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**RESURRECTING COPYRIGHT FORMALITIES:
NO 'DEADLY' HUMAN RIGHTS IMPLICATIONS**

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Table of Contents

Abstract.....	III
I Introduction.....	1
II A Closer Look at Copyright Formalities.....	3
A Types of Formalities.....	3
B Functions of Copyright Formalities.....	5
III International Law on Copyright Formalities.....	7
A Berne Convention.....	7
B Other International Treaties.....	8
IV Reintroducing Mandatory Copyright Formalities: An Analysis.....	8
A Legal Certainty.....	9
B Facilitation of Rights Clearance.....	9
C Enhancement of the Free Flow of Information by Enlargement of the Public Domain.....	11
D Cure for the Problem of Orphan Works.....	11
E Other Benefits of Copyright Formalities.....	12
V Resurrection of Copyright Formalities Through the Human Rights Lens.....	12
A Arguments for Resurrection of Copyright Formalities.....	13
1 Analogy between copyright formalities and property formalities.....	13
2 Discrimination between copyright formalities and patent formalities.....	14
3 Formalities enhance the protection of moral interests.....	15
4 Loss of a copyright – Is it really a breach of article 15(1)(c) of the ICESCR?	16
5 Formalities will assist in striking an adequate balance in the fulfillment of competing human rights.....	17
B Arguments against Resurrection of Copyright Formalities.....	19
1 Economic burden.....	19
2 Unintentional non-compliance with formalities.....	20
VI Conclusion.....	21
Bibliography.....	22

Abstract

This paper argues that resurrecting copyright formalities is justified from a human rights perspective, especially in the context of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights. Copyright formalities were abolished in the early twentieth century. Since then, the copyright system has operated without formalities, copyright protection existing from the moment an original artistic or literary work is fixed in a tangible medium of expression. The abolishment of formalities has created new problems of orphan works and difficulties in making licensing arrangements. As a result, calls have been made to reintroduce copyright formalities. However, natural rights theorists and human rights activists have opposed this proposal on the ground that it will breach the human rights of creators. This paper contends that reinstating copyright formalities will not have any such human rights implications. It discusses the types and functions of copyright formalities before arguing that copyright formalities must be reintroduced because they provide legal certainty, will cure the problem of orphan works in the future, facilitate the clearance of rights and enhance the flow of information by enlarging the public domain. From a human rights perspective, formalities should be revived because the human right of property is subjected to formalities and by analogy, the enjoyment of human rights of creators can also be conditioned on formalities; patentees are also protected by art 15(1)(c) but patents are subjected to formalities; formalities will enhance the moral interests of authors and they will assist in achieving the balance in the fulfilment of competing human rights. However, if the new copyright formalities impose an unbearable economic burden on the authors and ignore the issue of unintentional non-compliance with formalities, the human rights of creators could be potentially breached. The paper concludes that copyright formalities should be brought back, albeit, in a revised and relaxed form so that they are human rights compliant.

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I Introduction

Copyright formalities have undergone transformation like no other type of formalities in intellectual property law. They first came into existence in the sixteenth century with the invention of the printing press¹ and evolved until the mid-nineteenth century, when countries like Germany and France began to limit their use.² By the early twentieth century, with the introduction of the prohibition on formalities in the Berne Convention for the Protection of Literary and Artistic Works³ (the Berne Convention) in 1908, many countries began to abolish formalities.

Today, neither the international law nor the domestic law of majority of the countries, conditions the grant of copyright on formalities. Copyright protection exists automatically as soon as any original literary or artistic work is fixed in a tangible medium of expression.⁴ This may seem like the perfect solution theoretically, but in practice, it has created a new set of problems. In the absence of copyright formalities, there has been a proliferation of orphan works, which are works whose authors are not traceable or identifiable,⁵ difficulties in making licensing arrangements,⁶ shrinking of works in the public domain and the consequential stifling of creativity⁷ and increasing legal uncertainty about whether particular works are copyright protected or not.⁸ These problems have been exacerbated by an increase in the creation and dissemination of literary and artistic material online (including musical compositions).⁹ As a result, there have been calls for the reintroduction of copyright formalities for the digital age.¹⁰

¹ Stef van Gompel *Formalities in Copyright Law: An Analysis of their History, Rationales and Possible Future* (Kluwer Law International, Netherlands, 2011) at 55.

² At 90. For a more comprehensive history of copyright formalities, see Van Gompel, above n 1, 53-115.

³ Berne Convention for the Protection of Literary and Artistic Works 1886 (opened for signature 9 September 1886, entered into force 5 December 1887) [Berne Convention]. This Convention has been amended since then in 1896 at Paris, in 1908 at Berlin, in 1914 at Berne, in 1928 at Rome, in 1948 at Brussels, in 1967 at Stockholm and in 1971 and 1979 at Paris.

⁴ Van Gompel, above n 1, at 1. Also see Copyright Act 1994 (New Zealand).

⁵ David R Hansen and others, “Solving the Orphan Works Problem for the United States” (2013) 37 *Colum JL & Arts* 1, at 3.

⁶ Van Gompel, above n 1, at 5.

⁷ Laurence R Helfer and Graeme W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, Cambridge, 2011) at 206.

⁸ Maria Pallante “The Curious Case of Copyright Formalities” (2013) 28 *Berkeley Tech LJ* 1415 at 1416.

⁹ Van Gompel, above n 1, at 3.

