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Formalities in the digital era: an obstacle or opportunity?

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1. INTRODUCTION

For a very long time in the history of copyright, the coming into existence and/or the exercise of copyright was subjected to formalities of some kind. The first modern laws on copyright, including the 1710 UK Statute of Anne, the 1790 US Federal Copyright Act and the 1791 and 1793 French *droit d'auteur* decrees, all imposed formalities. To enjoy copyright protection or to enforce the right before courts, these laws required authors or copyright owners to register their copyrights, to deposit copies of their works or to mark these copies with some kind of copyright notice.¹ These statutory formalities were maintained in later copyright acts, not only of the states just mentioned, but of nearly all countries worldwide.²

Around the end of the nineteenth century, however, a number of states, particularly those in continental Europe, began to limit imposing formalities on authors or to soften their nature

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¹ See secs II (registration) and V (deposit) of the Act for the Encouragement of Learning (1710), 8 Anne, c. 19 (UK); secs 1 (renewal registration), 3 (registration and publication of a copy of the record of entrance in US newspapers) and 4 (deposit) of the US Federal Copyright Act of 31 May 1790 (1st Cong., 2nd Sess., c. 15); and art. 6 of the French Decree of 19-24 July 1793 on the property rights of authors of writings of all kind, of music composers, of painters and of designers (deposit). The French Decree of 13-19 January 1791 on theatrical plays required authors who wished to retain a public performance right in their plays, to publicly announce this by a notice, which should be deposited with a notary and printed at the text of the play. The 1791 Decree, however, was repealed by the Decree of 1 September 1793 and the prescribed formality did not reappear in later acts.

² Examples are Germany, the Netherlands, Italy, Spain, Australia, Canada, Japan and most Latin-American countries. For a state-of-the-art overview of copyright formalities in national copyright law in the 1850s, 1900s and 1950s, see A.W. Volkmann, *Zusammenstellung der gesetzlichen Bestimmungen über das Urheber- und Verlagsrecht: Aus den Bundesbeschlüssen, den deutschen Territorialgesetzgebungen und den französischen und englischen Gesetzen* (Leipzig: Polz, 1855), pp. 132-36; Ernst Röthlisberger, *Der interne und der internationale Schutz des Urheberrechts in den verschiedenen Ländern: Mit besonderer Berücksichtigung der Schutzfristen, Bedingungen und Förmlichkeiten* (Leipzig: Börsenverein der Deutschen Buchhändler, 1904); and 'Formalities for acquisition, maintenance and transfer of copyright', in *World Copyright: An Encyclopedia*, ed. by H.L. Pinner, 4 vols (Leyden: Sijthoff, 1953-1960), II (1954), pp. 672-703.

and legal effects.³ This ultimately resulted in the complete abolishment, in some states, of all formalities (e.g. in Germany in 1907).⁴ Additionally, at the international level, the prohibition on formalities was introduced with the 1908 Berlin revision of the Berne Convention for the Protection of Literary and Artistic Works (BC). Art. 4(2) BC (1908) – currently art. 5(2) BC (1971) – reads: ‘The enjoyment and the exercise of these rights shall not be subject to any formality [...]’.⁵ Since 1908, therefore, states adhering to the Berne Convention were required to automatically grant copyright to works of other contracting states. This induced most signatory countries to the Berne Convention to remove all formalities and grant unconditional protection to all works of Berne Union authors, irrespective of their origin.⁶ Consequently, formalities were removed e.g. in the UK in 1911,⁷ in the Netherlands in 1912⁸ and in France in 1925.⁹ Other countries followed, some of them later, some of them much later. Uruguay, for instance, did away with all mandatory copyright formalities in 1979,¹⁰ Colombia in 1982¹¹ and Spain in 1987.¹² The US did not abandon formalities as a prerequisite for protection until 1989.¹³

Accordingly, just around the time of the transition to the digital era, copyright formalities had been abolished in practically all countries around the globe. The digital revolution, however, caused a paradigm shift in the way copyright protected content is produced and consumed. While, in the pre-digital era, all content was locked up in physical information

³ 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*, ed. by Ronan Deazley, Martin Kretschmer and Lionel Bently (Oxford: Open Book Publishers, forthcoming 2009).

⁴ In Germany, all formalities were abolished, for literary and musical works, by the Act Concerning Copyright in Literary and Musical Works of 19 June 1901, *RGBl.* 1901, 227 and, for artistic works and photographs, by the Act Concerning Copyright in Artistic Works and Photographs of 9 January 1907, *RGBl.* 1907, 7.

⁵ Because the Berne prohibition on formalities has been incorporated by reference in both the TRIPS Agreement (art. 9(1) TRIPS) and the WIPO Copyright Treaty (art. 1(4) WCT), it has largely become the norm at the international level. Only the Universal Copyright Convention (art. III UCC) allows contracting states to subject international protection to a prescribed notice requirement (i.e. the symbol © accompanied by the name of the copyright owner and the year of first publication).

⁶ There are obvious reasons for contracting states not to just abolish formalities for foreign works, but to grant unconditional protection to all works, regardless of their origin. Besides the clear and understandable antipathy to grant foreign authors more rights than domestic authors, it would make little sense to require national authors to continue with formalities, because they could always choose to publish their works in another Berne Union country which had eliminated formalities. This would allow them to claim protection in their own country under the Berne Convention without the need to comply with the own domestic formalities. See Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, 2 vols (New York: Macmillan, 1938), I, p. 275.

⁷ Copyright Act (1911), 1 and 2 Geo. V, c. 46 (UK).

⁸ Act of 23 September 1912 containing new regulation for copyright, *Stb.* 1912, 308 (the Netherlands).

⁹ Act of 19 May 1925, *Journal Officiel* of 27 May 1925 (France).

¹⁰ Law No. 14.910 of 19 July 1979 (Uruguay).

¹¹ Law No. 23 of 28 January 1982 on Copyright (Colombia).

¹² Law No. 22/1987 of 11 November 1987 on Intellectual Property, *Boletín Oficial del Estado*, no. 275, of 17 November 1987 (Spain).

¹³ Berne Convention Implementation Act of 31 October 1988, Pub. L. No. 100-568, 100th Cong., 2nd Sess., 102 Stat. 2853 (US). This act became effective on 1 March 1989.

products and the cost of dissemination was high, the current digital networked environment allows for interactive, simultaneous and decentralized production and access. In addition, as digitization has considerably lowered the cost of production, storage and distribution, content goods have never before been made available to the public on such a large scale.¹⁴ In view of that, there is an increased need for more legal certainty concerning the claim of copyright, for an improved rights clearance and for an enhanced free flow of information. It has been suggested that copyright formalities are able to meet these current needs. In the last decennium, this idea has encouraged several academics to call for a reintroduction of formalities in copyright law.¹⁵

Unsurprisingly, the recent calls for a reintroduction of formalities are surrounded by quite some controversy. Although there are surely good reasons to reconsider imposing formalities, opponents of the idea claim that formalities have not been removed for nothing.¹⁶ This raises the question which of these reasons in the present digital age should prevail. Put differently, the question is whether the historical issues with formalities are still relevant at present and, if so, how they weigh up against the opportunities that formalities can bring in the digital era.

To examine this question, this paper first considers the new challenges for copyright that have come to the fore in the digital environment (section 2) and scrutinizes whether formalities may help with facing these challenges (section 3). It reaches the conclusion that formalities can fulfil a useful role in this respect. Subsequently, the legal-historical concerns that in the previous centuries caused the abolition of formalities are introduced (section 4) and contextualized (section 5). It will be shown that, although some of the historical concerns may still apply at present, they do not completely militate against formalities. Moreover, digital networked technologies have made it entirely feasible to establish registration and deposit

¹⁴ James Gibson, 'Once and Future Copyright', *Notre Dame Law Review*, 81 (2005), 167-243 (pp. 212 et seq.).

¹⁵ The reintroduction of formalities has been called for, inter alia, by Lawrence Lessig, *The future of ideas: the fate of the commons in a connected world* (New York: Random House, 2001), pp. 251-52, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), pp. 287-90 and *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), pp. 260-65; William M. Landes and Richard A. Posner, 'Indefinitely renewable Copyright', *University of Chicago Law Review*, 70 (2003), 471-518; François Lévêque and Yann Ménière, *The Economics of Patents and Copyright* (Berkeley Electronic Press, 2004), p. 105; Christopher Sprigman, 'Reform(aliz)ing Copyright', *Stanford Law Review*, 57 (2004), 485-568; Cecil C. Kuhne III, 'The steadily shrinking public domain: Inefficiencies of existing copyright law in the modern technology age', *Loyola Law Review*, 50 (2004), 549-563; Gibson (2005), *supra*; Kevin A. Goldman, 'Limited times: Rethinking the bounds of copyright protection', *University of Pennsylvania Law Review*, 154 (2006), 705-740; and Pamela Samuelson, 'Preliminary Thoughts on Copyright Reform', *Utah Law Review* (2007), no. 3, 551-71 (pp. 562-63).

