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4. (Re)introducing Formalities in Copyright as a Strategy for the Public Domain

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4.1 Introduction

Formalities are an oddity in copyright law, at least for the countries adhering to the Berne Convention. Recently, however, many voices have been heard in favour of the reintroduction of formalities in copyright law, in order to counteract the rapid expansion of copyright protection and the ensuing diminishing of the public domain.

The idea of reintroducing some formal requirements in the copyright regime, so as to render access to copyright protection less automatic, has mostly appeared on the agenda of the open content proponents. As described by Lessig, the Copyleft initiatives aim, with a straightforward ‘Us Now – Them After’, to enable those creators who wish (‘Us’) to give the public (‘Us’ again) free access to their works. A further and necessary step to extend that regained freedom to the whole range of copyrighted works would be to convince legislators to introduce some elements for enhancing the opening of content by granting copyright owners (‘Them’) a limited monopoly on their works. Such a strategy, subsidiary and parallel to the deployment of Copyleft licenses, flows from the realization that the open source and open content licenses will not be sufficient to open access to and use of all creative content, if nothing is done to limit the extent of copyright in creative content.

Introducing new formalities in copyright, or reintroducing old ones, is one of the suggestions made by some scholars to reduce the power and extent of copyright. Formalities have been considered as a way to limit the automatic granting

1. Professor at the University of Namur (Belgium). The author wishes to thank all the participants of the Dutch Royal Academy Colloquium, *Open Content: New Models for Accessing and Licensing Knowledge*, that was held in Amsterdam on the 27-28 April 2006, for their reactions and questions on a preliminary version of this paper and, in particular, Professor Jane C. Ginsburg for her insightful comments.

of copyright, to shorten its duration or to make its enforcement less easy. Ultimately, such formalities would either aim at putting more works into the public domain or at making protected works more easily available and usable.

Thus, such formalities are conceived as *opt-in* mechanisms, i.e. as gateways through which the creator should pass in order to benefit from the protection of copyright or from some of its added features. In the history of copyright, formalities have always been considered, in the countries that provided them, as *opt-in* systems. Copyright was granted upon the condition of complying with the formalities required by the law, whether registration, deposit of copies, copyright notices and so on. A return to such systems of *opt-in* formalities would probably have an effect on the public domain. It would burden access to copyright protection and, as a result, expand the public domain to all creative content for which the creators have either decided not to apply for protection, or neglected to accomplish the required formalities.

However, formalities might have another effect on the public domain, if conceived differently. Indeed, formalities could be imposed to secure the relinquishment of one's work into the public domain. Such system of reverse formalities would remove the existing uncertainties, at least in Europe, about the possibility to give up copyright in a work. It would also guarantee the public domain status of a work for potential users. In this case, formalities would be an *opt-out* mechanism.

This chapter will examine both types of formalities – those opting into the copyright grant, and those opting out of the (now automatic) protection – and it will assess their opportunity and validity. Part 2 will examine those formalities the introduction of which (or reintroduction in some countries) has been proposed as a precondition for benefiting from or for exercising copyright. In each case, the validity of all these possible formalities will be assessed, specifically in relation to Article 5(2) of the Berne Convention, which prohibits making the existence or exercise of copyright contingent upon formal requirements. More importantly, the relevance of such proposals and their effect upon the promotion and availability of the public domain or open content will be considered in order to underline the pros and cons of the (re)introduction of formal requirements. Part 3 will consider the introduction of formalities for opting out of copyright protection. Examples will be drawn from the open access movement and an assessment will be made of the need for such formalities or, at least, for a better formalization of public domain relinquishment. Part 4 will explore formalities that can exist outside of copyright legislation but that may have an effect on the public domain.

In conclusion, Part 5 will attempt an overall critique of the system of formalities, which could enhance the public domain. I will argue for the retention of some formalities and explain their potential for enhancing access to and dissemination of knowledge without impairing authors' rights.

4.2 Opt-In Formalities for Copyright

Opt-in formalities have played a part in the history of copyright, both in Europe and in the United States. They have been gradually abandoned, particularly as a result of the adhesion to the Berne Convention, Article 5(2) of which prohibits conditioning the existence or exercise of copyright to the accomplishment of any formal requirements. Would the reintroduction of some formalities in copyright be appropriate and would it help the expansion or preservation of the public domain?

First, I will explain what type of open content could be enhanced by the introduction of the formalities proposed and to what extent it can be equated with the public domain in copyright. Then, I will review the history and early role of formalities in the copyright regimes. Finally, I will address the different formal conditions necessary for the promotion of open content.

4.2.1 Formalities for Which Open Content?

The ultimate purpose of the proposed reintroduction of formalities in copyright is to make more creative works available to the public – to make the public domain grow. Traditionally, copyright scholars have opted for a strict definition of the public domain, encompassing elements that are not protected by copyright, either due to the absence of the conditions needed to acquire such protection (absence of originality, mere ideas or principles); to a rule of exclusion (exclusion of official documents, of the news of the day); or to the expiration of the term of the right (works of an author deceased more than 70 years ago, works published more than 95 years from publication or 120 years after creation for some works in the US).

In recent articles, the notion of the public domain has been extended to embrace any freely available resources for intellectual production,² because they are not at all protected by copyright or because their use is beyond the copyright monopoly. If the function of the public domain, as envisaged by Cohen³ – whether cultural, creative, technical, scientific or purely cognitive or consumptive – is to exempt authors from the exercise of an exclusive proprietary right, then it should include not only those elements in which such rights are non-existent, but also resources or practices that are left untouched by the exercise of those rights.

2. Cohen, J.E. (2006), 'Copyright, Commodification, and Culture: Locating the Public Domain', in Guibault L. & P. B. Hugenholtz (eds.), *The public domain of information*. Amsterdam: Kluwer Law International. pp. 121-166; Samuelson, P. (2003), 'Digital Information, Digital Networks, and The Public Domain', *Law & Contemp. Probs.* 66(148); Chander, A. & M. Sunder (2004), 'The Romance of the Public Domain', *Cal. L. Rev.* 92:1331.

3. Cohen uses this criterion to envisage a new metaphor and theory for the public domain, based on viewing the commons as a set of cultural and creative practices. See Cohen, J.E. op. cit.

From a practical point of view, the commons or the public domain should be the field into which the public can enter without stepping on anyone else's intellectual rights. Economically speaking, it should cover the assets, or uses of such assets, for which no transaction could take place, based on an exclusive right of the author. Therefore, to determine the effect of possible formalities on the extension of the public domain, the latter can include all elements for which no exclusive rights of copyright can prevent use. One can also refer to the definition of the public domain devised by Chander & Sunder, that 'the resources for which legal rights to access and use for free (or for nominal sums) are held broadly'.⁴ This definition rightly encapsulates the public dimension of the resources, the 'commons' facet of the public domain, in other words the fact that the content enshrined by this notion of public domain is 'open', since it can be used by any member of the public without infringing copyright.

Emphasizing the quality of the content that should be open, i.e. whose access to use is not impeded by the existence or exercise of a copyright, is a reference to the function and objective of the public domain. It forms a public domain comprising two main parts: the first is the public domain in a traditional sense – what we can call the 'structural' public domain and encompassing elements that are not protected by copyright; the second includes those resources protected by copyright, but whose use or access is open and free (in the sense that no exclusive right of the author can prohibit it) – what we can call the 'functional' public domain.⁵

This is the definition of the public domain/open content that will guide my reflections on the introduction (or reintroduction) of formalities into the copyright regime. The role or objective of formal requirements can, indeed, be twofold. On the one hand – and it was this that was their original purpose in some countries – they can determine the existence of private protection. In that case, the default of compliance with those conditions would leave the creation in the realm of the unprotected (structural) public domain, making the creation available for all to use. On the other hand, some formalities leave access to the copyright protection intact, but make it more difficult for owners to exercise or enforce their rights. In that case, the content would still be protected by copyright but, not having satisfied the formalities required, it could only be used by the

4. Chander, A. & M. Sunder, *op. cit.* at 1340.

5. For a more elaborated view of these notions of the public domain, see Dusollier, S. (2008), 'Le domaine public, garant de l'intérêt général en propriété intellectuelle?', in M. Buydens & S. Dusollier (eds.), *L'intérêt général et l'accès à l'information en propriété intellectuelle*. Brussels: Bruylant. pp. 117-146. For a similar development in English, but limited to copyright, see Dusollier, S. & V.-L. Benabou (2007), 'Draw me a public domain', in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research*. Oxford: Edgar Elgar. pp. 161-184.

public in certain circumstances. The content would then fall into the functional public domain.