¹⁰ In 2013, a symposium entitled “Reform(aliz)ing Copyright for the Internet Age” was hosted by the Berkeley Centre for Law and Technology [Berkeley Symposium 2013], where academics and policy makers debated on the need for copyright formalities for a generation dominated by internet. There is also a vast number of scholarly articles on resurrecting copyright formalities. To cite a few: Christopher Sprigman “Reform(aliz)ing Copyright” (2004) 57 *Stan*

The debate on whether copyright formalities should be reinstated or not, has centred around the pros and cons of reinstating copyright formalities and the kinds of new-style formalities that could be implemented for the digital age.¹¹ A few commentators have considered this issue through the human rights lens, advancing the argument that resurrecting copyright formalities will breach the natural right and the consequential human right of the creators to the protection of material and moral interests resulting from their artistic or literary works, enshrined in art 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹² and art 27(2) of the Universal Declaration of Human Rights (UDHR).¹³ The proponents of natural rights consider “an author [as having] an innate right to control his creation.”¹⁴ Ginsburg argues that “if copyright is born with the work, then no further state action should be necessary to confer the right; the sole relevant act is the work’s creation.”¹⁵ This natural rights argument is flawed. The history of copyright formalities and the discussion leading up to the prohibition of formalities in the Berne Convention reveals that copyright formalities were abolished largely due to practical difficulties in the application of the Berne rules in international copyright law and not due to a breach of the natural rights or the human rights of the authors of artistic or literary works.¹⁶

However, due to human rights commentators’ continued contention that copyright formalities should not be reintroduced because they will breach the human right of creators, there is a need to analyse the human rights implications of reviving copyright formalities. This paper argues that the

L Rev 485; Pallante, above n 8; Stef van Gompel “Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing” (2013) 28 Berkeley Tech LJ 1425.

¹¹ “New-style formalities include requirements on metadata-tagging of digital works, the storage of rights management information in digital depositories, and virtually all digital tools that, in one way or another, create a link between right owners and their works”: Van Gompel, above n 10, at 1436.

¹² International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

¹³ Universal Declaration of Human Rights (adopted on 10 December 1948) [UDHR]. Article 27(2) of the UDHR states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” A few regional human rights treaties also contain this right: art 13(2) of the American Declaration of the Rights and Duties of Man 1948 and art 14(1)(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988; Van Gompel, above n 1, at 269.

¹⁴ See Patrick Goold “Reform(aliz)ing Copyright for the Internet Age – A Conference Recap” (May 2013) TAP <www.techpolicy.com>. Also see Daniel Gervais and Dashiell Renaud “The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to do it” (2013) 28 Berkeley Tech LJ 1459, at 1463.

¹⁵ Jane C Ginsburg “A Tale of Two Copyrights: Literary Property in Revolutionary France and America” (1990) 64 Tul L Rev 991, at 994.

¹⁶ See generally Van Gompel, above n 1, at 144-46; Michael W Carroll “A Realist Approach to Copyright Law’s Formalities” (2013) 28 Berkeley Tech LJ 1511, at 1519 (criticising that commentators have “[attempted] to treat the anti-formalities provisions of Berne as recognition of authors’ human rights rather than as a situationally pragmatic response to administrative difficulties”).

reintroduction of copyright formalities is justified from a human rights perspective, especially in the context of art 15(1)(c) of the ICESCR. In advancing this proposition, Part II begins with a general introduction of copyright formalities, discussing the types of formalities and their functions, followed by Part III, which provides a brief summary of the international law on copyright formalities. The paper analyses the reasons for resurrecting copyright formalities in Part IV, before considering the issue of reintroducing copyright formalities from a human rights perspective in Part V, where arguments for and against the reinstatement of copyright formalities are discussed through the human rights lens. It is concluded that resurrecting copyright formalities is justified from a human rights perspective. Copyright formalities will not constitute a breach of the human rights of authors of artistic or literary works, but enhance them, provided the new formalities are flexible, reasonable and easy to comply with.

II A Closer Look at Copyright Formalities

Copyright formalities are “formal requirements that the law imposes on authors and copyright owners for the purpose of securing or maintaining copyright protection or enforcing this right before the courts.”¹⁷ The different types of formalities and the functions they perform will be discussed below, with examples from national copyright laws of countries such as the United States of America, the United Kingdom, Argentina, Germany, the Netherlands and India.

A Types of Formalities

Generally, there are five types of copyright formalities: registration, renewal, recordation of transfers or assignments of rights, deposit and notice requirements.¹⁸

1 Registration

Registration requires a copyright owner to register his work to obtain copyright protection or to enable the copyright owner to sue for copyright infringement. For instance, the United States Copyright statutes¹⁹ did not allow an action for copyright infringement to be instituted unless the work in question was registered.²⁰ The award of statutory damages or attorney’s fees was also

¹⁷ Van Gompel, above n 1, at 12.

¹⁸ At 17.

¹⁹ Copyright Act 1909 and 1976.

²⁰ Copyright Act 17 USC § 411 (1976). The United States signed the Berne Convention in 1988 and implemented it through the Berne Convention Implementation Act 1988 whereby it removed the requirement of registration as a pre-requisite to instituting an action for copyright infringement for all foreign works.

conditioned on registration of the work within three months of the first publication.²¹ The United Kingdom’s copyright law also required registration of literary work to allow the owner to sue for copyright infringement.²² In some German States, literary or artistic works were only protected by copyright if they were registered.²³

2 *Renewal*

This formality requires copyright owners to renew their registration periodically to retain their copyrights. In the United States, for instance, the Copyrights Act 1909 allowed copyright owners to apply for a second term of protection of 28 years within one year prior to the expiration of the first term of protection (which was also 28 years).²⁴ Failure to renew the term terminated the copyright and put the work in the public domain.²⁵ In Argentina, periodicals were required to be registered and renewed annually, “in order to be maintained in force.”²⁶

3 *Recordation*

Recordation required copyright owners to register any transfer of rights, whether by way of an assignment, grant or conveyance.²⁷ The rationale for this formality was to keep registers up-to-date and make the third parties aware of the transfer of rights.²⁸ In the United States, the 1909 Copyright Act required an assignment of copyright to be recorded within three months of its execution in the United States or within six months after its execution outside the United States.²⁹ If it was not recorded, it would be void as against any subsequent purchaser or mortgagee whose assignment had been recorded.³⁰

4 *Deposit*

This copyright formality requires copyright owners to deposit a specified number of copies with the designated authority.³¹ For example, the United States Copyright Act 1909 required two copies

²¹ Copyright Act 17 USC § 412 (1976).

²² Copyright Act 1842.

²³ Act of Saxony 1844.

²⁴ Copyright Act 1909, s 23.