¹⁶ See e.g. Arthur Levine, 'The End of Formalities: No More Second-Class Copyright Owners', *Cardozo Arts and Entertainment Law Journal*, 13 (1995), 553-557; Irwin Karp, 'A Future Without Formalities', *Cardozo Arts and Entertainment Law Journal*, 13 (1995), 521-528; Shira Perlmutter, 'Freeing Copyright From Formalities', *Cardozo Arts and Entertainment Law Journal*, 13 (1995), 565-588 and Graeme W. Austin, 'Symposium: Metamorphosis of artists' rights in the digital age: Keynote address', *Columbia Journal of Law & the Arts*, 28 (2005), 397-418 (p. 416).

schemes. Therefore, it appears that the legal-historical concerns do not impede the reintroduction of formalities altogether.

Accordingly, this paper queries whether the absence of formalities in copyright law should perhaps be perceived as a temporary phenomenon only. It proposes that it might be time to set aside some of the legal-historical objections against copyright formalities and to look ahead at how formalities could be deployed to meet the challenges that copyright faces today.

2. THE CHALLENGES FOR COPYRIGHT IN THE DIGITAL ENVIRONMENT

The calls for a reintroduction of formalities in copyright law are obviously a response to the momentous change in the production and usage of copyright protected works caused by the advent of digital technologies. While creating and commercially exploiting creative content used to be the almost exclusive province of creative industries, it has now become something that nearly anyone can undertake. The widespread availability of computers, digital recording devices and online networks as media for dissemination has allowed and, in fact, encouraged people to create and distribute works to a potentially worldwide audience. This undeniably has presented new challenges for copyright. Above all, it has increased the need to establish legal certainty concerning the claim of copyright, to improve rights clearance and to enhance the free flow of information. These challenges are considered in more detail below.

2.1 ESTABLISHING LEGAL CERTAINTY CONCERNING THE CLAIM OF COPYRIGHT

Because of the fact that copyright arises automatically upon the creation of an original work of authorship, it is not always easy to establish *ex ante* whether a particular object is protected by copyright. Even for experienced copyright lawyers this may be difficult to determine, as the definition of what constitutes a work of authorship is very broad and open-ended and the standard of originality required for protection is uncertain.¹⁷ A wide array of different types of creations may thus qualify for protection. In fact, in the past decades, the subject matter of copyright has been extended both by legislature and the courts. This has brought all kinds of industrial and technical creations (such as software and databases) within the realm of copyright protection. In some countries, courts have also opened the door for protecting

¹⁷ Art. 2(1) BC (1971) defines a work of authorship as ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’ and gives a non-exhaustive list of examples of what this might entail. The Berne Convention contains no further definition of the requirement of originality.

blank forms,¹⁸ the scent of a perfume¹⁹ and even transcripts of a simple conversation.²⁰ And these are just examples. Copyright currently seems to ‘[spring] up to protect nearly every creation of the human mind, be it ever so trivial.’²¹

This may cause legal uncertainty for authors, copyright owners and users alike. Unlike patents, designs and trademark rights, the property titles of which are defined by registration, the absence of copyright formalities together with the ‘lack of legislative definitional closure’ of copyright-protectable subject matter makes an *ex ante* definition of the claim of copyright very difficult.²² For authors and copyright owners this may create legal uncertainty, as only *ex post* can it be established whether and to what extent they have acquired copyright over their creations. In addition, users face legal uncertainty when they use a particular object believing no copyright subsists in it, only to be informed *ex post* by the courts that it is copyright protected.²³

With the recent expansion of the domain of copyright to industrial and technical creations (such as software), as well as ‘creations’ of a more obscure character (such as the scent of perfume and simple conversations), the need for a clear *ex ante* qualification of creations as protectable subject matter has become ever more pressing. The vaguer the limits of copyright-protectable subject matter are, the more ambiguous the claim of copyright is.²⁴ This explains why in some countries voluntary registers have been created for the registration of e.g. television formats, websites and slogans.²⁵ Moreover, the recent calls for the establishment of

¹⁸ See e.g. the Australian case *Kalamazoo (Australia) Pty Ltd v. Compact Business Systems Pty Ltd* (1985) 5 IPR 213, where it was held that copyright could exist in a collection of blank accounting forms.

¹⁹ Judgment of the Supreme Court of the Netherlands of 16 June 2006, *Kecofa v. Lancôme, Nederlandse Jurisprudentie* 2006, 585 (annotated by J.H. Spoor). A few days earlier, in the case of *Mme Nejla Bsiri-Barbir v Sté Haarmann et Reimer* (Arrêt No. 1006, 13 June 2006), the French Court of Cassation declined to accord copyright protection to the scent of a perfume.

²⁰ Judgment of the Supreme Court of the Netherlands of 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam, Nederlandse Jurisprudentie* 2008, 556 (annotated by E.J. Dommering); *Ars Aequi* 2008, p. 819-22 (annotated by P.B. Hugenholtz).

²¹ Sir Hugh Laddie, ‘Copyright: Over-Strength, Over-Regulated, Over-Rated’, *E.I.P.R.*, 18 (1996), 253-60 (p. 257).

²² Kathy Bowrey, ‘The Outer Limits of Copyright Law: Where Law Meets Philosophy and Culture’, *Law and Critique*, 12 (2001), 75-98 (p. 85).

²³ See e.g. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), pp. 192-93, arguing that ‘to this extent, unlike the other areas of intellectual property law, copyright law remains pre-modern.’

²⁴ See e.g. A.A. Quaedvlieg in his annotation to the judgment of the Supreme Court of the Netherlands of 24 February 2006, *Technip v. Goossens, AMI* 2006-5, no. 13, pp. 153-61 (p. 156), in which he concludes that, while the boundaries of the ‘objective domain’ of intellectual creations (e.g. patent law) are fairly strict, the opposite is true for the boundaries of the ‘subjective domain’ of intellectual creations (e.g. copyright law).

²⁵ See e.g. the UK Copyright Service’s registration centre where television formats and websites can be registered, <<http://www.copyrightservice.co.uk/>>, and the Dutch *GVR/slagzinnenregister* for the registration of slogans, <<http://www.gvr-slagzinnenregister.nl/>>.

registers for the registration of the source code of computer programmes can be better understood against this background.²⁶

Additionally, even if it may reasonably be assumed that a creation falls within the subject matter of copyright and is sufficiently original, no property claim will exist if the term of protection has expired. The term of protection may be difficult to establish, however, if a work does not contain any information concerning the author or date of first publication.²⁷ For several types of works (e.g. photos, film footage, etc.) it will not be uncommon that this information is not provided. Therefore, if it cannot be determined whether a work is still protected by copyright, this again could prove a source of legal uncertainty for prospective users.²⁸

2.2 IMPROVING RIGHTS CLEARANCE

Another area where the current copyright system presents real challenges involves the clearance of rights. Whereas, in the digital environment, reutilizing creative content has become easy, inexpensive and commonplace, copyright protected works cannot be used legally without the consent of the copyright owner (unless the usage is covered by an exception or limitation). As a consequence, the copyright owner must first be identified and located. This may be difficult, as not all works carry a statement indicating the authorship or ownership of rights and, even if they do, this information may be outdated due to a change of ownership.²⁹ Often, information on copyright ownership cannot be obtained from other sources either, because, in the absence of copyright formalities, adequate and up-to-date copyright registers are scarce.

Although these licensing difficulties are certainly not new, they clearly have exacerbated in recent times. While in the pre-digital era, the production and dissemination of creative content was restricted to the relatively few authors that could exploit their works through a publishing

²⁶ See e.g. Robert Bond, 'Public registers for software programs', *Copyright World* (1995), no. 49, p. 35-39 and Gibson (2005), *supra*.

²⁷ In general, the term of protection of copyright is calculated either from the date of death of the author or, in case of anonymous or pseudonymous works or works the authors of which are not a natural person (but e.g. public institutions or companies), from the date of creation or communication to the public of the work.

²⁸ See Lucie Guibault, 'Wrapping Information in Contract: How Does it Affect the Public Domain', in *The Future of the Public Domain: Identifying the Commons in Information Law*, ed. by Lucie Guibault and P. Bernt Hugenholtz, Information Law series no. 16 (Alphen aan den Rijn: Kluwer Law International, 2006), pp. 87-104 (p. 95), questioning: 'How can an average user easily know whether a work has fallen into the public domain or whether an element of information qualifies for protection?'

²⁹ See e.g. US Copyright Office, *Report on Orphan Works*, A Report of the Register of Copyrights, January 2006, <<http://www.copyright.gov/orphan/orphan-report-full.pdf>>, pp. 23 et seq., summarizing the main obstacles to identifying and locating copyright owners in current copyright law.

house or media conglomerate, nowadays virtually anyone can become the creator and distributor of creative content.³⁰ Modern technologies allow nearly anyone to digitally record, assemble and reproduce creative content and make it available online. Thus, '[with] the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded.'³¹ Moreover, because in the online environment works are increasingly exploited across borders, reutilizing these works implies that rights might need to be cleared in potentially unknown foreign territories. Consequently, the number of occasions where the clearance of rights is a problem has grown exponentially.

