arguably permits conditioning the protection of copyright management information on the requirement to register or deposit such information in a publicly accessible database. On this basis, countries can create rules encouraging the metadata-tagging of digital content. Second, since the prohibition on formalities does not extend to purely voluntary formalities, lawmakers can reinforce voluntary registration by cooperating with industry to build a rights management infrastructure that combines and integrates existing registries and databases and makes relevant information publicly accessible for licensing purposes. Once such an infrastructure is operational and functioning well, this can motivate right owners to voluntarily submit additional rights management information. Third, the Berne Convention seems to permit formalities that establish the manner of effectuating a transfer of copyright or prove the existence or scope of the relevant transaction. Accordingly, lawmakers could introduce rules mandating or incentivizing recordation of transfers of ownership of rights. This would ease title searching and enhance clarity about who owns the copyrights in a work. International law thus provides ample opportunity for reintroducing formalities for the purpose of improving licensing.

In conclusion, in pairing the objectives behind a reintroduction of copyright formalities with possibilities for their implementation, this Article contends that, at present, formalities could only be meaningfully introduced for the purpose of facilitating rights clearance. Unless the Berne prohibition on formalities is changed, which is fairly unrealistic given that this requires unanimous consent of all contracting states, introducing formalities with the

aim to enlarge the public domain will either fail to satisfy the Berne requirements or produce only limited effects. A more realistic approach is for national lawmakers to make optimal use of the policy space in the Berne Convention and the other international copyright treaties by introducing formalities that are permissible and that may contribute to improving licensing. This would certainly benefit the copyright system.