²⁵ Section 23.

²⁶ LAW No. 11.723 Legal Intellectual Property Regime, art 30.

²⁷ Van Gompel, above n 1, at 20-21.

²⁸ At 21.

²⁹ Copyright Act 1909, s 44.

³⁰ Section 44.

³¹ Van Gompel, above n 1, at 22.

of the work to be deposited with the Copyright Office; a failure to do so made the owner liable to a fine and rendered the copyright void.³² The United Kingdom’s copyright law imposed even more burdensome deposit formalities initially. The Statute of Anne 1710 required nine copies of each new book to be deposited to the Stationers’ Company’s warehouse keeper³³ and it was increased to 11 copies in 1801.³⁴ In Netherlands, a failure to deposit copies within one month of publication forfeited the right.³⁵ In India, publishers were required to deposit three copies of every book with fees to a local authority within a month of the publication.³⁶ A failure to comply with this rule resulted in severe fines and even imprisonment.³⁷

5 *Notice requirements*

This formality requires copyright owners to indicate by using a symbol such as © that that work is protected by copyright. The Argentine copyright law, for example, required “the date, place of publication, name or mark of the author or publisher [to] be inscribed on the photographic or cinematographic work.”³⁸ The United States copyright law also prescribed that the word ‘copyright’ or the abbreviation ‘copr’ or the symbol ‘©’, with the name or the initials of the owner and the year of first publication should be placed on the title page or somewhere conspicuous.³⁹ A failure to adhere to these notice rules led to a loss of copyright.⁴⁰ In Australia, formal notice is not a legal requirement today, but it is generally advised and regarded as best practice to place a copyright notice on the work.⁴¹

B *Functions of Copyright Formalities*

Formalities perform a variety of functions depending on their type. They may perform a filtering function, signalling and publicity function, evidentiary function or information function.

³² Copyright Act 1909, s12. Under the Copyright Act 1976, failure to deposit the copies of work did not render the copyright void but the owner was still liable to a fine and payment of the reasonable cost of purchasing those copies: Copyright Act 17 USC §407(d) (1976).

³³ Act for the Encouragement of Learning 1710, s2.

³⁴ Copyright Act 1801, s6.

³⁵ Copyright Act 1881, art 10. This requirement was removed in 1912 after the Berne prohibition on formalities.

³⁶ Press and Registration of Books Act 1867.

³⁷ Above n 36.

³⁸ LAW No. 11.723 Legal Intellectual Property Regime, art 34.

³⁹ Copyright Act 1909, s18.

⁴⁰ Section 18.

⁴¹ “Short Guide to Copyright” (October 2012) Attorney-General’s Department <www.ag.gov.au/> at 6.

Firstly, formalities play a significant role in filtering out works for which protection is desired from works for which it is not.⁴² For instance, the strict requirement of a copyright notice meant that those that affixed the notice correctly desired protection while those that did not, wanted the work to be in the public domain. Similarly, the renewal requirements provided the copyright owner a chance to weigh the commercial value of the work against the cost of renewal.⁴³ The copyright owner may not renew work that has lost its commercial value so that work enters the public domain quickly.⁴⁴ Hence, the renewal formality filters out works that still need copyright protection from those that do not.

Formalities also perform a signalling and publicity function.⁴⁵ The requirement of a copyright notice, for instance, alerts the public that the work containing that notice is protected by copyright.⁴⁶ The United States courts have held that the object of the copyright notice was “to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work.”⁴⁷ Further, the recordation of transfer of rights informs the public of the current owner of the copyright and allows third parties to check the register to determine the changes in titles.⁴⁸

In addition, the copyright formalities perform an evidentiary function by providing evidence that links the rightful owners of copyrights to their protected work.⁴⁹ The intangible nature of intellectual property makes it difficult to trace the rightful owners once the work is out in the public.⁵⁰ The formalities of registration, recordation of transfer of rights and copyright notice assist in identifying the rightful owner of the copyright. The certificate of registration, for example, provides evidence of the legal owner of a particular work.

The final function that copyright formalities perform is the information function. They provide information regarding the copyright owner, the subject matter of protection and the scope and the

⁴² Christopher Sprigman “Reform(aliz)ing Copyright” (2004) 57 *Stan L Rev* 485, at 502.

⁴³ Sprigman, above n 42, at 519.

⁴⁴ At 519.

⁴⁵ Van Gompel, above n 1, at 43. Also see, Stef van Gompel “Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe” in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds) *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers, Cambridge, 2010) 157, 189-90.

⁴⁶ Van Gompel, above n 1, at 43.

⁴⁷ *Shapiro, Bernstein & Co v Jerry Vogel Music Co* 161 F 2d 406 (2d Cir 1946) at 409 and *Harry Alter Co v Graves Refrigeration* 101 F Supp 703 (ND Ga 1951) at 705.

⁴⁸ Van Gompel, above n 1, at 44.

⁴⁹ At 45. Also see, Van Gompel, above n 45, at 188-89.

⁵⁰ Van Gompel, above n 1, at 45.

term of protection.⁵¹ For example, the Argentine copyright notice requirements provided information regarding the owner of the copyright and the place and date of publication. Additionally, the requirement to register copyrights and any transfers of copyrights provided information on the successive owners of a copyright.⁵² The registers may not always provide up-to-date information but they still made identification and location of the owner of copyright a lot easier.⁵³

III International Law on Copyright Formalities

A Berne Convention

The Berne Convention, which is the leading multilateral treaty on international copyright, initially imposed formalities. Article 2(2) of the Berne Convention (1886) provided that, “[t]he enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work...”⁵⁴ This country of origin rule meant that authors seeking international copyright protection had to comply with the formalities imposed in the copyright law of their home country.