Furthermore, the licensing difficulties have intensified as a result of the expansion of the traditional domain of copyright (and related rights) in recent decennia. Over the years, various new categories of rights have been introduced to adapt copyright law to the emergence of new technologies. This has added new layers of protection to existing productions and has brought new categories of right holders into the realm of copyright (including software producers, performers, producers of phonograms and films, broadcasters and database producers). As a result, a single object now may be protected by various layers of overlapping rights, each of which may potentially be held by a different right holder.³² Moreover, as most countries have extended the term of copyright, the practical difficulties of clearing rights have increased even more.³³ Not only has this term extension resulted in an increased number of works covered by an exclusive right, but with the passage of time, the ownership of rights may also become more obscure as a result of the transferability and divisibility of copyright.³⁴

³⁰ Gibson (2005), *supra*, pp. 213-14.

³¹ Samuelson (2007), *supra*, p. 563.

³² Stef van Gompel, 'Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?', IIC, 38 (2007), 669-702 (pp. 675-76).

³³ Whereas the main international copyright treaties stipulate a minimum term of protection of copyright of 50 years *post mortem auctoris*, many countries have extended this copyright term. In 1993, for example, art. 1 of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9 of 24 November 1993 (as recently has been repealed and replaced by 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 (codified version), OJ L 372/12 of 27 December 2006), provided for an upward harmonization by setting the copyright term for all EU Member States at 70 years *post mortem auctoris*.

³⁴ Over the years, information on copyright ownership may become outdated or even lost, for instance, because the copyright has been assigned to an unknown third party or because a corporate body owning the copyright has gone out of business. A longer term of protection may also lead to an exponential growth of the number of right holders in the later years of the term of protection, thereby resulting in an increased fragmentation of rights. This is particularly true in case of hereditary succession of rights upon the death of the author. See Van Gompel (2007), *supra*, pp. 674-75.

2.3 ENHANCING THE FREE FLOW OF INFORMATION

A last important challenge for copyright law lies in preventing the automatic ‘lock up’ in the copyright system of all creative content. In the absence of copyright formalities, the threshold for obtaining copyright protection is rather low. In general, any literary or artistic work that is sufficiently original is automatically protected by copyright (some states impose an additional condition to the effect that the work is fixed in a tangible medium of expression). As a result, the vast majority of creative output that is created nowadays is propertized under copyright law.³⁵ Irrespective of whether or not authors want to avail themselves of protection, they enjoy exclusive copyrights in their works until at least 50 years – and in many countries 70 or more years – after their death. This allows them or their successors in title, at the exclusion of all others, to authorize or prohibit the reproduction, distribution, communication or making available to the public of their works.

In the pre-digital era, when distribution costs were high and the level of interactivity low, it may not have made such a great difference that copyright automatically attached to all (fixed) content that was sufficiently original. Due to the high costs involved in the dissemination of content goods, it could generally be assumed that anyone engaged in exploiting a creative work desired protection against free-riding by others. The fact that virtually all creative content was protected automatically, even if it did not necessarily merit protection (e.g. if it was not meant for commercial exploitation), had few detrimental effects. Most creative works that were not commercially exploited were simply not directly available for use. As all content was locked up in physical information products, it was accessible only to those few people that could obtain a copy of the work. Also, ‘analogue’ works did not easily lend themselves to be used as building blocks for new creative efforts. As a result, little transformative use was made of pre-existing works. The public still consisted of passive consumers of media content.³⁶

All this has changed dramatically in the digital era. Modern digital networked technologies offer the capacity to produce and distribute works on a large scale and at a modest expense. Nowadays, anyone with a computer and internet access can upload content and distribute it on the world-wide-web. Therefore, creative content has never been more readily accessible to the public than it has now. This allows citizens, researchers and creative industries to take full advantage of digital content and make it usable for studies, work, leisure or as raw material for

³⁵ See Laddie (1996), *supra*, p. 9: ‘Another of the problems with copyright law is that [...] the requirements for qualification are so low to be virtually non-existent. Virtually any written material, any sketch and any film footage or sound recording is automatically protected.’

³⁶ Gibson (2005), *supra*, pp. 212-13.

new creative efforts (e.g. ‘user-created content’). Hence, ordinary people are now able to participate in the creation and dissemination of creative works. An important indicator is the success of various personal websites, weblogs, social networking sites, such as MySpace and Facebook, and online audio, photo or video communities, such as YouTube. Here, works are constantly uploaded, viewed, shared and reused for the creation of new derivative works. This social partaking in the creative process is clearly enriching our culture and society.

In view of this, it is highly questionable whether, in the current digital era, all works should automatically warrant copyright protection. The old maxim that ‘what is worth copying is prima facie worth protecting’³⁷ seems to become increasingly irrelevant in the online environment. While copyright undeniably aims at protecting creators and creative industries against free-riding by others, the costs of producing and disseminating content have fallen so significantly that it is doubtful whether all works automatically merit the strong and long-term copyright protection that is presently granted.³⁸ In addition, the assumption that that ‘most of the most useful and valuable creative content’ should be automatically protected by copyright law seems odd,³⁹ in view of the fact that more and more works are created, not for commercial purposes, but for the benefit of social sharing and remixing.

Obviously, this by no means implies that copyright law has become totally redundant. On the contrary, lots of creative content still warrants protection. ‘Without the law, the incentives to produce creative work would be vastly reduced. Large-budget films could not be produced; many books would not get written.’⁴⁰ However, the fact that certain creations do deserve the protection of copyright is not the issue here. The point is that copyright law lacks the flexibility to assure that those works that do not necessarily merit protection – or at least not for the full copyright term – are not unnecessarily locked up in the copyright regime, but remain free to be used by others. From the analysis below, it will be seen that formalities may contribute significantly to achieving this goal.

³⁷ Peterson J in *University of London Press Ltd v University Tutorial Press Ltd*, [1916] 2 Ch 601, 610.

³⁸ See e.g. Gibson (2005), *supra*, pp. 212 et seq.

³⁹ Lessig (2001), *supra*, p. 107.

⁴⁰ *Ibid.*

3. FACING THE CHALLENGES: A NEW ROLE FOR COPYRIGHT FORMALITIES?

In addressing the above challenges, formalities may have a useful role to play.⁴¹ However, the degree to which the problems may be overcome depends largely on the particularities of the formality employed. Before exploring the role of copyright formalities in the light of today's challenges, therefore, the various kinds and categories of formalities will be introduced and defined.

3.1 THE DIFFERENT KINDS AND CATEGORIES OF FORMALITIES

Copyright formalities exist in different kinds. The most prominent examples are copyright registration, recordation of assignments of copyright, renewal registration, legal deposit and copyright notices (the familiar 'c-in-a-circle' and the various notices of reservation of rights). Moreover, depending on their role in the copyright system, formalities vary greatly in nature and legal effects. In this regard, four categories of formalities can be distinguished:

- (1) constitutive formalities: formalities on which the coming into existence of copyright depends;
- (2) renewal formalities: formalities that after a certain period must be completed to renew (and extend) copyright protection;
- (3) specifying formalities: formalities that affect the enjoyment of a particular type of right, usually of a specific class of works (e.g. notices of reservation to retain a public performance right in musical compositions);⁴² and
- (4) declarative formalities: formalities on which the ability to legally enforce copyright, to recover statutory damages or to claim other – e.g. procedural – benefits depends.⁴³

⁴¹ See also Samuelson (2007), *supra*, p. 563 arguing that 'copyright formalities may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years', thereby referring in particular to 'the problems of too many copyrights and not enough notice of copyright claims and ownership interests', which basically are the problems that we have identified in para. 1 above.

⁴² The term 'registration as specification' was introduced by Friedemann Kawohl and Martin Kretschmer, 'Abstraction and Registration: Conceptual Innovations and Supply Effects in Prussian and British Copyright (1820-50)', *Intellectual Property Quarterly*, 2 (2003), 209-28 (pp. 221 et seq.).

⁴³ Examples of declarative formalities can still be found in US federal copyright law, which still relies heavily on copyright formalities. For works of US origin, registration is a prerequisite for initiating an infringement action. Moreover, for works of both US and foreign origin, the recovery of statutory damages and attorney's fees is limited to instances of infringement occurring after registration. See 17 U.S.C. §§ 411 and 412.

3.2 THE FUNCTIONS OF COPYRIGHT FORMALITIES

Formalities may perform various significant functions depending on their kind and role in the copyright system. First, constitutive and renewal formalities play an important role as filtering instruments between works for which authors desire copyright protection and those for which they do not.⁴⁴ If authors must fulfil a formality before their works are eligible for protection, they are obliged to make an initial assessment of whether or not their works are sufficiently commercially valuable to warrant protection, i.e. whether the expected revenue of royalties would exceed the costs of completing the formality.⁴⁵ The same assessment must be made if copyright is subject to a renewal formality. If this assessment appears favourable, authors are likely to fulfil the formality so as to secure protection for their works. If not, they most likely will refrain from doing so and the work will enter the public domain.⁴⁶ Thus, in their capacity as filtering instruments, formalities may greatly enhance the free flow of information.

Second, formalities may fulfil important signalling functions for the public. If, in a system where copyright protection relies on formalities, works for which no protection is desired are easily identifiable as being unprotected (e.g. if no notice is attached to the work or if the work has not been registered or deposited in a public registry), it is instantly recognizable when a work resides in the public domain and thus can be used without prior authorization. This will significantly increase legal certainty for prospective users.⁴⁷ More legal certainty will also be established if formalities provide indicators that facilitate the calculation of the duration of protection (e.g. if they would require authors and/or right owners to make relevant information concerning the author or date of first publication publicly available).