4.2.2 The Early Role of Formalities in Copyright

4.2.2.1 *The history of formalities*

Most early copyright laws required compliance with some formalities prior to the granting of a copyright monopoly. The first copyright law in history, the UK's Statute of Anne of 1709, required the registration of the title of the work with the Stationers' Company and the deposit of copies in different libraries. Non-compliance with those formalities was sanctioned by inability to enforce copyright before the courts. In order to comply with the revised version of the Berne Convention, this regime of formalities was suppressed altogether in 1911.

Similarly, the revolutionary decrees of 1791 and 1793, which gave birth to the French copyright system, required that some copies of the work be deposited at the Bibliothèque Nationale or, for visual works, at the Cabinet des Estampes. The legislative decrees made this deposit the only prerequisite for the enforcement of rights, although the case law has sometimes construed this formality as a condition for the birth of copyright.⁶ The formality of deposit was abolished in 1925, in order to allow French law to conform to the Berne Convention. However, deposit still plays an important role in France and it was recently expanded to websites, software and databases. A failure to fulfil the deposit requirement does not affect the existence or exercise of the copyright, but is a criminal offence. It should be noted that many countries have such a deposit system but do not make it a prerequisite for the existence or exercise of copyright.

In the United States, the 1790 Federal Copyright Act required a whole range of formalities.⁷ Works had to be deposited and registered with the Secretary of State, and a notice of copyright registration had to be published in different newspapers for at least four weeks. A copyright notice, providing the identity and location of the author and the date of copyright, was also to be affixed on each copy of the work. Copyright was granted for a limited number of years and could be renewed once by complying with new formalities of registration by publishing proof of compliance in newspapers.

In the first version of the Berne Convention, it was admitted that an author seeking protection in a country other than the country of origin had to subject her work to the conditions and formalities required by the law in the country of

6. Ginsburg, J. (1995), 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in B. Sherman & A. Strowel (eds.), *Authors and Origins – Essays on Copyright Law*. Oxford: Clarendon Oxford Press. p. 147.

7. Copyright Act of 1790, 1 Statutes At Large, 124. Available at: www.copyright.gov/history/1790act.pdf. Last accessed 13 October 2009.

origin of the work. This first admission of a role for formalities in copyright protection was eventually abolished by the Berlin revision that occurred in 1908. The rule now appearing in the Article 5(2) of the Berne Convention is that ‘the enjoyment and exercise of these rights shall not be subject to any formality’.⁸

Most countries have suppressed the formalities that they imposed on the existence or exercise of copyright, following the revision of the Berne Convention at the beginning of the twentieth century. This was not the case, however, in the United States, which did not become a member of the Berne Convention until 1989 and where many formalities have continued to exist until now. In order not to fall foul of its international obligation, the US legislator has made the existing formalities voluntary, while offering some inducements to compliance.⁹ Registration is still a predominant formality and acts as a prerequisite to an infringement action. Statutory damages and attorney’s fees can only be claimed for infringement procedures related to registered works, whereas the affixing of a copyright notice to the work disallows the defence of innocent infringement. The registration of transfers of copyright ownership is also encouraged by the law.

4.2.2.2 *The objective and effect of the formalities*

The decision to make the enjoyment of copyright dependent on formalities is often considered to be part of the typical distinctions between copyright’s regimes and the system of *droit d’auteur*.¹⁰ The history of literary and artistic property shows, however, that formalities have existed in both systems. Nonetheless, one can rightfully assume that the perspective of each national regime regarding copyright strongly influences the existence and persistence of formalities. This is underlined by Ginsburg, who sees copyright primarily as ‘a governmental incentive-program’¹¹ and suggests that, where the law favours free copying, there may be many formalities to comply with before copyright protection can be enjoyed. The mere creation of the work is not sufficient to justify protection and an additional burden is put on the author to assert her rights. Thus, the public domain is considered to be the default destination of literary and artistic content and copyright protection is seen as the exception, conditioned by compliance with the formalities laid down by the law. Conversely, in regimes where copyright is considered as simply flowing from the creative act, ‘no further action should be nec-

8. On that rule, see Ginsburg, J. & S. Ricketson (2006), *International copyright and neighbouring rights: The Berne Convention and beyond*. Oxford: Oxford University Press, N°6.101-108.

9. Sprigman, C. (2004), ‘Reform(aliz)ing Copyright’, *Stan. L. Rev.*, 57 (484): 494-495.

10. Strowel, A. (1993), *Droit d’auteur et Copyright – Divergences et Convergence*. Brussels: Bruylant / LGDJ, p. 297.

11. Ginsburg, J., *op. cit.*, p. 133.

essary to confer the right'.¹² Such a view became predominant in author-centred systems of copyright, such as France.

This was also the rationale behind the prohibition of formalities introduced in the Berne Convention in 1908, as a result of which the Contracting Parties opted for a copyright system centred around the notion of authorship.¹³

More specifically, the early formalities pursued different objectives. One of the first and foremost of these was to make the granting of copyright less easy in order to preserve the public domain. This objective explains the presence of formalities in all early laws, whatever the country. The public domain objective is also in line with the idea, prevalent in most countries at the time, that intellectual property is a limited monopoly. Early copyright laws, influenced by the Enlightenment ideology (in which the emergence of literary and artistic property is rooted), considered that ideas belonged to everyone and that only the author should be granted a limited right, the purpose of which was to promote both the act of creation and the public dissemination of works. In this way, copyright was shaped as the granting of a limited entitlement, both in duration and scope, and was either conditioned by a formalities-compliance process or accompanied by formalities enhancing the public access to works.

Within this framework, the aim of submitting the grant of copyright to formalities was to protect the public interest of access to creative content, both by encumbering the process of protection for copyright owners and by creating, via the formality of deposit, a huge repository of works available to the public. Formalities played a double role: Firstly, establishing the compliance with formalities as a default requirement meant that more creative works would fall into the public domain. This would enrich the territory of open content, since it increased the difficulty of putting a work within the ambit of property protection. Secondly, when fulfilled, the formality of depositing copies of the work constructed the kind of public domain that can be considered as belonging to the functional public domain, as defined above. Works deposited in the relevant national libraries were available for consultation and research, both during the duration of protection and after the expiration of the right. Thus, access to the knowledge or culture they contained was enhanced.

Despite (or aside from) the granting of copyright protection, such a formality gave birth to content that was relatively open. This is similar to the granting of a patent, where the trade-off is between the granting of the monopoly and the public availability of the knowledge contained in the invention to be patented. In a way, such a deposit formality created a cognitive public domain encompassing intellectual material, the content of which can be intellectually enjoyed or known.

12. Ibid.

13. Goldstein, P. (1991), 'Copyright', *Journal of the Copyright Society of the USA.*, 38: 120.

As far as copyright is concerned, where acts of viewing, reading, listening or enjoying a work are not deemed to infringe copyright, the deposit of copyrighted works adds a layer of practical accessibility to the enjoyment of protected content. This enriches the cognitive public domain, in the same way as patent divulgation does in the scientific field.

In other words, the role of the early formalities in copyright was a double-edged strategy for promoting the public availability of works, at least in terms of the deposit requirement, which had a significant archival function.¹⁴

Other, more practical, functions of formalities were designed to inform the public about the existence of copyright protection in a work, about its rights owner and, in the case of the copyright notice, to indicate the date of publication.¹⁵ The case law also recognizes that the registration of a work, and more rarely the presence of a copyright notice, could constitute *prima facie* evidence of copyright protection.¹⁶

4.2.3 Old and New Formalities for Opening Content

4.2.3.1 *Formalities conditioning the existence of copyright*

The realm of copyright protection has increasingly been seen as excessive and the ensuing shrinkage of the public domain has repeatedly been denounced. It seems logical, therefore, that the initial ideas about the reintroduction of formalities dealt with the conditions of enjoying copyright over creative content. Proposals to subject the existence of copyright to some formal requirements have mainly been voiced by American scholars. This is unsurprising given that the US has endured a regime of formal granting of copyright for a long time.

Lessig was probably one of the first scholars to investigate the idea of formalities as a way to constrain the copyright monopoly. In *The Future of Ideas* (2001), he suggested a return to a formalities-driven copyright regime.¹⁷ The system he proposes would be based on registration. Once registered, the work would be protected for an initial term of five years. Registration would be made simpler by the technological possibilities offered by the internet and could occur via the website of the Copyright Office. However, private and unpublished works would be exempted from this registration condition and be protected, as they are now, simply upon creation.