This rule seemed quite easy to apply but it raised a number of problems in practice. For instance, there was uncertainty as to which country’s formalities should be complied with if the work was published in a number of countries at once.⁵⁵ The courts were also hesitant in accepting the certificate of registration as conclusive evidence of formalities being fulfilled.⁵⁶ They checked if the formalities were correctly applied and in doing so, they also faced difficulties in interpreting the national laws of the different countries.⁵⁷

As a result of these difficulties, calls were made at international conferences for countries to abolish formalities in their national laws.⁵⁸ Many European countries obliged.⁵⁹ Subsequently, the Berne Convention was revised in 1908, to abolish the requirement of formalities. At present, art

⁵¹ Stef van Gompel “Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing” (2013) 28 Berkeley Tech LJ 1425, at 1427.

⁵² Van Gompel, above n 1, at 47.

⁵³ At 48.

⁵⁴ Berne Convention (1886), art 2(2).

⁵⁵ Van Gompel, above n 1, at 144-45.

⁵⁶ At 145.

⁵⁷ At 145.

⁵⁸ At 146.

⁵⁹ For instance, Germany abolished formalities for literary works and music in 1901 and for artistic works and photographs in 1907.

5(2) of the Berne Convention prohibits the imposition of formalities on foreign works in the following terms:⁶⁰

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.

Following the prohibition on formalities for foreign works in the Berne Convention, most countries removed the formalities for domestic works too.⁶¹

B Other International Treaties

Under the Universal Copyright Convention⁶² (UCC), the formalities of registration, notice, payment of fees and other requirements are considered satisfied if the work is marked with the symbol ©, the name of the copyright owner and the year of first publication.⁶³ On the contrary, the Agreement on Trade-Related Aspects of Intellectual Property Rights⁶⁴ (the TRIPS Agreement) and the World Intellectual Property Organisation (WIPO) Copyright Treaty⁶⁵ prohibit copyright formalities by incorporating the Berne Convention provisions by making reference to them in art 9(1) and art 3, respectively.⁶⁶

IV Reintroducing Mandatory Copyright Formalities: An Analysis

Academics, policy makers, and commentators in the field of copyright have predominantly used words such as “reintroducing”, “reinstating”, “resurrecting”, “reviving” when talking about bringing copyright formalities back. This gives the impression that the abolished formalities will be merely brought back. However, this is not the intended meaning of these words, or at least in my opinion, should not be. Reintroducing or reinstating or reviving formalities in this paper means formalities must be brought back but in a revised form, which makes their compliance easier, functionality more effective and meets the current needs of the digitised world. The United States

⁶⁰ Berne Convention (1979), art 5(2).

⁶¹ The United Kingdom removed the formalities for domestic works in 1911, Netherlands followed in 1912 and France in 1925.

⁶² Universal Copyright Convention (adopted on 6 September 1952, entered into force 16 September 1955) [UCC].

⁶³ UCC, above n 62, art III(1).

⁶⁴ The Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted on 15 April 1994, entered into force 1 January 1995) [TRIPS Agreement].

⁶⁵ World Intellectual Property Organisation Copyright Treaty (opened for signature 20 December 1996, entered into force 6 March 2002) [WIPO Copyright Treaty].

⁶⁶ See TRIPS Agreement, above n 64, art 9(1); WIPO Copyright Treaty, above n 65, art 3.

Register of Copyrights, Maria Pallante also remarked in her speech at the Berkeley Symposium 2013 that “[c]hasing history will not do us any good – we must remake the law [(referring to law on copyright formalities)].”⁶⁷

There are many justifications for reintroducing mandatory copyright formalities, which will be discussed below.

A Legal Certainty

Firstly, formalities create legal certainty about copyright claims.⁶⁸ In the current digital age, a large number of works are created and used online. Pallante noted in her speech that “[t]oday, [al]most anyone who spends time on the Internet will interact with the copyright system, but for many if not most, the rule of law will be more unclear than clear.”⁶⁹ Due to the automatic copyright protection of works that are original and expressed in a tangible form, there is confusion as to whether a particular work is copyright protected or not. Even if it can be reasonably gauged that a particular piece of work enjoys copyright protection, it is quite difficult to find information regarding the copyright owner, the term of protection of the work and whether the work has entered the public domain. These difficulties, as van Gompel puts it, “threaten a smooth operation of the copyright system for copyright owners and users alike and will do no good for the social acceptance and legitimacy of copyright law...”⁷⁰ Thus, to ensure legal certainty in the field of copyright law, formalities should be resurrected.

B Facilitation of Rights Clearance

A second reason for reintroducing copyright formalities is that formalities will facilitate the clearance of rights.⁷¹ The formalities of registration, recordation of transfer of rights and copyright notice provide information to the public about the current copyright owner and the scope and term of protection. This information assists potential licensees in locating the copyright owner, which makes licensing of rights easier and cost-effective.⁷²

⁶⁷ Pallante, above n 8, at 1416.

⁶⁸ Van Gompel, above n 51, at 1430.

⁶⁹ Pallante, above n 8, at 1416.

⁷⁰ Van Gompel, above n 51, at 1430-31.

⁷¹ Rights clearance is also known as licensing, vetting the production or getting permission.

⁷² Brad A Greenberg “More Than Just a Formality: Instant Authorship and Copyright’s Opt-Out Future in the Digital Age” (2012) 59 UCLA L Rev 1028, at 1043. Also see Genevieve P Rosloff “‘Some Rights Reserved’: Finding the Space Between All Rights Reserved and the Public Domain” (2009) 33 Colum JL & Arts 37, 45-51 (contending that the abolishment of formalities has complicated copyright licensing and contributed to increasing licensing costs).