In the same vein, formalities may help to define and identify copyright-protectable subject matter. Constitutive formalities could provide the public with a clear indication of works for which authors claim protection. Obviously, this would not imply that these works automatically satisfy the substantive requirement(s) for protection. That will always be a

⁴⁴ Sprigman (2004), *supra*, pp. 502 et seq.

⁴⁵ Kawohl and Kretschmer (2003), *supra*, pp. 221-22; Sprigman (2004), *supra*, p. 514.

⁴⁶ In contrast to the present situation, in which each and every original work of authorship was automatically covered by copyright, constitutive formalities and renewal formalities may substantially enlarge the number of works in the public domain. See e.g. Lessig (2001), *supra*, pp. 106-07 and 251-52; Lessig (2004), *supra*, pp. 137-38; Landes and Posner (2003), *supra*, pp. 517-18; Lévêque & Ménière (2004), *supra*, p. 105; Sprigman (2004), *supra*, pp. 502-28.

⁴⁷ See e.g. Guibault (2006), *supra*, p. 95, who poses the question of whether a reintroduction of formalities as a precondition for copyright protection could perhaps provide an acceptable solution to remedy the lack of legal certainty as to what content is protected by copyright and what is in the public domain.

matter for the courts to decide.⁴⁸ Moreover, if copyright depended on registration, it is likely that registering bodies are given the discretionary power to refuse registering creations that obviously do not qualify as ‘literary or artistic works’ or lack sufficient originality (which should of course be subject to appeal by the applicant). This would help preventing all kinds of trivial works from entering the copyright arena. Likewise, it is possible that in cases of highly complex and technical works, applicants would be required to clearly indicate the elements of information for which they seek protection. Requirements of this kind are not uncommon in other fields of intellectual property law. In a patent specification, for example, the subject matter which the applicant regards as his invention must be particularly pointed out and distinctly claimed and, if necessary, be accompanied by a drawing.⁴⁹ Likewise, the registration of a design typically takes no legal effect unless the filing of a design sufficiently reveals its characteristics.⁵⁰

Even if only declarative of the right, formalities may grant a few key benefits. In general, they fulfil important evidentiary functions. The receipt of deposit or entrance in the registers, for instance, may establish *prima facie* proof of initial ownership of copyright.⁵¹ Moreover, if the law requires a compulsory recordation of assignments or licences, this may produce *prima facie* evidence of the legal transfer of ownership of copyright.⁵² This enables authors and copyright owners to easily assert their rights and claim the title of property in a work. This may be particularly useful in conflicts where the anteriority of authorship and/or the priority of a claim to the title must be resolved. In addition, even if the *prima facie* status of the claim allows the recorded facts to be rebutted by other proof, formalities may facilitate the exercise of rights by providing more certainty concerning the claim of copyright ownership.

Finally, formalities may constitute an indispensable source of information relevant to the clearance of rights. If authors and copyright owners were obliged to register their copyrights in

⁴⁸ In other fields of intellectual property law, it is completely normal that, despite the grant of protection upon completing the prescribed formalities, the substantive requirements for protection can be tested by the court. A patent application, for example, can typically be invalidated by the court on the ground that the subject matter of the patent is not patentable within the terms of the law. See e.g. art. 138(1) under a of the Convention on the grant of European patents (European patent convention) and art. 75(1) under a of the Dutch Patents Act 1995.

⁴⁹ §§ 112 and 113 of the US Patent Act (35 U.S.C. §§ 112 and 113). Likewise, art. 83 of the European patent convention requires a patent application to disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. See also art. 25(1) of the Dutch Patents Act 1995.

⁵⁰ See e.g. art. 3:6 under (f) of the Benelux (Belgium-Netherlands-Luxembourg) Convention on Intellectual Property 2005.

⁵¹ Under the nineteenth-century French legal deposit scheme, for instance, the receipt that was given upon deposit constituted *prima facie* proof of the property right on the work deposited. See art. 9 of the French Ordinance of 24 October 1814. Currently, voluntary registration schemes often provide for the same. See e.g. art. 53(2) of the Canadian Copyright Act (R.S., 1985, c. C-42): ‘A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.’

⁵² See e.g. 17 U.S.C. § 205 under c and art. 53(2.1) and (2.2) of the Canadian Copyright Act.

a publicly accessible register and to duly record each assignment of rights, this would increase the availability of information identifying the work, its author(s) and current right owner(s) and other valuable information (e.g. about the date of first publication). To a greater or lesser degree, the same information would become available if authors were obliged to mark the copies of their works with a copyright notice. As a result, formalities may contribute noticeably to lowering transaction costs,⁵³ to providing adequate legal certainty and to alleviating rights clearance problems, such as those of ‘orphan works’ (i.e. works the copyright owners of which cannot be identified or located).⁵⁴ Hence, formalities may perform a key role in facilitating the licensing of copyright, thereby stimulating the legitimate use of copyright protected content.

3.3 CONCLUSION

The above overview demonstrates that formalities may function to the benefit of the public at large. By enlarging the public domain, enabling the public to differentiate between protected subject matter and unprotected content, facilitating licensing and enhancing legal certainty for users and copyright owners alike, they may contribute significantly to facilitating the regular exercise of rights. In view of this fact, it seems safe to conclude that formalities may well be fit to address the challenges that copyright is facing in the current digital environment.

But this is just one side of the coin. Although reintroducing formalities may have become something worthy of consideration, one cannot ignore the fact that, despite the fact that formalities fulfilled similar functions in the history of copyright, they were nevertheless abolished. The next sections therefore introduce and contextualize the legal-historical concerns with formalities.

⁵³ See e.g. Lessig (2001), *supra*, p. 252; Lessig (2004), *supra*, pp. 249; Landes and Posner (2003), *supra*, pp. 477-80; L  v  que & M  n  re (2004), *supra*, p. 105; Sprigman (2004), *supra*, pp. 500-02; Dennis W.K. Khong, ‘Orphan Works, Abandonware and the Missing Market for Copyrighted Goods’, *International Journal of Law and Information Technology*, 15(1) (2007), 54-89 (p.61).

⁵⁴ See Khong (2007), *supra*, p. 88: ‘The easiest solution to the orphanhood problem is a copyright register.’ The lack of adequate rights management information resulting from the absence of formalities is seen by many as one of the structural causes of the ‘orphan works’ problem. See e.g. Jerry Brito & Bridget Dooling, ‘An orphan works affirmative defense to copyright infringement actions’, *Michigan Telecommunications and Technology Law Review*, 12 (2005), 75-113 (pp. 82-83); Benjamin T. Hickman, ‘Can you find a home for this “orphan” copyright work? A statutory solution for copyright-protected works whose owners cannot be located’, *Syracuse Law Review*, 57 (2006), 123-56 (pp. 129-32); and Olive Huang, ‘U.S. Copyright Office orphan works inquiry: Finding homes for the orphans’, *Berkeley Technology Law Journal*, 21 (2006), 265-88 (pp. 268-71).

4. THE OTHER SIDE OF THE COIN: THE LEGAL-HISTORICAL CONCERNS WITH COPYRIGHT FORMALITIES

As observed in the introduction, from the late-nineteenth or early-twentieth centuries onward, copyright formalities began to lose their significance at both the national and the international levels. The reasons for this are manifold. In general, they can be grouped into four categories, which concern the ideological foundation of copyright, the ‘natural justice’ legitimation of copyright, the concept of abstract-authored works and the practical implications for securing international copyright protection. These four concerns are examined in more detail here.

4.1 THE IDEOLOGICAL FOUNDATION OF COPYRIGHT

One of the primary arguments against formalities is that they are believed to be inconsistent with the idea that copyright is not granted by the legislature, but arises ‘naturally’ and *ex lege* upon the creation of an original work of authorship. Under this conception, copyright is not created by law, but the law merely recognizes its existence and demarcates its legal boundaries.⁵⁵ It is generally considered that to subject the enjoyment or the exercise of copyright to formalities would be to undercut the notion that the right originates directly from the act of creation.⁵⁶

This idea can be traced back to the continental-European property and personality rights theories of copyright (*droit d’auteur*), which developed in France and Germany during the course of the nineteenth century. In France, justification for the protection of authors’ rights was increasingly found to exist in their identification as property rights. Expanding on the theory of ‘intellectual property’ developed in the eighteenth century under the influence of natural law,⁵⁷ and in particular on John Locke’s labour theory which held that man has a

⁵⁵ See e.g. Adolf Dietz, *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with Special Reference to the Provisions of the Treaty Establishing the European Economic Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), p. 25 (no. 54) and Silke von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008), p. 119 (no. 5.58).

⁵⁶ See Jane C. Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’, in *Of Authors and Origins: Essays on Copyright Law*, ed. by Brad Sherman and Alain Strowel (Oxford: Clarendon Press, 1994), pp. 131-58 (pp. 133-34 and 147).