14. Strowel, A. *op. cit.*, p. 311.

15. *Ibid.*

16. For the United States, see *Ibid.*, p. 312.

17. Lessig, L. (2001), *The Future of Ideas – The Fate of the Commons in a Connected World*, Random House, p. 250.

Lessig detailed his proposal – again in favour of more formalities – once more, in his 2004 book, *Free Culture*.¹⁸ Here he articulates a system the main objective of which would be to create the incentives to minimize the burden of these formalities. Registration of a work would still be the condition for enjoying the legal protection of copyright.¹⁹ Nevertheless, instead of making the Copyright Office the central point for registration, Lessig finds inspiration in the model of registration of internet domain names, which delegates the task of registering works to competing registrars. (The Copyright Office would continue to establish and monitor the central registry and would decide on a set of standards for registrars). He expects that such a decentralized system of competing actors would significantly lower the burden and cost of the registration formality.

This proposal is not without obstacles. First, there are doubts about the compatibility of the reintroduction of a registration formality with the Berne Convention. Article 5(2) of the Berne Convention is very clear in this regard: no formality can condition the existence of the copyright. This prohibition undeniably comprises the obligation to register the work created as a precondition to enjoying copyright protection. The only solution to making the registration proposal valid would be to limit it to national works, as suggested by Sprigman.²⁰ Indeed, the Berne Convention only obliges Contracting States to refrain from imposing formalities conditioning the protection of a foreign work in their territory. Such an obligation does not apply to works the country of origin of which and the country in which the protection is claimed are the same.²¹ Such a limitation to national works would, however, greatly impair the usefulness of the proposal.

Leaving aside the question of compatibility with international obligations, as laid down in the Berne Convention, what could be the real effect of such new or recycled formalities on the expansion of the public domain and, more generally, on the copyright regime itself? The key motive for coupling the granting of copyright with a registration process is to grant copyright protection only to those works that are worth it – i.e. that they have market potential. The copyright owner would only endeavour to comply with and pay for the registration of these types of work. As Lessig says, ‘if a copyright isn’t worth it to the author to renew for a modest fee, then it isn’t worth it to society to support (...) the monopoly protected’.²²

18. Lessig, L. (2004), *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. Penguin Books, p. 287.

19. *Ibid.*, p. 289-290.

20. Sprigman, C., *op. cit.*, p. 542.

21. Ricketson, S. (1987), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Amsterdam: Kluwer, p. 220. N°5.81.

22. Lessig, L., *The Future of Ideas*, *op. cit.*, p. 252.

This rationale begs some comments. First, it espouses a peculiar view of copyright where, in practice, protection would only be granted to those works that might be expected to be commercially lucrative. The market demand (and success or hope for success) would then shape the realm of copyright protection, albeit indirectly. It seems to me that by making such a proposition, the (proclaimed) foes of the increased commodification of copyright paradoxically avail themselves of the category of the market to determine what should be protected by copyright. Literary and artistic works do have value outside of that granted by the market. By way of comparison, an invention's value can be rightfully determined by the market, since the system of rewarding inventors with a patent is based on the usefulness of the invention. Patents offer a monopoly affected by the industrial application and social usefulness of each patent, whereas copyright is not.

Second, although the proposal for registration ultimately purports to put more works into the commons, it curiously leads to the conclusion that only works that are considered as valuable, from a market point of view, but also based on the possible needs and demands of the public (how could the market potential be evaluated otherwise?), will be protected. Works with no interest to the public – or at least none recognized by the market – will fall into the public domain. Is this really the kind of public domain that the proponents of an open content world would like to build? It would mean a sort of openness by default, i.e. not only by a default of compliance with formalities but, mainly, as a result of a lack of interest or hope on the part of the author or rights owner in the commercial exploitation of her work.

Finally, the proposal for the registration formality leaves many practical questions open. For instance, would there be a limited period of time in which the registration would have to take place before copyright protection is forfeited? If so, would this mean that a work that the author failed to register in due time, would be forever placed into the commons or the public domain, even if this work has commercial potential? Could the registration of a work be carried out by an heir of the author after her death? Lessig's proposal carries the implicit assumption that the registration would only apply to published works, while the current system of copyright could still protect unpublished creations. This awakens doubts about the added value of such a proposal. It can reasonably be assumed that publishers would always register their works in the hope or expectation of commercial success. Which works, then, would fall into the public domain? Published works that the owner does not register because she believes they are not worth it? Or published works that the owner has forgotten to register? Works published by individuals on the internet, in blogs or discussion forums? This is unlikely to constitute a rich domain of unprotected content.

4.2.3.2 *Formalities conditioning the duration of copyright*

An important feature in the construction of a public domain of creative content is the passing of time, since the monopoly conferred by copyright is temporary. After a determined period of time has elapsed, the work is said to fall into the public domain. The length of that period has varied in the history of intellectual property but, on the whole, has tended to increase.

The reduction of the duration of copyright protection has often been posited by opponents or critics of the scope of copyright.²³ In fact, such arguments were strengthened following a decision in 2003 by the US Supreme Court in *Ashcroft v. Eldred*,²⁴ which upheld the most recent US law extending the duration of copyright. This provoked a number of proposals calling for the duration of copyright – considered to be excessive – to be reduced by reintroducing a formality of renewal after a short period of time.

In the aforementioned publications, Lessig suggested a return to the time when copyright was granted for a limited period and could be renewed. In his view, a first period of protection of five years should follow the first registration. This should be renewable for up to fifteen times, upon renewed formalities of registration and payment of an gradually increasing fee.²⁵ In the wake of the *Eldred v. Ashcroft* decision, Lessig agreed with others that the term of protection could even be made shorter than the potential duration of 100 years he first proposed, but still be subject to a renewal procedure.²⁶

Another idea connecting a shorter length of protection to a formal requirement of renewal, was recently expressed by Landes & Posner.²⁷ Based on an economic analysis of the commercial exploitation of copyrighted works, they propose a system of an indefinitely renewable copyright. The initial duration of the protection would be very short, but it could be renewed an unlimited number of times. That would not mean that the protection would be rendered perpetual, since Landes & Posner anticipate that many copyrights would not be renewed, resulting in works falling into the public domain perhaps even more rapidly than under the current system. The result of such a system would be that the bigger the commercial interest in a work, the longer the copyright duration should be. In turn, the costs of renewal would be minimal compared to the expected benefits. Landes & Posner argue that it is not the duration of the right that matters, but the formalities to

23. For an early proposal in this direction, see Breyer, S. (2002), 'The Uneasy Case for Copyright: A Study in Books, Photocopies, and Computer Programs', *Harv. L. Rev.*, 84: 323.

24. 537 U.S. 186 (2003).

25. Lessig, L., *The Future of Ideas*, op. cit., p. 251.

26. Lessig, L., *Free Culture*, op. cit., p. 292-293.

27. Landes, W. & Posner, R. (2003), 'Indefinitely Renewable Copyright', *U. Chi. L. Rev.*, 70: 471.

expand this duration and that reintroducing a renewal formality could ultimately make the public domain grow.²⁸

The criticism, expressed above, of the initial registration requirement can also be made here. According to the rhetoric of both Lessig and Landes & Posner, the public domain that would be gained through the reintroduction of a renewal formality, would be reduced to the garbage of valueless (at least in economic terms) works. This reasoning coincides with a commoditized view of the construction of the public domain, in which the market value of a work (and not its social one) dominates the protection. Under the system proposed, only valueless works would fall into the public domain, whereas works with the most value (where value is considered from an economic point of view) might be exclusively owned for longer or, in the Landes & Posner scheme, even forever.²⁹ Under such a system, Mickey Mouse would be perpetually protected.

Perpetual protection for economically valuable works might even be worse than the current system. Where economic value, rather than authorship, constitutes the dividing line between protection and non-protection, the copyright regime will only be shaped by the market's demands. The public domain will be the territory of market failures. This is a far cry from the vision of the public domain as the necessary destination of all creative content through the ineluctable passing of time.

This peculiar vision also aligns itself with some of the justifications that have been voiced in support of the extension of copyright duration. The enactment of the US Copyright Term Extension Act of 1998 was the result of the need to align the US duration with that applied in the European Union and to take into account demographic considerations. However, the need to extend the duration of copyright was also seen as a way 'to keep pace with the substantially increased commercial life of copyrighted works'.³⁰ The commercial life of works would certainly refer to the period of time during which they are valuable on the market. The insistence on the economic life of works as a touchstone for deciding the adequate duration of copyright is embedded in a strictly economic and commoditized justification of copyright. It is not a cultural justification. I still doubt that by referring only to economic motives, one can soundly develop and foster open content and public access to creative content and scientific knowledge.