However, academics and copyright commentators have suggested alternative methods of providing “adequate and reliable set of copyright management information that is publicly accessible” to facilitate licensing.⁷³ Van Gompel, for instance, suggests that in the internet age, metadata-tagging and watermarking of digital content with relevant information linking the author to his work could provide reliable information to the potential users of the work.⁷⁴ A major limitation of this proposal is that it will only provide information for works published online, leaving out all works that are published by other means. He also suggests that there already exists a large number of registries, databases and private companies like Google, Amazon and Microsoft that store copyright management information.⁷⁵ If the information from these sources is consolidated and made freely available to the public, it would make the process of rights clearance much easier.⁷⁶ However, private entities and collective rights management organisations rarely make such information freely available to the public.⁷⁷

Furthermore, organisations such as the Creative Commons already facilitate the licensing of copyright protected works quite successfully so it might be argued that formalities are not necessary. Creative Commons is a non-profit organisation, which enables copyright owners to allow reuse of their works by giving permission via one of the six types of licences.⁷⁸ Creative Commons may make licensing arrangements easier and cheaper but it is neither a satisfactory solution nor a substitute for copyright formalities. Creative Commons licences are irrevocable,⁷⁹ which may be problematic for a copyright owner wishing to stop the use of his work. Further, copyright formalities perform many other functions and do much more than only facilitating licensing arrangements. For instance, they provide evidence of ownership which might be used in court proceedings, signal the public that copyright exists in a particular work and keep works for which copyright protection is not desired in the public domain, thus promoting creativity. Creative Commons also provides a public domain tool which copyright owners can utilise to make their work available to the public to use and build upon.⁸⁰ However, the marking of works with a public domain tool is analogous to complying with a formality.⁸¹ Therefore, despite the existence of

⁷³ Van Gompel, above n 51, at 1447.

⁷⁴ At 1448-49.

⁷⁵ At 1450-51.

⁷⁶ At 1451.

⁷⁷ At 1451-52.

⁷⁸ “About Creative Commons” Creative Commons <www.creativecommons.org.nz>; “Licences explained” Creative Commons <www.creativecommons.org.nz>.

⁷⁹ Above n 78.

⁸⁰ “Public domain tools” Creative Commons <www.creativecommons.org.nz>.

⁸¹ Sprigman argues that the process of dedicating works to the public domain requires the author to “license the world” by incorporating a statement in the published works that they are available for public use and this process is the “mirror image” of compliance with registration and notice formalities: Sprigman, above n 42, at 518.

alternative options, on the whole, resurrecting copyright formalities remains a more attractive option.

C Enhancement of the Free Flow of Information by Enlargement of the Public Domain

A further reason for reintroducing copyright formalities is that it will “[enhance] the free flow of information by enlarging the public domain.”⁸² Mandatory formalities ensure that works for which protection is not desired, enters the public domain.⁸³ For example, if an author does not renew his copyright at the end of the renewal term, it is assumed that he does not want copyright protection so the work enters the public domain, where it can be freely used or built upon by others. Absent formalities, all works, whether they have commercial value or not and whether the authors desire copyright protection or not, are protected for the life of the author plus fifty years or seventy years, depending on the country. This unnecessarily locks up the works for a lengthy period of time, which shrinks the number of works in the public domain and stifles creativity.⁸⁴ To avoid these problems and to ensure that works for which protection is not desired are available freely for use by the public, copyright formalities should be reinstated.

D Cure for the Problem of Orphan Works

Moreover, copyright formalities will resolve the future problem of orphan works.⁸⁵ Since the abolishment of copyright formalities, orphan works have increased dramatically.⁸⁶ An assessment carried out by the United Kingdom’s Intellectual Property Office in 2012 on orphan works held by key cultural institutions revealed statistics, which indicate that orphan works is a very severe problem. It revealed that orphaned works accounted for approximately 20-25% of artworks, 5-10% of sound recordings, 5-90% of archive photos and 4-30% of the written material.⁸⁷ By extrapolation of the average, the total number of orphan works in the United Kingdom institutions could be as high as 50 million works.⁸⁸ These orphan works pose significant barriers for libraries, archives and repositories of copyrighted works, who are hesitant to digitise their collection out of fear of copyright infringement and litigation.⁸⁹ In the internet age where people want access to materials with a click, the inability of libraries and archives to digitise their large collections of potentially useful orphan works significantly impedes public access to pre-existing artistic,

⁸² Van Gompel, above n 51, at 1430.

⁸³ Greenberg, above n 72, at 1043.

⁸⁴ Helfer and Austin, above n 7, at 206. Also see Sprigman, above n 42, at 527-28.

⁸⁵ Hansen and others, above n 5, at 48-51.

⁸⁶ At 12-14.

⁸⁷ At 6.

⁸⁸ At 7.

⁸⁹ At 10.

literary, cultural and scientific materials.⁹⁰ Resurrecting copyright formalities may not resolve these existing issues but they will assist in creating a future free of orphan works.

E Other Benefits of Copyright Formalities

Pallante made the following comment at the Berkeley Symposium in favour of copyright formalities:⁹¹

formalities are one way to bring order to a system that is otherwise confusing to many people. Formalities are interesting because, if implemented fairly, they have the capacity to alleviate frustrations, incentivize good behavior, and create a more rational administration of the law, all of which is good for authors.

Finally, copyright formalities should be reinstated because they provide useful benefits through the functions they perform – formalities provide evidence of copyright ownership, which can be used in copyright infringement cases, signal the public that copyright exists in a particular work and filter out works that are no longer commercially valuable.

V Resurrection of Copyright Formalities Through the Human Rights Lens

Having analysed the various reasons for reintroducing copyright formalities, it would be appropriate now to examine the issue from a human rights perspective, particularly in the context of art 15(1)(c) of the ICESCR. It is essential to understand the aim and the scope of art 15(1)(c) of the ICESCR before delving into a discussion on why copyright formalities should or should not be resurrected from a human rights perspective.

According to the Committee on Economic, Social and Cultural Rights (the Committee), art 15(1)(c) “... seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole.”⁹² During the drafting of the ICESCR, the Uruguayan delegate, Tejera reiterated a comment made by the Chinese delegate, Chang, during the review of the UDHR, that there must be a human right of creators because “respect for the right of the author would assure the public of the authenticity of the works presented to it.”⁹³ Thus, the inclusion of

⁹⁰ Van Gompel, above n 1, at 6.

⁹¹ Pallante, above n 8, at 1418.

⁹² General Comment No.17 E/C.12/GC/17 (2005), at 2.

⁹³ Peter K Yu “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 UC Davis L Rev 1039, at 1067. The comment made during the review of the UDHR was relevant in the discussion on ICESCR as UDHR contains a provision similar to art 15(1)(c).

art 15(1)(c) in the ICESCR was not solely for the protection of the creators’ interests but for the benefit of the society as a whole.