⁵⁷ On the evolution of the theory of intellectual property (*geistigen Eigentum*) in eighteenth-century Germany, see Ludwig Giesecke, *Vom Privileg zum Urheberrecht: Die Entwicklung des Urheberrechts in Deutschland bis 1845* (Göttingen: Schwartz, 1995), pp. 115 et seq. This theory also found support in France. Already in 1725, Louis d’Héricourt pleaded that the author should be recognized as the owner of the work he created. Without questioning the ownership of the tangible work, he found that the author deserved to be accepted as a proprietor of a work because of his intellectual creation. See the text of his *Mémoire* in Éd. Laboulaye and G. Guiffrey, *La propriété littéraire au XVIIIe siècle: Recueil de pièces et de documents* (Paris: L. Hachette, 1859), pp. 21-40.

natural right to property which exists in his own person and which he originally acquires by appropriating the commons through his labour,⁵⁸ the proponents of the theory of literary and artistic property stressed the inextricable bond between the work and its author.⁵⁹ By regarding the person of the creator as ‘the natural law basis of literary and artistic property’,⁶⁰ they believed authors’ rights to emanate directly from the quality of the authors’ own intellectual creations.⁶¹ The rights were considered to have always existed in the legal conscience of men.⁶² The law was seen as merely recognizing the existence and regulating the exercise of authors’ rights.⁶³

This idea also became widespread among nineteenth-century German intellectuals. As in France, authors’ rights were progressively regarded as rights of intellectual property (*geistigen Eigentum*).⁶⁴ In parallel, another theory evolved in Germany that gave even more prominence to the person of the author as the creator of his work. This was the personality theory, which was based largely on the philosophies of Kant, who recognized that authors have an innate right vested in their own person (*ius personalissimum*),⁶⁵ and Fichte, who introduced the

⁵⁸ John Locke, *Two Treatises of Government* (London, 1690), pp. 245-46 (sec. 27). Locke’s labour theory appears to have been quite popular among nineteenth-century liberal thinkers in France. See e.g. Alfred Nion, *Droits civils des auteurs, artistes et inventeurs* (Paris: Joubert, 1846), pp. 127-28.

⁵⁹ For instance, during the parliamentary debates of 1839, Joseph Marie Portalis maintained that the author’s right constituted a ‘*propriété par nature, par essence, par indivision, par indivisibilité de l’objet et du sujet*’. In 1879, Eugène Pouillet affirmed that the author’s work consisted ‘*dans une création, c’est-à-dire dans la production d’une chose qui n’existait pas auparavant et qui est tellement personnelle qu’elle forme comme une partie [de son auteur]*’. The quotations are taken from Laurent Pfister, ‘La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d’auteur au XIX^e siècle’, *Revue Internationale du Droit d’Auteur*, no. 205 (2005), 116-209 (pp. 156-57 and 158-59).

⁶⁰ Pfister (2005), *supra*, pp. 158-59. *Ibid.* pp. 124-25 and 156-57: ‘For the proponents of literary and artistic property, the work was all the more its creator’s own as it proceeded immediately from an original and natural property of man: his person’. Authors’ rights were increasingly perceived as a natural right. In a case involving the operas of Verdi, for example, the French Court of Cassation fully acknowledged that authors’ rights derived from natural law. See French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado, Dalloz* 1858, 1, 161: ‘*Attendu que si la propriété des œuvres littéraires, musicales et artistiques dérive du droit naturel, ...*’ (p. 164). See also Étienne Blanc, *Traité de la contrefaçon en tous genres et de sa poursuite en justice*, 4th edn (Paris: Plon, 1855), p. 139: ‘*la propriété littéraire était une création ... du droit naturel et des gens*’.

⁶¹ See Blanc (1855), *supra*, p. 138: ‘*La propriété, c’est-à-dire la qualité d’auteur, ...*’.

⁶² See Francis J. Kase, *Copyright thought in continental Europe: Its development, legal theories and philosophy* (South Hackensack: Rothman, 1967), p. 8, who concludes that under the theory of authors’ rights as intellectual property rights, ‘[copyright] is thus a natural right growing out of natural law’.

⁶³ See Imperial Court of Paris, 8 December 1853, *Lecou v. Barba* in Blanc, pp. 38-39: ‘*Considérant que la création d’une œuvre littéraire ou artistique constitue au profit de son auteur une propriété dont le fondement se trouve dans le droit naturel et des gens, mais dont l’exploitation est réglementée par le droit civil*’.

⁶⁴ German natural law and legal philosophy assumed a fairly broad concept of property, included property of physical goods, property of the human body and property of man-made commodities. See Diethelm Klippel, ‘Die Idee des geistiges Eigentums in Naturrecht und Rechtsphilosophie des 19. Jahrhunderts’, in *Historische Studien zum Urheberrecht in Europa: Entwicklungslinien und Grundfragen*, ed. by Elmar Wadle, Schriften zur europäischen Rechts- und Verfassungsgeschichte, 10 (Berlin: Duncker & Humblot, 1993), pp. 121-38 (pp. 126 et seq.). Intellectual property thus was generally accepted, as it constituted ‘*durch Arbeit mit der Persönlichkeit verbundene geistige Eigentum*’ (*ibid.* p. 135). Here again, we see the influence of the labour theory of Locke.

⁶⁵ I. Kant, ‘Von der Unrechtmäßigkeit des Büchernachdrucks’, *Berlinische Monatschrift*, 5 (1785), 403-17, in *Primary Sources on Copyright: 1450-1900*, ed. by L. Bently and M. Kretschmer, <www.copyrighthistory.org> [accessed 1 February 2009], p. 416.

differentiation between freely usable ‘content’ and the protectable ‘form’ of the author’s thoughts and ideas (comparable to the idea/expression dichotomy).⁶⁶ This last differentiation especially provided a strong justification for copyright to be vested in the author. By assuring protection against any taking of the personal and unique form in which the author had expressed his thoughts or ideas, this new abstract concept linked everything done to the work back to the personality of the author.⁶⁷ This laid the groundwork for a number of German scholars to develop the theory of a largely personal author’s right.⁶⁸ By accentuating the personal element in the author’s creation, they claimed that authors’ rights arise directly from the authorship of a work.⁶⁹ Hence, they considered these rights to come into being through the very act of creation (*‘die geistige Schöpfungsthat’*) and through the act of creation alone.⁷⁰

This had some important consequences for the way in which formalities were perceived. In general, the idea that copyright was born with the creation of a work did not correspond with the notion of formalities being constitutive of the right. Thus, there was a growing consensus that the existence of copyright should not be subject to formalities and that failure to comply with formalities should never be the occasion of a defeat of copyright protection.⁷¹

4.2 THE ‘NATURAL JUSTICE’ LEGITIMATION OF COPYRIGHT

Another argument still put forth today by many legal scholars is that formalities would conflict with the ‘natural justice’ or fairness legitimation of copyright.⁷² This argument is closely connected with the assumed incompatibility between formalities and the ideological ‘natural rights’ underpinnings of copyright law. Because the legitimation of copyright is seen in the

⁶⁶ J.G. Fichte, ‘Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Raisonement und eine Fabel’, *Berlinische Monatsschrift*, 21 (1793), 443-83, in *Primary Sources on Copyright: 1450-1900*, ed. by L. Bently and M. Kretschmer, <www.copyrighthistory.org> [accessed 1 February 2009], pp. 447 et seq.

⁶⁷ Friedemann Kawohl and Martin Kretschmer, ‘Johann Gottlieb Fichte, and the Trap of *Inhalt* (Content) and *Form*: An Information Perspective on Music Copyright’, *Information, Communication & Society* (special issue on *Copyright, and the Production of Music*, ed. by Martin Kretschmer and Andy C. Pratt), 12 (2009), 41-64 (pp. 46-52).

⁶⁸ See Johann Caspar Bluntschli, *Deutsches Privatrecht*, 2 vols (Munich: Literarisch-artistische Anstalt, 1853-54), I (1853), pp. 191-92: ‘Das Werk als Geistesproduct gehört zunächst dem Autor an, der es erzeugt hat, ... als eine Offenbarung und ein Ausdruck seines persönlichen Geistes. Zwischen Autor und Werk besteht ein natürlicher Zusammenhang, wie zwischen Schöpfer und Geschöpf, und jener hat ein natürliches Recht, dass dieses Verhältnis geachtet werde’; and p. 186: ‘Heutzutage gehört das Autorrecht zu den allgemein anerkannten menschlichen Rechten’. See also Otto Gierke, *Deutsches Privatrecht*, 3 vols (Leipzig: Duncker & Humblot, 1895-1917), I (1895), p. 756: ‘Das Urhebersrecht ist ein Persönlichkeitsrecht, dessen Gegenstand ein Geisteswerk als Bestandteil der eignen Persönlichkeitssphäre bildet’.

⁶⁹ See Bluntschli (1853), *supra*, p. 199: ‘[Das Autorrecht] entsteht aus der Urheberschaft...’; and Gierke (1895), *supra*, p. 755: ‘durch die Schöpfung eines Geisteswerkes [entsteht] in der Person seines Schöpfers ein gutes Recht’.

⁷⁰ Gierke (1895), *supra*, pp. 766 and 787-88: ‘Das Urheberrecht entsteht durch die geistige Schöpfungsthat, ... wird unmittelbar durch die Schöpfungsthat begründet [und] wird nur durch geistige Schöpfungsthat begründet’.