28. *Ibid.*, p. 480.

29. It should also be said that the proposal by Landes & Posner has one main objective - to prevent rent-seeking from copyright owners who try to continuously extend the duration of the right. A formality would leave authors the possibility to augment the term of their right. This does not mean that the copyright term of others will be also be extended; this would be the case if legislation adding a number of years to the protection of all copyrighted works is enacted. I am indebted to Ejan Mackaay for having reminded me of this.

30. Statement by Senator Hatch, 144 Cong. Rec. S12377 (daily ed. 12 October 1998), cited in the Opinion of the Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), note 14.

Propositions to make the continued protection of copyright conditional have also found their way into a US Bill, the *Public Domain Enhancement Act*, introduced in May 2005 by Congressman Z. Lofgren.³¹ This Bill proposes that the Register of Copyrights charges a fee of \$1 for maintaining the copyright of any work published in the United States. This fee shall be due 50 years after the date of first publication or on a date to be determined after the enactment of the Act, whichever occurs later, and every 10 years thereafter until the end of the copyright term.

Such renewal formalities are contrary both to Article 5(2), which prohibits the dependence of the enjoyment of copyright on any formality, and to Article 7, which requires that the minimum duration of copyright be 50 years after the death of the author, of the Berne Convention. The main effect of the proposals seen so far would be to reduce the duration of copyright to less than the 50-years-plus-life term. The only solution for keeping the renewal formality in line with the Berne obligations would be to limit it to works of nationals, as in the *Public Domain Enhancement Act*. However, there is a possibility that this would make the system even more complicated to administrate and even more complex for users to grasp.

4.2.3.3 *Formalities conditioning the exercise or enforcement of copyright*

The exercise or enforcement of the rights granted by copyright can be subject to different types of formalities, not all of which are contrary to the Berne Convention. However, any formal requirement that conditions the exercise of copyright in such a way that impairs or constrains the enjoyment of the right's exclusivity, thereby rendering its existence meaningless, would certainly be invalid. Ginsburg and Ricketson consider that such an invalid situation would be encountered whenever any proceedings to enforce the right are made subject to a formality. As examples, they cite the deposit of works in the revolutionary French copyright decrees and the earlier US obligation of registration as a prerequisite to an infringement action.³² We will now examine the new formalities proposed by some scholars in the context of the meaning of 'the exercise of these rights' under Article 5(2) of the Berne Convention.

A right to use the work in default of some formalities

Again, Lessig has suggested making the capacity of the copyright owner to complain about unauthorized use of her work contingent upon the marking of that work (that could be ensured with the help of the new technological possibili-

31. A Bill to amend title 17, United States Code, to allow abandoned copyrighted works to enter the public domain after 50 years, 109th Congress, 1st Session, H. R. 2408, 17 May 2005.

32. Ginsburg, J. & S. Ricketson, *op. cit.*, N°6.104.

ties).³³ Should the work not be marked with a copyright notice, anyone would have the right to use it, without this being considered as a copyright infringement. This would lead to the granting of a default license, which would be applied when the work is unmarked. Lessig does not seek to prevent the copyright owner from complaining about such use, but the effect of such a complaint would be, in his view, to prohibit any further uses of the work, leaving the existing uses untouched and lawful.

This idea has been elaborated by Sprigman, who attaches a similar consequence to the failure of satisfying formalities.³⁴ In his scheme, the registration of the work and the affixing of a copyright notice would be voluntary. However, non-compliance with these formal conditions would expose the work to a type of legal or non-voluntary license, which would permit use of the work for a predetermined low fee (that would approximate the cost of complying with the formalities). According to Sprigman:

That way a rightholder who expects his work to produce revenue exceeding the cost of complying with the relevant formality will prefer to comply with the formality, whereas a rightholder who expects his work to produce revenue amounting to less than the cost of compliance will prefer to expose his work to the default license.

These two propositions differ slightly. Lessig's idea is probably more inclined to fall foul of Article 5(2) of the Berne Convention. Indeed, non-compliance with the formality of copyright notice would deprive the author of the very exclusivity of her right, since she would be unable to stop previous exploitation of her work. Sprigman's proposition produces a more complex situation, where the default of the formality does not prevent the copyright owner from exercising her right on prior use. However, it does result in such use entering into the field of copyright exceptions, in the form of a non-voluntary license. While such a proposal could successfully pass the scrutiny of Article 5(2) of the Berne Convention, it would also have to comply with the conditions of the 'three-step' test laid down in the Article 9(2) of the Convention, which I will not discuss here.

I have more reservations about the efficiency of Lessig's proposal than that of Sprigman. In Lessig's scheme, the author who forgets (or chooses not) to ensure the marking of her work, only makes the uses of her work prior to the discovery of her oversight or mistake fall into the realm of open content. One can imagine that the rights owners who want to stick to a traditional proprietary exercise of copyright would hasten to affix the copyright notice and to pursue those who

33. Lessig, L., *Free Culture*, op. cit., p. 290.

34. Sprigman, C., op. cit., p. 555.

infringe it. As a result, the content might be open for a very limited period of time, which jeopardizes the efficiency and soundness of the whole construct.

It also raises the question of the status of copies already in circulation. A rights owner who changes her mind (or realizes her forgetfulness) can only affix a copyright notice to copies of her works that she still has under her control – on those copies not yet sold or produced. Does this mean that, despite the accomplishment of the suggested formalities, the user who has access to an unmarked copy would still be able to use the work without fear of a copyright infringement suit? Such a conclusion would not give much weight to or incentive for the formality of marking once some time has lapsed. Rather, it would induce the rights owners to mark their works immediately and before any distribution of copies, a measure which would lead to less enrichment of the domain of open content.

I have similar reservations regarding all formalities that relate, in terms of their practical application, to the material copies of a work. In particular, such formalities give rise to a difficulty of evidence, given that the legitimacy of the usage of the work by a particular user would now depend upon establishing the status (marked or unmarked with a proper copyright notice) of the tangible copy of the work she has accessed. In practice, this would introduce considerations about the material copy, with which the user has accessed the work, into the debate about copyright infringement. Yet, the determination of the dividing line between copyright infringement and lawful use should not refer to a criterion that is external to copyright, i.e. the conditions under which a copy of the work was acquired. A key principle in copyright protection is the autonomy of the intellectual property of the work and of the real property of its material embodiment. Such a principle seeks to avoid the confusion between the rule governing the possession of the material copy and the conditions required to legitimately use (i.e. reproduce, communicate to the public or any other use covered by an exclusive right of the author) the copyrighted work itself. Attaching a formality to that material copy would only increase the confusion between the work and its material embodiment.

The same criticism can be addressed to the system of the default license put forward by Sprigman, at least as far as the formality of the copyright notice is concerned. However, his proposition to submit the unmarked and unregistered works to a default license – for which the user has to pay a price – does not harm the right of the copyright owner to the same extent. Besides, should the formality be reduced to a registration, the default license system would not depend on the status of the tangible copy, but rather, on the status of the intangible work itself.

Non-voluntary license schemes in file-sharing

A similar theme occurs in the discussion about peer-to-peer file-sharing. Proposals to immunize the downloading, or even the uploading, of works by users of

such networks have been numerous in recent years. Some suggestions have been made to consider the downloading of works as falling under the 'fair use' policy or the private copy exception, aided at times by lenient case law.³⁵ Others would prefer to submit such sharing of protected works to a non-voluntary license, the costs of which would be covered in the price of the internet access connection. Neither of these propositions really amounts to a formality imposed on the copyright owner. Opposing systems do touch upon the accomplishment of formal requirements.

On one hand, the suggestion to subject peer-to-peer sharing to the mandatory intervention of a collective society could be considered to be a kind of formality that would ultimately make content more open. Such a proposition has even been formulated in Europe by distinguished scholars whom no one can suspect of anti-copyrightism. Specifically, von Lewinski has written in favour of a compulsory collective management of copyright in the case of the distribution of works for private purposes, within peer-to-peer networks.³⁶

It is now commonly held that Article 5(2) of the Berne Convention does not prohibit the obligation to entrust a collective rights management society with the exercise of some rights in some peculiar exploitation contexts, as it does not limit, in any way, the exclusivity attached to the right or the possibility of claiming enforcement.³⁷

Should some states choose to adopt such a system of mandatory collective management of copyright for the purpose of authorising peer-to-peer file-sharing, such a 'formality' would make the creative content more open in that context, by facilitating the transaction between the user and the rights owners. Nonetheless, the efficiency of such a system, compared to other cases of mandatory collective management where the users are numerous individuals, has yet to be proven.