Additionally, the Committee clarifies that an author is a natural person so legal entities are excluded from the scope of protection of art 15(1)(c).⁹⁴ The Committee also explains that the author’s rights enshrined in art 15(1)(c) are closely linked to the right to the opportunity to gain one’s living by work which one freely chooses, to adequate remuneration and to an adequate standard of living.⁹⁵ The Committee also prohibits the State Parties from imposing higher protection standards that “unjustifiably limit the enjoyment by others of their rights under the [ICESCR].”⁹⁶

A *Arguments for Resurrection of Copyright Formalities from a Human Rights Perspective*

1 *Analogy between copyright formalities and property formalities*

The first argument is that if the human right to own property is subjected to formalities, by analogy, the grant of copyrights can also be conditioned on formalities.

Article 17(1) of the UDHR recognises the right of everyone to own property alone as well as in association with others.⁹⁷ Despite the right to own property being a human right, it is subjected to formalities by all national laws. For instance, the Land Transfer Act 1952 (NZ) requires all instruments to be registered.⁹⁸ Unless an instrument is registered, it is not effectual to pass any interest in land.⁹⁹ There are two main reasons for this formality: firstly, by registering the title, the new owner will be able to prove ownership of the property; and secondly it creates a “centralized record of ownership” of properties (including land).¹⁰⁰ Sprigman notes with respect to the requirement that title be recorded, that “it is a government regulation but no one complains in the particular context, that government is interfering in the ‘free market’ for real estate.”¹⁰¹ He further argues that people comply with these requirements because buying a house or a piece of land is their biggest investment.¹⁰²

⁹⁴ General Comment No. 17, above n 92, at 3.

⁹⁵ At 3.

⁹⁶ At 4.

⁹⁷ UDHR, above n 13, art 17(1).

⁹⁸ See generally, ss 33 – 48.

⁹⁹ Section 41.

¹⁰⁰ Sprigman, above n 42, at 500.

¹⁰¹ At 500.

¹⁰² At 500.

Analogously, the creators’ right to benefit from the protection of moral and material interests resulting from their literary or artistic production could also be subjected to formalities. The formality of registration of copyrights provided the same benefits: by registering, the copyright holder created evidence of ownership of that particular work and there was a central record of copyrights, which could be used by the public to find information about the owner of a particular piece of work, the scope of the copyright and the term of protection.¹⁰³ What makes this argument stronger is the fact that intellectual property is a form of property. If the enjoyment of the right to own property can be conditioned on the fulfilment of certain formalities, so can the right of copyright holders.

2 *Discrimination between copyright formalities and patent formalities*

Article 15(1)(c) of the ICESCR provides authors with the right to benefit from the protection of moral and material interests resulting from not only their literary or artistic works but scientific productions too, which means that patentees are also protected under art 15(1)(c).¹⁰⁴ Under the various national laws, an inventor of scientific work is required to comply with certain formalities in order to enjoy the benefits of a patent. Formalities include applying for a patent in the prescribed form with application fees,¹⁰⁵ paying maintenance¹⁰⁶ or renewal fees¹⁰⁷ and depositing samples.¹⁰⁸ For instance, under the United Kingdom’s patent law, a patent ceases to have effect if the renewal fees are not paid at the end of a prescribed period.¹⁰⁹ There is a similar provision in s 20(2) of Patents Act 2013 of New Zealand.¹¹⁰ These patent formalities are quite onerous but apparently they are neither considered to be breaching the human right of inventors under art 15(1)(c), nor abolished. It is perplexing that compliance with copyright formalities is deemed so burdensome that it breaches art 15(1)(c) but adherence to similar patent formalities is acceptable.¹¹¹ The fact that the patent system is functioning reasonably well with formalities indicates that a copyright system with formalities is workable, without violating the human right of creators.

¹⁰³ At 500.

¹⁰⁴ ICESCR, above n 12, art 15(1)(c).

¹⁰⁵ Patents Act 2013 (NZ), s32 and Patents Act 1977 (UK), s14.

¹⁰⁶ Patents Act (NZ), s 35.

¹⁰⁷ Patents Act 1977 (UK), s25. Additionally, in New Zealand, the renewal fees are payable every year from the fourth year of filing.

¹⁰⁸ For instance, section 43(1) of the Patents Act (NZ) requires micro organisms to be deposited.

¹⁰⁹ Patents Act 2004 (UK), s8(1).

¹¹⁰ Section 20(2) states: “... a patent ceases to have effect on the expiry of the period prescribed for the payment of any renewal fee if that fee is not paid within that period ...”

¹¹¹ Van Gompel argues that “[o]ther intellectual property rights, such as patents and trademarks, the subject matter of which might also fall within the ambit of Article 27(2) UDHR and Article 15(1)(c) ICESCR, are often also conditional on formalities”: Van Gompel, above n 1, at 272.

One reason for the acceptance of patent formalities but rejection of the copyright formalities might be due to the differences in the severity of ‘penalties’ for infringement of formalities. The costs of non-compliance with copyright formalities were very high compared to the consequences of violation of patent formalities. For instance, a failure to comply with a copyright formality resulted in the loss of copyright and thus a loss of a source of income, which might arguably be a breach of an author’s material interests. On the other hand, a failure to comply with patent formalities did not result in a loss of a patent. For instance, a failure to pay the renewal fees for a patent renders the patent ineffective¹¹² but if it was unintentional, the patentee could apply for restoration.¹¹³

It is concluded that formalities themselves are not as problematic as the consequences of the breach of formalities. Hence, resurrecting copyright formalities will not breach art 15(1)(c) as long as the penalty for the violation of formalities is reasonable and proportionate to the breach committed.

3 *Formalities enhance the protection of moral interests*

As stated earlier, art 15(1)(c) does not only protect material interests of authors but moral interests too. Unlike material interests, moral interests continue to exist even after the term of copyright protection has ended and the work has entered the public domain. Moral interests include the right of attribution and the right of authors to object to any distortion, mutilation or other modification of, or other derogatory action in relation to their work, which would be prejudicial to their honour and reputation.¹¹⁴

Van Gompel argues that:¹¹⁵

[t]he author’s moral rights are so intrinsically linked to his personality that subjecting these rights to formalities may be an unjustifiable impediment of the protection of the author’s moral interests.