⁷¹ As a consequence, at the end of the nineteenth century, there was a growing tendency, in Germany, to limit the imposition of formalities and, in France, to soften their nature and legal effects. See Van Gompel (2009), *supra*.

⁷² Von Lewinski (2008), p. 43 (no. 3.25).

very nature of the author's personal creation, the supporters of this theory believe that the author should not only be properly rewarded for the creative efforts he has put in his work (economic rights), but should also be protected against acts that could damage or alter his work or that could prejudice his name or reputation (moral rights).⁷³ In view of that, these scholars are very sceptical about formalities. They regard it as unreasonable if authors should inadvertently and unjustly lose protection due to a failure to complete a formality, as this may unnecessarily harm their economic and personal interests.⁷⁴

The notion of 'natural justice' again originates in the nineteenth century. In view of the personal and 'sacred' bond between the author and his work,⁷⁵ it was increasingly held to be unfair if authors could lose protection over a failure (e.g. an inconsistency or neglect) in the process of completing a formality. This was especially the case if the failure was ascribable to another person than the author (e.g. if the formality could also be legally complied with by the publisher),⁷⁶ to complicated procedure and costs involved (e.g. if the facilities where a formality should be accomplished were centralized and located too far away) or to mere technicalities, such as innocent mistakes or late submissions of applications.⁷⁷ In the nineteenth century, it was not uncommon for authors to lose protection as a result of any of these practicalities.

⁷³ This already came to the fore in the 1769 case of *Millar v. Taylor*, 98 *Eng. Rep.* 201, 4 *Burr.* 2303 (Court of King's Bench, 1769), where Lord Mansfield expressed the opinion that 'it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish' (at 252; 2398).

⁷⁴ See also H.R. Report No. 94-1476 (94th Cong., 2nd Sess. 1976), *U.S. Code Congressional and Administrative News* (1976), 5659-5809 (p. 5750), in which the US Congress noted that certain copyright formalities, the renewal registration in particular, were the 'cause of inadvertent and unjust loss of copyright'.

⁷⁵ See P. Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe', in *Expanding the Boundaries of Intellectual Property: Innovation for the Knowledge Society*, ed. By Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman and Harry First (Oxford: Oxford University Press, 2001), pp. 343-363 (p. 344).

⁷⁶ This was the case, for example, with respect to the legal deposit requirement in France. While art. 6 of the 1793 French Decree placed the duty to deposit on the author, the Decree of 5 February 1810 makes the publisher responsible for depositing. However, this must be understood correctly. In theory, the publisher's obligation was separate from that of the author. Both were equally responsible for performing the duty imposed on them. This also manifests itself in the legal consequences of non-compliance. For authors, an omission to deposit resulted in the inadmissibility of their claims before a court. For publishers, it gave rise to a fine and confiscation of the copies that were not deposited. In practice, however, it was unnecessary for both the publisher and author to deposit. A deposit carried out by the publisher exempted the author from his obligation. See e.g. Eugène Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et pratique et du droit de représentation*, ed. by Georges Maillard and Charles Claro, 3rd edn (Paris: Marchal and Billard, 1908), pp. 465-66 (no. 425). Consequently, the deposit performed by the printer was sufficient to ensure the preservation of the author's rights. Cf. the rulings of the Court of Cassation of 1 March 1834, *Thiéry v. Marchant*, *Dalloz* 1834, 1, 113; *Sirey* (2me Sér.) 1834, 1, 65; of 20 August 1852, *Bourret et Morel v. Esriche de Ortéga*, *Dalloz* 1852, 1, 335; and of 6 November 1872, *Garnier v. Lévy*, *Dalloz* 1874, 1, 493. But see Court of Cassation, 30 June 1832, *Noël et Chapsal v. Simon*, *Dalloz* 1832, 1, 289, ruling in the opposite direction.

⁷⁷ See e.g. Henri Louis de Beaufort, *Het auteursrecht in bet Nederlandsche en Internationale recht* (Utrecht: Den Boer, 1909; repr. Amsterdam: Buma, 1993), p. 263.

4.3 THE CONCEPT OF ABSTRACT-AUTHORED WORKS

Another, more general problem is that formalities do not combine well with the abstraction implicit in works of authorship. Since formalities typically are connected with the outside appearance of a work, the distinctive features that make the work eligible for protection, i.e. the level of originality and subjectivity in the author's creation, are not easily captured by formalities.

This concern came to the fore when, in the nineteenth century, copyright law 'moved from the concrete to the abstract'.⁷⁸ Instead of merely granting protection against a straightforward reproduction of printed matter (books, maps, charts, journals and sheet music) or pre-fixed works of art (sculptures, engravings, drawings and paintings), protection was increasingly conferred on works *qua abstractum*. Accordingly, severed from the physical object in which literary and artistic works were embodied or manifested, copyright protection was accorded to the personal and unique form of expression of the author's thoughts or ideas.⁷⁹

Formalities, however, are not easily applicable to abstract work identities. In particular in the pre-digital era, it was considered difficult (if not impossible) 'to reduce the subject matter of copyright law beyond the material form in which it existed'.⁸⁰ Because a representative description or sample of the intangible property was hard to give, literary and artistic works needed to be reproduced in their full physical manifestation to be able to identify the subject matter of protection.⁸¹ Not all works lend themselves easily to reproduction however. Artistic works and special or limited editions of literary works were particularly difficult to duplicate and, even if technically reproducible, it would be inapt to demand a deposit of replicas or copies of these works, as the cost of reproduction were often prohibitively high.⁸² Moreover, formalities could not be completed unless a work was fixed in a tangible medium.⁸³

Accordingly, as the identification of the subject matter of copyright protection continued to rely on the specific object in which the work existed and not, as in the case of patents, designs and trade marks rights, on a registered representation of the object,⁸⁴ formalities

⁷⁸ See Sherman and Bently (1999), *supra*, pp. 55 et seq. for an account of how 'the law ... moved from the concrete to the abstract' due to the 'shift from the surface of the text to the essence of the creation'.

⁷⁹ Kawohl and Kretschmer (2003), *supra*, pp. 214 et seq.

⁸⁰ Sherman and Bently (1999), *supra*, p. 183.

⁸¹ *Ibid.* pp. 183-84.

⁸² See e.g. the remark on this point by Mr Meissonier, president of the 1878 International Conference on Artistic Property in Paris, in: *Congrès International de la Propriété Artistique: Tenu à Paris du 18 au 21 septembre 1878* (Paris: Imprimerie Nationale, 1879), p. 56. Others, however, questioned the impracticability of registration for artistic works. See e.g. the response by Eugène Pouillet (*ibid.* pp. 56-57).

⁸³ J. Heemskerk Az., *Voordragten over den eigendom van voortbrengselen van den geest*, 2nd edn (Amsterdam: Beerendonk, 1869; repr. Amsterdam: De Kloof, 2000, with introduction by R.J.Q. Klomp), pp. 81-82.

⁸⁴ Sherman and Bently (1999), *supra*, p. 191-93.

seemed less indispensable for an efficient protection of copyright.⁸⁵ This was even more so after the law had introduced legal presumption of authorship, stipulating that, without proof to the contrary, the person who was named as author on the work was deemed to be the actual author.⁸⁶ This weakened the importance of registration or deposit for establishing priority.⁸⁷ In addition, in copyright law, there was less need of avoiding difficulties of proof regarding independent creation (*Doppelschöpfung*). If compared with designs and patents law, the chances that this occurred were limited, due to the very personal nature of literary and artistic property.⁸⁸

4.4 THE INTERNATIONAL IMPLICATIONS OF FORMALITIES

There are significant concerns with formalities at the international level as well. In contrast to the above-mentioned ideological and legal-theoretical concerns, however, these international concerns are mostly pragmatic. In the mid-nineteenth century, when international copyright protection was first explored, the patchwork of bilateral agreements by which protection was secured laid down numerous formalities.⁸⁹ Hence, if authors sought protection in a foreign territory, they usually were required to fulfil the formalities prescribed by the relevant bilateral

⁸⁵ The possibility to prove the author's identity by means other than formalities was stressed by John Leighton, a British artist, at the 1878 International Conference on Artistic Property in Paris. He maintained that registration was redundant because the author of a work could always be recognized by experts, either by his writing, his drawing, his brushstroke, or the manner of painting. See *Congrès International de la Propriété Artistique* (1879), *supra*, p. 57.

⁸⁶ In Germany, for example, art. 28 of the Federal the Copyright Act of 1870 laid down a general presumption of authorship, stipulating that without proof to the contrary, the person who was named as author on the work was deemed to be the actual author. The Berne Convention also contained legal presumptions of authorship from its early inception. See art. 11 BC (1886). Nowadays, similar presumptions are contained in art. 15 BC (1971).

⁸⁷ Legal presumption of authorship were considered to give authors greater latitude for the assertion of their rights. While less onerous for authors, they were believed to generally achieve the same outcome as formalities. Since most formalities provided prima facie proof only, legal certainty could equally be established by a set of legal presumptions. Because the facts recorded by formalities usually were not verified *ex ante*, their correctness could always be contested. In principle, therefore, formalities only proved that a fact was recorded at a certain time. See e.g. Robert Fischer, *Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11. Juni 1870* (Gera: Griesbach, 1870), pp. 33-34; Otto Dambach, *Die Gesetzgebung des Norddeutschen Bundes betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken* (Berlin: Enslin, 1871), pp. 205-09.