35. See early case law in France, e.g. TGI Rodez, 13 October 2004, *Comm. com. électr.* 2004, *comm.* N° 152, note Ch. Caron; CA Montpellier (3^{ème} ch. Corr.), 10 March 2005, *Comm. com. électr.*, May 2005, note Ch. Caron, now reversed by later case law and court of cassation.

36. Von Lewinski, S. (2005), 'Certain Legal Problems Related to the Making Available of Literary and Artistic Works and other Protected Subject Matter through Digital Networks', *eCopyright Bulletin* 1 (January-March). See also Bernault C., & A. Leblois (2005), 'Peer-to-peer et propriété littéraire et artistique – Etude de faisabilité sur un système de compensation pour l'échange des oeuvres sur Internet'. Available at: <http://alliance.bugieweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf>. This study has been frequently quoted by the French proponents of a compulsory license applied to P2P file-sharing and has sometimes been falsely claimed as being endorsed by Prof. André Lucas. The legal arguments of this study, however, are rather weak.

37. Ginsburg, J. & S. Ricketson, *op. cit.*, N° 6.105, footnote 322 and the references cited; Von Lewinski, S (2004), 'Mandatory Collective administration of Exclusive Rights – A case Study On Its Compatibility With International and EC Copyright Law', *eCopyright Bulletin* 1 (January-March): 11.

Another proposition dealing with peer-to-peer file-sharing includes a formal condition. Litman has suggested permitting rights holders to choose between allowing their works to be shared in peer-to-peer networks in exchange for a levy system and encapsulating their works in DRM systems of protection that would prevent them from being further distributed without authorization.³⁸ In other words, the copyright owner would have the choice between a fully-fledged exercise of her exclusive rights, aided by lock-up mechanisms, and an amputation of her exclusive rights in favour of the users, compensated by an adequate remuneration. This system has been elaborated in another article by Peukert,³⁹ who dubbed Litman's scheme a 'bipolar copyright system'. Litman proposes that sharing, compensated with a levy or tax, would be the default rule. Copyright owners would formally indicate their will to opt out of that default license to maintain the full exclusivity of their rights. This act of opting-out would involve providing the work in a DRM format with adequate information for users or, alternatively, filing a notice with the competent authority. Arguably, this can be considered a formality forbidden by Article 5(2) of the Berne Convention,⁴⁰ since it imposes a formal condition on the copyright owner in order to regain her exclusive rights. For this reason, Peukert recommends transforming the model into an opt-in system, in which the rights holder could positively choose to permit the sharing of her works.⁴¹ Such an opt-in system would, in fact, consist of the very exercise of the exclusivity afforded by copyright: by opting for a scheme of authorization of sharing-plus-levy, the copyright owner exercises her right to authorize uses of her work, normally covered by the monopoly. Thus, the formality-free Berne rule would no longer be in the way. What differs from the actual situation, where the rights owners can certainly decide not to sue users for file-sharing, is that a coherent mechanism of perception and repartition of levies would be provided to the authors.

The effect of such a system on open content differs according to whether a choice is made for an opt-out or an opt-in regime. Should the authorized file-sharing of the work be the default rule, the formal and positive act to be complied with by the rights holder to maintain her exclusive right would indeed promote greater freedom to use copyrighted works in the digital environment and particularly in peer-to-peer networks. Conversely, if the option for a compulsory licensing scheme rests upon the rights owner, it is doubtful that the copyright industry would prefer compensation through levies over a full remuneration enabled by the exercise of copyright. However, some types of rights owners (individual

38. Litman, J. (2004), 'Sharing and Stealing', *Hastings Comm. & Ent. L.J.*, 27: 39.

39. Peukert, A. (2005), 'A Bipolar Copyright System for the Digital Environment', *Hastings Comm. & Ent. L.J.*, 28:1.

40. *Ibid.*, p. 61.

41. *Ibid.*, p. 69.

authors, independent labels, performers, etc.) might well choose for a comprehensive, fair and effective mechanism of adequate remuneration. This would compensate for the uncontrolled sharing of works and be an alternative to the exclusive control of their works, since it might generate more secure compensation. Not all copyright owners value their copyright in the same way; not all of them favour a model of complete control over the use of their works. The support that the representatives of such rights owners have sometimes given to legal proposals for a peer-to-peer compulsory license indicates that they may indeed welcome the opt-in system suggested by Peukert.

Formalities conditioning the enforcement of copyright

Other formalities can be imposed at the enforcement stage without being in contravention of the Berne Convention. The first type of valid enforcement formality still operates in the US, where the claim for statutory damages and attorney fees is contingent upon the prior registration of the work. Since they do not prevent the enjoyment of the copyright or the initiation of an enforcement action, but only confer additional remedies (that are not required by the Berne Convention), the effect of such formalities is certainly an important incentive. That said, its effect on open content is minimal.

Other formalities might be more relevant from a user's viewpoint. For instance, it would be very useful to oblige the rights owners to attach some publicity to the transfer of their rights. The profusion of content available makes it very difficult to know who the author of a work is and, more importantly, whom the user should contact in order to obtain authorization to use a work. Copyright notices usually served that purpose, at least by indicating who the initial rights holder was and when the work was published. While the Berne Convention prohibits that notice from being a condition to enjoy or enforce the right, it also encourages the use of such mechanisms, by stating that such an indication would serve as a presumption of authorship.

One could take a step further and put in place a system of public registers, in which the transfer of copyright from the original author to the subsequent and successive rights owner(s) could be recorded. An incomplete registration of the authorship status of a work would not lead to the forfeiture of copyright or of the possibility to claim enforcement, but would mean that the unregistered transfer to the user could not be opposed. Ginsburg and Ricketson approve such formal rules that 'tell us *who* is entitled to enforce a copyright whose existence the rules do not call into question'.⁴² They also consider that 'authors and right holders are free, and indeed should be encouraged, to facilitate both would-be exploiters'

42. Ginsburg, J. & S. Ricketson, *op. cit.*, N°6.105.

clearance of rights, and general knowledge of when a work will fall into the public domain'.⁴³ Such a formality should be imposed by copyright laws.

4.2.3.4 *Formalities conditioning new protections of copyright*

Proposals for formalities conditioning additional protections of copyright, such as protection against the circumvention of technological measures, are less rare. Yet, they could prove to constitute an efficient way of making more content open.

Among the possible formal rules that could be imposed, are the traditional sets of formalities, such as work registration or notice, which would not condition the enjoyment of the right in the work, but only the possibility to benefit from the legal protection of the technological measure encapsulating the work.⁴⁴ The consequence of not complying with those formal requirements would be that the technological measure protecting the work could then be circumvented, without fear of an infringement action (at least for the act of circumvention, the ensuing copyright infringement would still be unlawful). However, the effect on availability of creative content would remain minimal. The only additional burden would be on the rights owners, albeit a burden that seems too minor to really matter in relation to the burden of deploying technological protection around creative products.

Conveying a more significant purpose to the formality related to technical lock-ups could have a more direct effect on the openness of the content. One idea would be to force the copyright owner to publish information about the technological measures used to protect the work or to entrust a public body with that information. This publication could have two effects on enhancing open content: First, it would enable competitors to develop interoperable products. The publication of the source code or the interface specification (or any other useful information) of the means developed to protect and secure the content could be made a prerequisite to the protection of such technical means. The lack of interoperability between the systems developed to securely distribute works on the internet can lead to a further content lock-up, whereby closed formats or standards of DRM systems are used in an anti-competitive manner. Such anti-competitive behaviour has already been observed in respect of certain legal platforms for music downloading, where an unattractive tied-in provision of content was offered without being a necessity for copyright protection. The interoperability between different DRM systems is encouraged by the European Commission in Directive 2001/29/

43. *Ibid.*, N° 6.107.

44. It should be noted that the requirement for the registration of work that is mandatory under US law, in order to claim a copyright infringement, was not deemed necessary to enjoy the protection of the anti-circumvention provisions of the Digital Millennium Copyright Act. See *I.M.S. Inquiry Management Systems, Ltd., v. Berkshire Information Systems, Inc.* 2004 U.S. Dist. LEXIS 2673, (S.D. N.Y. 2004).

EC of 22 May 2001 on Copyright in the Information Society.⁴⁵ However, no incentive or obligation appears in that text.