The author disagrees that the nature of the moral rights prevents the imposition of formalities. In fact, copyright formalities are capable of enhancing the protection of moral interests of authors. For instance, the right of attribution or the moral right to be identified as the author of a work is reinforced by the fulfilment of copyright formalities of registration and the attachment of a copyright notice. By registering a copyright in his or her name, the author of the work makes it clear that he or she is the creator of the work. Likewise, the fixation of a copyright notice with the

¹¹² Patents Act (NZ), s20(2).

¹¹³ Patents Act (NZ), s117 and Patents Act 1977 (UK), s28(1).

¹¹⁴ General Comment No.17, above n 92, at 5.

¹¹⁵ Van Gompel, above n 1, at 272.

symbol ‘©’, author’s name and the year of first publication indicates to the future users of the work that the marked work is created by the person named in the copyright notice.

In addition, the formalities of registration, recordation and copyright notice create evidence that a particular person is the creator of that piece of work. By complying with these formalities, the author creates evidence of his or her ownership of the work, which could subsequently be used in an action for breach of moral interests. Therefore, resurrecting copyright formalities will not breach the moral rights of the authors but enhance their protection.

4 *Loss of a copyright – Is it really a breach of creator’s human right under art 15(1)(c)?*

One issue that was at the forefront of the debate on abolishment of copyright formalities was the loss of copyright for not complying with the formalities ‘perfectly’. Historically, it was quite common for a copyright owner to lose a copyright for not depositing the required copies of the work with the designated authority, for failing to attach a copyright notice in the appropriate place or importantly, for failing to renew the copyright on time. However, with time, this horrendous consequence of not complying with the formalities to the dot, was removed significantly before being completely abolished.

It is contended that the loss of a copyright for trivial breaches of the copyright formalities such as not attaching a notice in a particular manner or depositing copies of work a few days late or depositing only one copy instead of two, was a disproportionate consequence. It would also be a breach of the human rights of creators enshrined in art 15(1)(c). General Comment No. 17 states that:¹¹⁶

The term of protection of material interests under [art 15(1)(c)], need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved ... by vesting an author, for a limited period of time, with the exclusive right to exploit his ... literary or artistic production.

As the deposit and notice requirements were usually required to be fulfilled at or around the time of the first publication of the work, a loss of copyright for non-compliance with these formalities meant that the author did not get an opportunity to exploit his work for even a limited period of time, as guaranteed by art 15(1)(c).

¹¹⁶ General Comment No.17, above n 92, at 5.

However, a loss of copyright for a failure to renew the copyright at the end of the prescribed renewal term does not necessarily breach art 15(1)(c). As stated above, art 15(1)(c) does not require the term of protection of material interests to last a whole life time but for a limited period of time only. What is a limited period of time is not defined but it is assumed that it should be long enough for the author to enjoy the economic benefits of his creation. This means that a loss of copyright for a breach of the requirement to renew a work annually is a breach of art 15(1)(c) but a loss of a copyright for failing to renew copyright after enjoyment of the material benefits for a 30-year term is not.

From a human rights perspective, since the author’s loss of a copyright after the enjoyment of the material benefits of his artistic or literary productions for a limited period of time is not a breach of art 15(1)(c), it must be reinstated as a penalty especially for a failure to renew the copyright at the end of the prescribed term (which could be about 30 years).

There are several reasons for making this proposition. To begin with, the requirement of renewal (a breach of which results in the loss of copyright) gives the author an opportunity to assess the commercial value of the work after the initial term of protection.¹¹⁷ If the author expects to continue to make profits from the work in the future, he would renew the copyright.¹¹⁸ On the other hand, if he does not expect to gain any further economic returns, he would not bother renewing the copyright.¹¹⁹ When the work is not renewed by the author intentionally, the author should lose the copyright so that the work can enter the public domain. It is very important for works to enter public domain, especially when they cease to economically benefit the authors, because it allows public to freely use the work and allows potential authors to build upon the existing creative works,¹²⁰ and produce new works that actually have a commercial value, thus promoting creativity and progress, which is what art 15(1)(c) aims to achieve.¹²¹

5 *Formalities will assist in striking an adequate balance in the fulfillment of competing human rights*

A broader argument is that the States are obliged to fulfil their obligations under art 15(1)(c) in conjunction with other obligations under other human rights provisions. States are required to strike “an adequate balance” between obligations under art 15(1)(c) and obligations under other

¹¹⁷ Sprigman, above n 42, at 519.

¹¹⁸ At 519.

¹¹⁹ At 519.

¹²⁰ At 527.

¹²¹ The General Comment No.17 states that art 15(1)(c) “...seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole”: above n 92, at 2.

provisions in the ICESCR.¹²² In its General Comment No.17, the Committee stated:¹²³

States parties are ... obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant [(ICESCR)], on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant.

One of the most important competing human rights against which the human right of creators enshrined in art 15(1)(c) must be adequately balanced is the right to education, provided by arts 13 and 14 of the ICESCR.¹²⁴ One way in which the fulfillment of these two rights could be balanced is by resurrecting copyright formalities.

Copyright formalities will assist in the realisation of material and moral interests of the authors in various ways, as explained in the preceding sections. At the same time, they will also enhance the fulfillment of the right to education in the following ways. The formality of deposit, for instance, enriches the national library, which is open to the public. Students could easily access the latest books through the library, free of charge. The formality of renewal, on the other hand, assists in enlarging the public domain. By requiring copyright owners to renew their works, works (which includes learning materials and educational resources) which have become commercially valueless will not be renewed and will therefore become part of the public domain. This will result in cheaper learning materials for students.