⁸⁸ See J.J. Wijnstroom and J.L.A. Peremans, *Het auteursrecht* (Zwolle: Tjeenk Willink, 1930), pp. 16-17 and Lionel Bently, 'Requiem for Registration? Reflections on the History of the UK Registered Designs System', in *The Prehistory and Development of Intellectual Property Systems*, ed. by Alison Firth, Perspectives on Intellectual Property Series, 1 (London: Sweet & Maxwell, 1997), pp. 1-46 (pp. 38 and 41).

⁸⁹ For a general overview of the formalities in bilateral copyright agreements prior to 1886, see Ladas (1938), *supra*, I, pp. 55-57 and Sam Ricketson and Jane C. Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, 2 vols (Oxford: Oxford University Press, 2006), I, at 37-38.

treaty. This made it very difficult to secure international protection, especially at a multi-national level.⁹⁰

When the issue of formalities was considered in the framework of the Berne Convention, therefore, the drafters were led by a strong desire to liberate authors from the multitude of formalities which they needed to complete to secure protection in different countries.⁹¹ This resulted in the adoption of the rule, in 1886, that Union authors received protection under the Berne Convention once they completed the formalities in the country of origin of the work.⁹² In practice, however, this rule caused problems, as it required national courts in international disputes to interpret the laws of foreign countries.⁹³ Moreover, some countries still continued to require that foreign authors claiming protection under the Berne Convention comply with domestic formalities.⁹⁴ Therefore, a further simplification was needed to enable authors to optimally secure international copyright protection. This was found in the independence of protection and the corresponding prohibition on formalities, which still apply at present.

5. CONTEXTUALIZING THE LEGAL-HISTORICAL CONCERNS WITH COPYRIGHT FORMALITIES

In view of the ideological and practical concerns with copyright formalities considered above, it is not difficult to understand why copyright gradually lost its attachment to formalities in the course of the twentieth century. This is not to say, however, that the historical reasons for abolishing formalities are absolute impediments for their possible reintroduction. Upon closer inspection, it appears that neither the ideological concerns (para. 3 under a and b) nor the

⁹⁰ See e.g. Ladas (1938), *supra*, I, p. 55, who speaks about formalities as being ‘one of the most unsatisfactory features of the conventions on literary and artistic property prior to 1886.’ Illustrative is the letter of concern which a group of French experts in the field of literary and artistic property addressed to the Committee of Organization of the 1858 Brussels conference, reported in Édouard Romberg, *Compte rendu des travaux du Congrès de la propriété littéraire et artistique*, 2 vols (Bruxelles/Leipzig: Flatau, 1859), I, pp. 217-238.

⁹¹ See, in this respect, the speech of Numa Droz in *Actes de la Conférence internationale pour la protection des droits d’auteur: réunie à Berne du 8 au 19 septembre 1884* (Berne: Imprimerie K.-J. Wyss, 1884), p. 21.

⁹² Art. 2(2) BC (1886).

⁹³ Despite the delivery of a certificate from a foreign authority affirming that the formalities of the country of origin had been fulfilled, some courts felt the need to apply the formalities to particular cases to control whether the foreign procedures had been followed correctly and, if not, to deny protection to the author of a foreign work. See Ernst Röhliberger, *Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst und die Zusatzabkomme: Geschichtlich und rechtlich beleuchtet und kommentiert* (Bern: Francke, 1906), pp. 110-11.

⁹⁴ British courts, in particular, upheld the requirement that national formalities applied equally to alien works for which protection was sought under the Berne Convention. See e.g. *Fishburn v. Hollingshead*, [1891] 2 Ch. 371 (Chancery Division, 14 March 1891). But see *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1 (Queen’s Bench Division, 1893) and *Hanfstaengl v. The American Tobacco Company*, [1895] 1 Q.B. 347 (Court of Appeal, 1894) in which the *Fishburn v. Hollingshead* ruling was not followed and, in fact, overruled.

pragmatic concerns (para. 3 under c and d) mentioned above exclude the imposition of formalities completely.

First, copyright formalities do not seem to be entirely at odds with the labour theory and natural rights approach underlying the property and personality rights theories of copyright (*droit d'auteur*). These theories concentrate on the *acquisition* of rights and therefore on their enjoyment (i.e. the existence of rights), rather than their exercise.⁹⁵ Accordingly, they merely oppose reliance on formalities as prerequisites for the coming into being of copyright, but they do not seem to preclude formalities that affect the exercise of copyright as such.

In fact, the exercise of copyright has never been absolute and unconditional. Just as the law contains exceptions to and limitations of copyright, there appears to be no reason why, from a principled standpoint, the exercise of copyright could not be subjected to formalities of some kind.⁹⁶ At the most, it could be argued that such formalities should always be accompanied by adequate legal safeguards to accommodate the legitimate interests of authors and copyright owners.⁹⁷ Likewise, because the duration of copyright is limited but unspecified by nature, it could be asserted that, from a principled point of view, there appears to be little objection to subjecting copyright to more differentiated terms, e.g. renewable terms that are conditional on compliance with formalities, instead of to a fixed term after the author's death, as is currently the case. However, since the duration of copyright is directly linked to its legitimation, this should be preceded by a careful, balanced and comprehensive discussion on the optimal term of protection.⁹⁸ Such an exercise is necessary to determine to what extent differentiated terms can be introduced, given the 'natural justice' and other rationales of copyright.⁹⁹

⁹⁵ For the late nineteenth-century French legal terminology of the 'enjoyment' and 'exercise' of a property right, see Marcel Planiol, *Traité élémentaire de droit civil: conforme au programme officiel des facultés de droit*, 5th edn, 3 vols (Paris: Pichon etc., 1908-10), I (1908), p. 161 (no. 431): '*Avoir la jouissance du droit de propriété, c'est avoir l'aptitude nécessaire pour devenir propriétaire*' (referring basically to the acquisition of the right and thus to the title of property); and: '*en avoir l'exercice [du droit de propriété], c'est pouvoir user de son droit de propriété*' (referring to the ability to use the right, i.e. to legally enforce it, assign it, license it, etc.).

⁹⁶ In nineteenth-century France, all limitations to copyright were considered permissible by the proponents of literary and artistic property, as long as they did not affect the author's title of ownership and thus the property rights in his work, during the statutorily prescribed terms of protection. See Pfister (2005), *supra*, pp. 166-67.

⁹⁷ It could perhaps be asserted that similar safeguards should apply as the three-step test lays down in relation to exceptions and limitations. However, it is debatable whether this would be desirable. Formalities are not one-to-one comparable to exceptions and limitations. On the one hand, formalities are less far-reaching in the sense that authors and copyright owners control themselves whether or not they comply with them. Unlike exceptions and limitations, which in specific cases must simply be tolerated, they remain in command of their own rights as long as they observe the prescribed formalities. On the other hand, the legal consequences of non-compliance with formalities may be far more rigid. Where exceptions and limitations apply in specific cases only, authors and copyright owners may lose control over the exercise of their rights in case they have failed to complete formalities. This calls for additional legal safeguards, which may perhaps be found in the possibility to cure any inadvertent omission of formalities within a reasonable timeframe (see e.g. 17 U.S.C. § 405(a)(2) (1976)).

⁹⁸ The optimal duration of copyright protection is directly linked to its legitimation: finding the optimal term of protection is to identify the point at which the objectives for which copyright was granted in the first place are best realized. Until today, however, the literature on law and economics has failed to identify an optimal term of

In summary, provided that copyright formalities leave the genesis of copyright unaffected and cause no unnecessary prejudice to the legitimate interests of copyright owners, they seem to be consistent with its ideological underpinnings and ‘natural justice’ legitimation.

This can also be perceived in the history of copyright. Despite the rise of ‘natural’ property and personality rights theories in nineteenth-century continental Europe, there was common understanding that the exercise of copyright could always be restricted if that were to be in the public interest.¹⁰⁰ This was equally the case for other property rights.¹⁰¹ Because of its cultural importance and social utility, it was deemed completely normal that copyright at a certain moment would enter the public domain (and thus had a limited duration) and that its exercise could be subject to particular formalities.¹⁰² This clarifies to a great extent why, despite the growing belief that copyright is born with the creation of a work, copyright formalities were nevertheless continued. In France, for example, the legal deposit was thought to fulfil a few key functions for facilitating the regular exercise of copyright.¹⁰³ Therefore, in the nineteenth century, copyright formalities were considered to have a central role in upholding the balance between safeguarding the rights of authors and the public interest.¹⁰⁴ This may explain why several countries continued imposing formalities until (far into) the twentieth century.

protection for copyright or any other right of intellectual property. See Natali Helberger, Nicole Dufft, Stef van Gompel and Bernt Hugenholtz, ‘Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea,’ *E.I.P.R.*, 30 (2008), 174-181 (p. 177) and the references contained therein.