The French government has acted on this need for interoperability in its transposition of the Directive. The new provision appears in article L. 331-5 of the *Code de la propriété intellectuelle* and relates to the definition of protected technological measures. It also establishes a regulatory body (*Autorité de Régulation*), one of the missions of which is to decide about the interoperability issues raised by the deployment of DRM. This body can enjoin DRM providers or rights owners using DRM to provide the information needed to achieve interoperability. That information is defined as the technical documentation and interfaces needed to obtain, in an open standard, a copy of a technically protected work and a copy of information in an electronic form accompanying this work. The French transposition law has not gone as far as conditioning the protection of the technological measure against circumvention on the provision of the interoperability-related information.

The second effect of the publication of useful information about the operation of a technological measure could help the organizations in charge of reconciling the presence of DRM with the benefit of some copyright exceptions to find ways to effectively enjoy such exceptions. Already, some years ago, Cohen & Burk proposed the use of a key-escrow system, which would enable users to benefit from fair use, despite the presence of technological measures.⁴⁶ A third party, trusted by the public, would hold the keys to the technological tools used by the rights owners and could ‘open’ or unlock the work when justified by fair use. Making the protection of the technological measures dependent upon the deposit of the keys would be a formality that might be effective in opening content to users in legitimate cases. It could also help archive technically protected content and solve issues raised by technological measures that become obsolete.

Would such formalities violate the prohibition of formalities imposed by the Berne Convention? The WIPO Copyright Treaty states that Articles 2 to 6 of the Berne Convention apply *mutatis mutandis* to the protection it provides.⁴⁷ This includes Article 5(2) of the Berne Convention and seems to indicate that the existence and enjoyment of the adequate protection of technological measures shall not be subject to any formalities. However, this proviso could be construed as referring to the copyright protection it provides and not to the ancillary protection

45. Directive 2001/29/EC of 22 May 2001 on Copyright in the Information Society, OJ L 167, 22.6.2001, p. 10–19.

46. Burk, D. & J. Cohen (2001), ‘Fair use infrastructure for copyright management systems’, *Harv. J. L. & Tech.* 15(41); see also Labbe, E. (2002), ‘L’accès aux dispositifs de neutralisation des œuvres verrouillées : une condition nécessaire à l’exercice d’exceptions au droit d’auteur’, *C.P.* 1. 2002: 771.

47. See Article 3 of the WIPO Copyright Treaty.

of the technological measures. It should not prevent requiring some formalities to enjoy such a protection, and certainly not, setting up incentives, or even sanctions, to promote the publication or public deposit of information, such as the provision of the DRM-code or of any information related thereto.

One could go a step further and argue that formalities imposed as a prerequisite to the prohibition of DRM tampering belong to the overall balance pursued by the anti-circumvention provisions, conveying the adequate protection required by the WIPO Treaties. This adequate protection begs legislators to include the proper safeguards for the exceptions, as well as access to knowledge and culture as underlined by the Preamble of the 1996 Treaties, within the anti-circumvention provisions.⁴⁸

4.3 Opt-out Formalities

Formalities to opt-out of copyright protection would be another avenue to explore. As yet, they do not exist, but some formal systems are emerging, which promote the use of some creative content, even when it is still protected by copyright. This section will give an overview of such systems and address new ideas for formalizing the public domain.

4.3.1 Formal Systems for Orphan Works

Orphan works are copyrighted works for which a user cannot identify and/or locate the copyright owner, after diligent research. As a result of this impossibility of identification of the copyright owner, no authorization to use the work can be provided. This leads to an economic inefficiency both for the potential user, who is forced to give up the envisaged exploitation of the work, and for the copyright owner, who cannot benefit from revenues related to any exploitation.

Many countries have established mechanisms to solve the issue of orphan works and to allow exploitation under certain conditions.⁴⁹ I will not review all the systems or solutions developed so far. What interests me most is the gradual construction of a system partially based on formalities, in order to facilitate the

48. On the construction of the notion of 'adequate protection of technological measures' by reference to the Preamble of the Treaties, see Dusollier, S. (2005), *Droit d'auteur et protection des oeuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des oeuvres*. Brussels: Larcier, p. 86.

49. The US report on this question is available at: www.copyright.gov/fedreg/2005/7ofr3739.html. For the European Union, see also Digital Libraries High Level Expert Group – Copyright Subgroup, *Report on Digital Preservation, orphan Works, and Out-of-Print Works*, June 2008. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf, as well as the *Memorandum of Understanding on Orphan Works*. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf.

availability of the orphan works. Orphan works are not part of the public domain *stricto sensu*, but they contribute to what we have previously called the functional public domain: provided a work is recognized as orphan, the works benefit from a regime where access and reuse is generally granted, not on the basis of an exclusive right but, depending on the country, within the framework of an exception, a compulsory license or an extended collective license arrangement (still based on exclusivity, but in practice the exploitation will be authorized).

Different formalities can condition the orphan works regime. First, the European Recommendation of 24 August 2006, on the digitization and online accessibility of cultural material and digital preservation,⁵⁰ advocates the establishment of lists of orphan works and works in the public domain in order to promote their availability. This could amount to a registration or deposit mechanism for orphan works, administered by collecting societies. In fact, collecting societies and libraries (through the European-based ARROW project) have already started to put in place such lists or databases of orphan works.⁵¹ The Report of the European High-Level Group on Digital Libraries also underlines the need to establish registries for orphan works, with the purpose of collecting information on any work that has been declared orphan by the competent body or administration, in order to facilitate searches by other users. In a sense, this establishes a formal registration of orphan works, which can lead to the specific regime for such works.

Another interaction between orphan works and formalities stems from the fact that the issue has raised the question of the measures needed to improve the availability of information on works, rights holders and rights. In particular, the use of electronic and other identifiers, the creation, use and maintenance of metadata in the digital files, the recognition of the value of standard identifiers, or the naming of the relevant rights holders on the packaging or covers of works have been mentioned. While these formalities are not mandatory, they may work as incentives for the rights owners to affix proper information to the work, in the form of a copyright notice or otherwise. This would prevent the application of the regime of orphan works and is more lenient than the mere application of exclusive rights. Thus, the development of a formalized system for identifying works, rights owners and works that are considered orphan, would enhance the availability of works.

However, if the omission of registering the work or affixing a copyright notice were sufficient to qualify the work as 'orphan', it would amount to a formality prohibited by the Berne Convention, since the very exclusivity of the copyright

50. Commission Recommendation of 24 August 2006 on the digitization and online accessibility of cultural material and digital preservation, 2006/585/EC, OJ L 236, 31.8.2006.

51. See www.d-nb.de/eng/wir/projekte/arrow.htm.

would be reduced by not complying with these conditions.⁵² Therefore, the precise conditions for benefiting from an extended use of orphan works, should be carefully determined to enable authors to properly exercise their rights.

4.3.2 Formalizing Open Access Mechanisms

Creative Commons or similar licenses rely heavily upon formal requirements to promote openness and public availability of creative content. Indeed, the desire of the copyright owner to share her work on a free basis requires her to undertake some formal steps: Firstly, the identification of the basic rights granted to the user (formalized by the choice of a different license for each combination of rights) and secondly, the affixing of the chosen license to the work, embedded in digital icons and a digital file accompanying the work.

This situation is a reversal of the traditional copyright formalities, where the work has to be registered and a copyright notice has to be affixed to copies of the work in order that they be granted protection. In Creative Commons licenses, the choice for an open access regime depends on the registration of the work through the Creative Commons licensing tool and, primarily, on the affixing of the relevant icons and license, which formalize the open access regime chosen by the creator. The Creative Commons system is probably a more elaborate example of the formalization of the granting of open access, but other licensing systems might work in a similar way.

Here, formalities play a new role in copyright law; not strictly opting-out of the copyright regime, but opting-out of its exclusive nature and choosing a non-exclusivity regime. Because it is a private-ordering mechanism, the creators adhering to such models for the exploitation of their works are free to determine which formalities to apply. One cannot talk *prima facie* of a requirement of formalities in the open access field. However, the particularity of the Creative Commons licensing tools is that they establish a genuinely normative system, with its roots in private ordering, but which pretends to have value beyond the parties to the license, insofar as the license remains attached to the work itself.⁵³ Consequently, the formalization of the public domain feature (in the functional sense of the public domain) of such licenses applies to the works themselves and they could be considered as formalities enhancing the availability of works.

Some scholars have suggested going a step further by legally formalizing the conditions to put copyrighted works under such a regime. Clément-Fontaine defended a PhD in France that proposed a complete regime for open works.⁵⁴ The

52. See Reply Comments on 'Orphan Works' Inquiry (Federal Register, 26 January 2005, by Jane C. Ginsburg & Paul Goldstein, 9 May 2005 (on file with the author).

53. On that point see Dusollier, S. (2007), 'Sharing Access to Intellectual Property through Private Ordering', *Chicago-Kent Law Review*, 82: 1391-1435.

54. Clément-Fontaine, M. (2006), *Les œuvres libres*, Thesis. Montpellier: to be published.

recourse to the instrument of contract that characterizes the private ordering strategy of the open access initiatives, suffers from an intrinsic weakness linked to the privity condition of the contract and the legal uncertainty that results from the often complex chain of successive open access licenses.⁵⁵ This legal insecurity may prejudice the user of the work.⁵⁶ Clément-Fontaine offers a solution, proposing the establishment of a specific status in the law for *free works*.⁵⁷ Such a system would necessarily imply some formality to publicize the exploitation of a work under an open access regime. These formalities would serve as an opt-in to that specific regime, or rather, an opt-out from the default copyright regime, which requires an explicit and individual authorization to exploit the work. In addition, it would make the author's choice known to potential users. This proposal is not so far removed from the primary role assumed historically by formalities in copyright.⁵⁸

4.3.3 Formalizing Public Domain Relinquishment

In the same vein, formalities can be viewed as a means to allow for the definitive abandonment of copyright in a work. Some authors would not be satisfied with the open access strategy, but would like to give up their rights altogether and relinquish their works to the public domain. This relinquishment faces legal issues of validity, particularly in Europe where moral rights are generally said to prevent a complete renunciation of copyright.

The legal aspects of a copyright abandonment certainly deserve greater attention in legal literature. In particular, the doctrine that equates copyright to a property right should consider that property encompasses a right to dispose of one's goods: the owner of a tangible good can abandon it, thereby renouncing any right over the object. This is the *abusus* in the civil law notion of property. If copyright is nothing but a property right, then does the moral right offer sufficient grounds to reject that right in order to dispose of one's work?

The moral right itself may contain the features to justify the relinquishment of the work into the public domain through the right of divulgation. The right of divulgation, when recognized by copyright law, grants the author the right to decide when and how her work can be disclosed to the public. This right of divulgation can certainly explain the author's choice to exploit her work under a Crea-

55. See Dusollier, S., 'Sharing Access to Intellectual Property through Private Ordering', *op. cit.*

56. See Elkin-Koren, N. (2005), 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons', *Fordham L. Rev.*, 74: 375.

57. See Clément-Fontaine, M. (2008), 'Faut-il consacrer un statut légal de l'œuvre libre?', *Propriétés Intellectuelles*, p. 69.

58. Formalities to enter this specific regime should also serve as a means for the author to properly assess her choice, as open access might not be a very remunerative strategy and should not be imposed on the author by economic intermediaries.

tive Commons or similar license. Would it not equally legitimize the divulgation under a no-copyright regime? One might object on the basis of the inalienable nature of the right of divulgation, which would support the argument that it is impossible for the author to get rid of this right and therefore of the copyright itself. Yet inalienability should not mean non-disposability.

In any case, the legal validity of the relinquishment by the author of her copyright merits further study. If recognized, it would be useful to formalize such an abandonment by setting up formal steps to opt out of copyright protection, both to protect the author from the consequences of a definitive, but ill-thought through, decision and to publicize the work as belonging to the public domain.

4.3.4 Marking Public Domain Works

Recognizing the validity of copyright relinquishment begs another question, that of the status of the voluntary public domain (or *domaine public consenti*). Admitting that the author can renounce her copyright in favour of the public domain is only a legitimate choice if no other person can regain copyright or exclusivity over the work in any other way. This would demand that the works placed voluntarily in the public domain benefit from a legal status that guarantees their non-exclusivity and non-rivalry. Such a legal status should relate to any part of the public domain, whether constituted of the free will of creators giving up their rights or of the application of the law, as is the case for works excluded from the protected subject matter and for works where the copyright has lapsed.

Yet, no legal status exists for the public domain, which weakens its effectiveness.⁵⁹ At the time that intellectual property was created and during the constant organization of its regime in the ensuing three centuries, no consideration was given to the organization and institutional construction of the intellectual commons or public domain. This was considered unnecessary because such commons were a given; whereas intellectual property had to be built and designed to organize exclusivity.

That situation has changed. The public domain is no longer a given, but an exception to intellectual property. As a result of the public domain being seen as the negative of property, as well as its default position of having no legal protection, it has never been submitted to a clearly defined regime and the non-exclusivity of some goods has never been organized or governed. Conversely, this lack of regulation has jeopardized the public domain, since it cannot rely on a proper legal construction to preserve its key features of non-rivalry and non-exclusivity. Thus, building a legal regime for the public domain should be a primary objective for proponents of the public domain.⁶⁰ There is no room in the context of this

59. See Dusollier, S. & V.-L. Benabou, *op. cit.* at 164.

60. *Ibid.*, p. 171.

chapter to further develop this possible construction. That said, any legal status of the public domain would greatly benefit from a formality regime, which would primarily rely on the active deposit of public domain works and an assertion that a work belongs to the public domain either through the will of its copyright owner or through the passing of time. Systems of marking public domain works could also be developed.

Such formalities would not be contrary to Article 5(2) of the Berne Convention as they would organize the non-copyright status of a work.

4.4 Formalities External to Copyright Legislation

Other formalities are worth mentioning, even though they are external to the copyright regime and neither condition the enjoyment of the copyright nor the enforcement of additional layers of protection currently organized by the copyright legal provisions.

The best known is the formality of the legal deposit of works, which has existed in many countries following the adoption of the prohibition on formalities by the Berne Convention. In some countries, the sanctions for the failure to accomplish the deposit are rather harsh. In France, for example, a penalty of up to €75,000 can be imposed. This is certainly an inducement for producers of creative content to comply with this administrative requirement.

The effect of these provisions on copyright protection and the public domain are rather indirect. They would, at least, enrich a cognitive public domain, in the sense that works would be stored in a public repository and their content made available to the public. Additionally, as previously mentioned, if such a deposit remained protected, it would greatly contribute to publicizing the public domain works when copyright expires. The writings of Hess & Ostrom also suggest looking at the protection of the intellectual commons in the institutional environment that surrounds them.⁶¹ Economists have analyzed systems where commons are to be found. Such systems are referred to as a *common-pool resource*. While some commons are not owned by anyone (*res nullius*) or, conversely, they are collectively owned (*res communes*) – in both cases ownership is not necessarily a legal term – a common-pool resource will generally include some property rights, i.e. a set of rights defining the access and use of the resource.⁶² Thus, common-pool resources can be defined as ‘substractable resources managed under a property

61. Hess, C. & E. Ostrom (2003), ‘Ideas, Artefacts and Facilities: Information as a Common-Pool Resource’, *Law & Contemp. Pblms*, 66:111.

62. The set of rights defining such a property regime is said to comprise the access right, the right of extraction, the right of management, of exclusion and of alienation. These categories have been identified in Schlager, E. & E. Ostrom (1992), ‘Property-Rights Regimes and Natural Resources: A Conceptual Analysis’, *Land Econ.*, 68: 249.

regime in which a legally defined user pool cannot be efficiently excluded from the resource domain'.⁶³

In the economic literature related to tangible resources, protecting the commons from exhaustion and allowing a sustainable use of the resource can generally be done by protecting such common-pool resources. This can be done by regulating access to these resources, by establishing a collective type of management between possible appropriators of the commons or by coordinating their activities.⁶⁴ Ocean resources are protected by regulating access rights (including fishing, commercial exploitation, mining, scientific research rights) to the pool or domain that contains such commons.⁶⁵ The same is true for Antarctica, where rights of scientific research are shared and organized between countries, which accept the rules and obligations of the applicable treaty.⁶⁶

Hess and Ostrom have applied this traditional reasoning to creative content and have tried to devise a scheme for enhancing the size of the intellectual commons and access to them. Examples of common-pool resource systems in this context are libraries or archives, repositories or even the internet.⁶⁷ Making the legal deposit of works mandatory could create and enrich a central repository/library and establish a common-pool resource system that prevents the depletion (in the sense of intellectual loss) of the intellectual goods created and produced. This might be a sufficient objective in terms of the tangible commons where the main concern is the risk of excessive consumption, exhaustion or pollution of common resources (such as water, air, biodiversity, etc.). In terms of the intellectual commons, however, overuse would not lead to exhaustion. Conversely, the discourse about the intellectual commons should take into account their inherent value; that is, the possibility of access to them and of obtaining knowledge of their content. This explains Hess & Ostrom's further step of analyzing the information flows occurring in such systems and the way these flows could be better organized, specifically through collective action, in order to ultimately enhance access to the intellectual commons.⁶⁸ Once the legal deposit is imposed, it becomes necessary to implement other policies in order to allow the public to have knowledge of this intellectual wealth and to gain effective access to it, in respect of copyright. The organization developed for managing access to such content could eventually extend to the organization of an effective availability to public

63. Buck, S. (1998), *The Global Commons – An Introduction*. Washington: Island Press, p. 5.

64. Hess, C. & E. Ostrom, *op. cit.*, p. 117.

65. Buck, S., *op. cit.*, p. 71-102.

66. *Ibid.*, p. 45-70.