⁹⁹ Obviously, there are various rationales underlying copyright protection. Apart from the ideological ‘natural justice’ rationale, there are utilitarian and economic rationales, free speech arguments, cultural and social rationales, pragmatic rationales, etc. See F.W. Grosheide, *Auteursrecht op maat: Beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context* (Deventer: Kluwer, 1986), pp. 127-43; and F. Willem Grosheide, ‘Paradigms in Copyright Law’, in *Of Authors and Origins: Essays on Copyright Law*, ed. by Brad Sherman and Alain Strowel (Oxford: Clarendon Press, 1994), pp. 203-33 (pp. 207 et seq.).

¹⁰⁰ French Court of Cassation, 14 December 1857, *Verdi et Blanchet v. Calzado, Dalloz* 1858, 1, 161: ‘*Que des considérations d’ordre et d’intérêt public ont dû déterminer le législateur à en régler et modifier l’exercice*’ (p. 164). In Germany and other states, the laws were based on a comparable ‘balancing act’ between the protection of authors and the interest of the public. See e.g. Bluntschli (1853), *supra*, p. 193, Gierke (1895), *supra*, p. 755 and Klippel (1993), *supra*, p. 135.

¹⁰¹ Proprietors of real property, for example, were also obliged to sacrifice a portion of their rights if the public interest so required, e.g. for the exploitation of (mineral) resources or for road construction. See Étienne Blanc at the 1858 International Conference in Brussels, in Romberg (1859), *supra*, I, p. 69.

¹⁰² See Resolution, part II, no. 7: ‘*Si des formalités particulières peuvent être utiles, soit comme mesure d’administration et d’ordre, soit comme moyen de constater et de prouver le droit de propriété; ...*’; and Resolution, part IV, no. 4: ‘*dans un cas comme dans l’autre, des formalités peuvent être désirables comme mesure d’ordre et pour faciliter l’exercice régulier du droit*’ of the 1858 International Conference on Literary and Artistic Property in Brussels in Romberg (1859), *supra*, I, pp. 175-78.

¹⁰³ At the 1858 International Conference on Literary and Artistic Property in Brussels, the importance of formalities for the exercise of rights was emphasized, inter alia, by Étienne Blanc, *avocat* at the Imperial Court in Paris. See Romberg (1859), *supra*, I, p. 210. The same was done by Jules Pataille, *avocat* at the Court of Appeals in Paris, at the 1878 International Conference on Artistic Property in Paris. See *Congrès International de la Propriété Artistique* (1879), *supra*, pp. 53 et seq. For a similar account from Germany, see the *Mémoire* of Prof. Warnkönig and Dr O. Wächter in response of the questions proposed by the 1858 Committee of Organization, in Romberg (1859), *supra*, I, 268-74 (p. 269).

¹⁰⁴ See Van Gompel (2009), *supra*.

Equally, the pragmatic reasons that added to the growing irrelevance of formalities in the nineteenth and twentieth centuries do not fundamentally oppose formalities either, but must rather be understood in their historical context. While the practical difficulties surely weighed heavy in the previous centuries, in the present digital age, many of the old pragmatic concerns over formalities appear to no longer exist or at least may be easier to overcome. In the online environment, registration and deposit systems can be organized quite efficiently.¹⁰⁵ Moreover, regardless of the abstraction implicit in works of authorship, these formalities can be made applicable to virtually any type of work (except for works that are unfixed). While in the pre-digital era, a good description of the essence of a work (e.g. an artistic work) may have been hard to provide, modern technologies for digital recording and reproduction, such as digital photo and video cameras, have enabled almost any type of work to easily and cost-effectively be reproduced verbatim, so as to capture its distinctive – subjective and original – features.

Lastly, the practical implications of formalities for securing international copyright seem to be fairly easy to overcome, at least from a theoretical standpoint. The success and ubiquity of the world-wide-web has enabled the creation of online registers, which would allow anyone with a computer and internet access to register and upload works.¹⁰⁶ At the international level, these registers could be amalgamated in a central register. Alternatively, an international (e.g. WIPO-administered) online register could be established. This would have great advantages, because, as we have seen, the copyright market has become increasingly international.

To avoid the historical difficulties of securing copyright in multiple countries, however, international registration schemes of this kind should be accompanied by international rules. In this respect, recourse could be made e.g. to the rule under the Berne Convention of 1886 stipulating that to acquire international protection, it would suffice to fulfil the formalities in the country of origin of the work. Yet, this would have the downside in that, if formalities would not be imposed in all countries worldwide, authors may circumvent the formalities of their home country by publishing their works in a country that does not prescribe formalities.¹⁰⁷ It seems that the 1886 rule cannot be successfully reinstated, therefore, without international consensus on the necessity of reintroducing formalities. On the other hand, if an

¹⁰⁵ See e.g. Lessig (2008), *supra*, p. 265: ‘Technology offers an extraordinary opportunity for making registration work efficiently.’

¹⁰⁶ Admittedly, not all people around the world have easy access to computers and the internet. There still are major divides between the industrialized and developing world. In view of that, reintroducing copyright formalities on a worldwide scale may not yet be a realistic option. On the other hand, things should not be exaggerated. The level of computer and internet access in developing countries is growing steadily and even in the least developed countries, people are increasingly provided internet access on local public terminals.

¹⁰⁷ See note 6 above.

international register were established, it would also be possible to provide that international protection is secured upon registering a work in this register.

However, both possibilities would require a revision of the Berne Convention and/or the other international copyright treaties that have incorporated the substantive provisions of the Berne Convention (1971) by reference.¹⁰⁸ This is easier said than done. To change the Berne Convention would require the unanimity of the votes cast.¹⁰⁹ This may be difficult to realize, given the large number of contracting states to the Berne Convention.¹¹⁰

Hence, even if, at the international level, the pragmatic objections against formalities have largely disappeared, in practice solutions may be difficult to achieve, given the requirement of international consensus on this – at least for some countries – rather delicate topic. Still, this does not mean that the idea of reintroducing formalities should be entirely abandoned. If there are legitimate reasons for doing so – and this paper has identified at least a few of these reasons – attempts at international consensus-building could certainly be further pursued.

6. CONCLUSION

By contrasting the current calls for reintroducing formalities with the legal-historical reasons for their abolishment, this paper has identified and examined some of the main arguments in favour of and against a reintroduction of copyright formalities. Evaluating these arguments in the light of today's digital realities, it can safely be concluded that there is now sufficient reason to look upon the issue of copyright formalities with new eyes.

The challenges for copyright that have emerged as a result of the increased production of digital content and its direct and ubiquitous accessibility in the online environment undeniably warrant legislative reform. The growing needs for creating more legal certainty concerning the claim of copyright, for improving copyright clearance and for enhancing the free flow of information are so pressing that it seems untenable to leave these challenges unaddressed.

Resurrecting copyright formalities may be one of the most salient ways of dealing with the current needs. Because of their inherent capacities to enlarge the public domain, to define and facilitate the recognition of copyright-protectable subject matter, to improve the licensing of

¹⁰⁸ These are the TRIPS Agreement (art. 9(1) TRIPS) and the WIPO Copyright Treaty (art. 1(4) WCT).

¹⁰⁹ Art. 27(3) BC (1971).

¹¹⁰ On 1 June 2009, there were 164 contracting parties to the Berne Convention (source: WIPO). Past experience teaches that revising the Berne Convention is not always a viable option. When the international copyright framework needed adaption to respond to the challenges of protecting copyright in the digital era, it was considered impossible to do this by introducing changes to the Berne Convention, because that would require unanimity among the contracting states. Instead, a new independent treaty was concluded, the WIPO Copyright Treaty, which is a special agreement within the meaning of art. 20 BC (1971). See art. 1(1) WCT.

copyright protected works and to enhance legal certainty for users and copyright owners alike, formalities seem fit to address the challenges that copyright is presently facing.

Moreover, from a contemporary viewpoint, the legal-historical reasons that contributed to the abolishment of formalities are no absolute impediment for their reintroduction. Although some ideological concerns with formalities, particularly the claims of the *ex lege* ‘natural law’ existence of and ‘natural justice’ legitimation of copyright, still appear relevant today, they do not seem to form an impregnable barrier to the reinstatement of formalities. In addition, the practical objections to copyright formalities, which relate to their awkwardness in the context of abstract-authored works and in securing international protection, have largely disappeared or at least may be easier to overcome. From a legal-theoretical point of view, therefore, there is sufficient ground to further explore and study the possible reintroduction of formalities.

In conclusion, in questioning whether formalities in the digital era provide an obstacle or an opportunity, this paper argues in favour of the latter. Copyright has never been an absolute and unconditional right, but has always reflected a balancing of interests between authors and the public. In the history of copyright law, formalities clearly played a key role in maintaining this balance. Although, in the twentieth century, they were abolished for obvious reasons, it is reasonable to ask whether they should now be reintroduced in the light of the changes caused by the advent of digital technologies. As this paper demonstrates, there indeed is sufficient reason to believe that reviving the copyright formalities of yesterday may help to address the challenges of today, with the object of preserving copyright for tomorrow.¹¹¹

¹¹¹ See Gibson (2005), *supra*, p. 173, who argues that ‘[reviving] the formalities of the past will preserve copyright for the future.’