67. Hess, C. & E. Ostrom, *op. cit.*, p. 129.

68. Hess, C. & E. Ostrom, *op. cit.*, p. 134-144.

domain works.⁶⁹ However, that reflection goes well beyond the issue of formalities in copyright and could be the topic of further research.

Another obligation to foster access to some creative content could be applied to scientific research. When research has been publicly funded, one could imagine requiring the publication of the results in open access schemes.⁷⁰ Here again, the mandatory destination of specific scientific creation into the commons is the result of a material rule or obligation, rather than a formal requirement. It also organizes a better system for information flows in a common-pool resource.

Even if, strictly speaking, it is outside of the copyright regime, such an obligation might be at odds with Article 5(2) of the Berne Convention, to the extent that it can be considered as preventing the rights holder from relying upon the exclusivity of her rights when deciding the mode of exploitation of her work. To achieve the same result, the funding authority could also decide to include a copyright waiver in the research contract. But this would deprive the author of her exclusive rights altogether and would not necessarily lead to a better dissemination of knowledge. Acknowledging the legitimacy of the obligation to provide scientific results in an open access scheme would be a lesser evil.

4.5 Conclusion: The Necessary Features of an Efficient Formalities Regime

Reintroducing some formalities could be a way of fostering the dissemination of knowledge and access to creative content. However, I doubt that the formalities generally proposed by proponents of open content initiatives would be effective in achieving this result. I have three criticisms with respect to the proposals emanating from the open content or commons movements.

First, most of the formalities proposed contradict the Berne rule that prohibits formalities conditioning the existence or enjoyment of copyright. However, this rule could be changed; it is not an immutable or sacred dogma, although lawyers are inclined to think of it as part of the natural order and to believe in it religiously. That said, the Berne Convention is not an easy piece of legislation to modify and, personally, I believe it offers a reasonable and balanced framework for the protection of literary and artistic property, particularly through its formality-free rule.

Secondly, I also have reservations about formal requirements that relate to the material copy of a work, such as a marking requirement or the affixing of a copy-

69. Dusollier, S. & V.-L. Benabou, *op. cit.*

70. As suggested in the *Study on the Economic and Technical Evolution of the Scientific Publication Markets in Europe*, European Commission, Final Report, January 2006, p. 69, and as discussed in Chapter 4 of this book.

right notice. Not only does this raise practical difficulties for some types of works, it also blurs the boundary between the work and its physical embodiment. By contrast, the copyright regime (perhaps most clearly in respect to author's rights) is exclusively or, rather, primarily, concerned with regulating intellectual and intangible works. More fundamentally, I find the very content of the formalities proposed questionable. On the whole, their proponents consider that the burden resulting from the obligation to comply with some formal requirements would be sufficient to push more works into the public domain. I doubt this. My main concern, however, is the logic of simply tying the formality to a supplementary burden that the creators or producers of creative content will endeavour to adhere to when they consider that their content is worth it. This puts the expected value of the work at the centre of the efficiency of the formal requirements and makes this value the main criterion for determining the line between what should and will be protected by copyright and what might fall into the public domain.

In that sense, the reasoning applied to the desired construction of an open content domain – in terms of commercial evaluation of the work or in terms of the market – is rather ambiguous. It reinstates a relative inequality in the copyright regime between works that are worthy of protection and those that are not. This is precisely the type of elitism and inequality in copyright that the Berne Convention wanted to abolish when it prohibited the formalities, almost a century ago. By rooting the granting of protection in the sole act of creation, the Berne Convention made all creators equal under the copyright regime. Reintroducing some formalities in copyright implies that all creators would have the same capacity to bear this burden. It also tends to neglect the possible impact of the economic and social situation of the rights owner on the weight of that burden. This corresponds to a particularly limited view of the creative process and would be a peculiar way of building the commons.

One way that the burden could be lightened is by using technological tools. However, if it becomes so easy, what would be the point of using formalities as a filtering mechanism and as an indirect tool to increase open content?

I might be in favour of a reintroduction of formalities in copyright, but for a completely different reason. Formalities could be imagined as an incentive linked to the possible commercial success of the work, on the sole condition that copyright only protects cultural creation and that formalities be applied to other types of intellectual creation for which the threshold of protection would be higher.⁷¹ This would demand making copyright a two-tier regime, where the protection of

71. See the proposition in Grosheide, W. (1995), 'Paradigms in Copyright Law', in B. Sherman & A. Strowel (eds.), *Authors and Origins – Essays on Copyright Law*, Oxford: Clarendon Oxford Press, pp. 203-233.

cultural works⁷² would be on the higher tier and formality-free, while other types of creations, such as computer software, databases, informational works, and neighbouring rights in phonograms, films and broadcasts, would only be protected when properly registered. The inherent value of this sort of creation, which also justifies the demand for copyright protection, is not cultural but purely commercial and could be perfectly assessed in terms of market value and access. Therefore, applying a system of formalities to such creations, as a filter for protection, might be legitimate. However, this would require a complete shift in our copyright world and it is a far more radical and heretical proposition than the one developed by proponents of open content!

Without going to this extreme, some formalities could have a beneficial effect on open content. One key condition could be that such formalities should not be just burdens or formal procedures, but that they have a direct effect on the dissemination of knowledge and, in turn, on the revitalisation of a broader public domain. Imposing a public registration of any transfer of copyright would be an important and Berne-compliant measure. Encouraging (or even imposing)⁷³ the publication of the way DRM and other technological measures operate could also curtail the excessive monopoly now granted by technological measures and anti-circumvention provisions. Submitting orphan works to a default license or the judicial authorization of use would also solve a practical problem. It would act as an incentive to properly and formally identify oneself as the rights owner and to mark the work accordingly.

The legal deposit of all types of works should also be better organized and made mandatory, even though its omission should not lead to the loss of copyright. The repositories of works constituted by such a deposit should then be available to the public in an effective and copyright-compliant way. By the same token, the old function of the formalities in copyright, i.e. that of allowing the public conservation and consultation of works, would be restored without using the formality as a burden on copyright owners that would ultimately discriminate against some creators.

All examples of such formalities facilitate access to content that is generally protected by copyright, without leading to the forfeiture of the literary and artistic property right. The ensuing flow of content into the public domain is relative, as it contributes to the making of a functional public domain (comprising copyrighted elements, the access and use of which does not infringe copyright), rather than a structural one (comprising elements not protected by copyright). It only

72. The determination of the criteria should certainly be discussed further. The criterion of 'cultural creation' seems rather dubious and vague.

73. It would be easier to modify the WIPO Treaties in order to make explicit that the protection of technological measures can be made conditional on some formalities, than to change the formality-free rule of the Berne Convention.

facilitates a copyright transaction between the copyright owner and the user. It might not be as ambitious as the often-heard propositions for more open content, but it can, at least, answer some of the criticisms and questions raised by the public wishing to use copyrighted works. It may also reconcile the prohibition of formalities prior to the existence and enjoyment of copyright with the role that some formalities could play in fostering access to knowledge.

More fundamentally, formalities to opt-out of the copyright regime should be introduced, both to frame and better protect the wish of some creators to share their works in an open access regime and to enable others to relinquish their copyright. An overall regime for public domain works would be beneficial to the copyright balance and should rely on deposit, registration, databases and marking mechanisms of public domain works. A clear status for the public domain is still to be conceived and organized, but formalities would be needed to ensure its effectiveness.

To sum up, I see a role for formalities in copyright in the sense that formalities should help to effectively make creative content available. I do not believe that the propositions for more formalities made by some open content advocates will ultimately achieve a greater availability of copyrighted works. Returning to the old formalities, even in a modernized form, would not suffice. However, imagining new ones, primarily to organize the key (though often neglected) counterpart of copyright that is the public domain, could be a more promising idea and one that merits further exploration. This would lead to a more radical change of the copyright regime than the repetition of the old refrain of formalities.