Further, the resurrection of copyright formalities will limit the number of works that are protected by copyright so more works, including the learning materials, will be available for use by the students. Currently, all original works are copyright protected, regardless of the author's desire to be protected. This unnecessary protection of all works unduly favours the private interests of the authors to the detriment of the enjoyment of the right to education. While the resurrection of copyright formalities will not assist in achieving the full realization of the right to education, it will enhance the enjoyment of this right quite significantly.

¹²² General Comment No.17, above n 92, at [35].

¹²³ At [35].

¹²⁴ Another important competing human right is the freedom of expression, provided by art 19 of the International Covenant on Civil and Political Rights. As the argument in (5) above focuses on competing rights enshrined in the ICESCR, the right of freedom of expression is not discussed. However, it is important to note that the resurrection of copyright formalities would help the States to strike an adequate balance between art 15(1)(c) and the freedom of expression. Helfer and Austin make the point that in the absence of copyright formalities, there does not exist a comprehensive register, which makes securing licences difficult. If a potential author is not able to secure a licence and therefore not use the work, he or she might be unable to create new works as initially intended, thus breaching their right of freedom of expression: Helfer and Austin, above n 7, at 206.

Hence, from a human rights perspective, resurrecting copyright formalities is not only justified in the context of art 15(1)(c) but also in the context of the competing human rights such as the right to education. Van Gompel sums it up perfectly: “[a] formality based copyright regime can ... promote the full range of rights guaranteed by ... the ICESCR.”¹²⁵

B Arguments against Resurrection of Copyright Formalities from a Human Rights Perspective

From a human rights perspective, there are two significant issues, which if not addressed adequately in the process of resurrecting copyright formalities, could result in a breach of the human right of creators. They will be discussed below.

1 Economic burden

The first issue is concerning the economic costs of complying with copyright formalities. The resurrection of copyright formalities will impose a financial burden on the authors of artistic or literary works in the form of registration fees, renewal fees, fines for non-compliance with formalities and hefty attorney’s fees if a matter relating to a breach of copyright formalities ends up in litigation. If the authors of artistic or literary works are not able to afford these costs of getting copyright protection, it is highly likely they could lose their copyrights or in some circumstances not get any copyright protection at all from the beginning, all of which would be a breach of the human right enshrined in art 15(1)(c) of the ICESCR.

The risk of breaching the human right of creators by imposing expensive-to-comply-with-copyright formalities is heightened when Pallante, the Register of Copyrights and Director at United States Copyright Office, makes a comment such as this:¹²⁶

The Copyright Office, like many government agencies, is under increasing pressure to become more self-sufficient – that is, to charge fees that more fully cover the cost of providing services. Certainly, the more we can incentivize copyright owners to participate, the more potential there is for revenue.

If the Copyright Registry aims to recover all the costs of operating the Registry from the copyright owners, and more alarmingly, if that is the reason for pushing the reintroduction of copyright formalities agenda, then human rights activists may have something to worry about as far as art 15(1)(c) rights are concerned.

¹²⁵ Van Gompel, above n 1, at 271-72.

¹²⁶ Pallante, above n 8, at

2 *Unintentional non-compliance with formalities*

Another issue that requires attention when examining the proposal of reviving copyright formalities through the human rights lens is unintentional non-compliance with formalities. When mandatory copyright formalities existed, there were many cases where authors or copyright owners failed to comply with a copyright formality unintentionally. This is likely to happen again if copyright formalities are revived. Previously, the consequences of breaching a copyright formality innocently were grave in the copyright world, so grave that copyright owners even lost their copyright. If these harsh consequences are brought back with the formalities, it is highly likely they will constitute a breach of the human right of creators.

A commentator has blatantly said that:¹²⁷

... we need not concern ourselves with noncompliance – it is not evidence of a failure of the system of formalities, but a signal that the prospect of obtaining or maintaining rights in the work is not valuable enough to merit the required investment in compliance.

The required investment that Sprigman is referring to is educating oneself about the steps that need to be followed to fulfill the formalities.¹²⁸ He argues that non-compliance is largely due to difficulties encountered in educating oneself.¹²⁹ He proposes that “[a]dministering registration and renewal through simple online forms would lower the cost of complying with these formalities and reduce the incidence of unintentional noncompliance.”¹³⁰ While this solution is likely to resolve the issue of unintentional non-compliance to a significant extent, it must not be ignored that an unintentional non-compliance with formalities does not only occur from not knowing about formalities. It could occur due to circumstances beyond the control of the copyright owner, like difficulties in transportation, lack of internet access, illness, natural disasters, accidents and others. If the copyright formalities are to be human rights compliant, they must provide for these circumstances. Lastly, the consequence of breach of formalities, whether due to lack of knowledge of formalities or due to circumstances beyond the control of the author, should not be disproportionate to the breach committed.

¹²⁷ Sprigman, above n 42, at 517.

¹²⁸ At 517.

¹²⁹ At 517.

¹³⁰ At 517.

VI Conclusion

It is concluded that formalities should be resurrected because they not only perform important evidentiary, signalling, filtering and information functions but offer other benefits such as creating legal certainty about copyright claims, facilitating licensing, solving the future orphan works problem and enlarging the public domain. On the whole, resurrecting copyright formalities will not have an adverse impact on the human rights of the authors of artistic or literary works, enshrined in art 15(1)(c) of the ICESCR, provided the new copyright formalities are flexible, easy to comply with and reasonable, with enough ‘wiggle room’ in case of unintentional non-compliance.

Many human rights are subject to some form of formality, yet are capable of being fully enjoyed by the people. For instance, the right to property is subject to registration and recordation requirements, the right to benefit from the protection of material and moral interests resulting from scientific productions is subject to patent formalities, the right to vote is subject to registration by voters, the right to education is subject to compliance with application and enrolment procedures which are even more onerous for international students and the like. It is acknowledged that complying with some of these formalities may not be as cumbersome as the old copyright formalities and a person would not lose the property or the patent or education completely for non-compliance with the formalities perfectly as was the case with copyrights historically. However, this does not mean that copyright formalities should not be reinstated; it only means that they need to be relaxed so that they are not as draconian as before.

It is noteworthy that any reintroduction of copyright formalities will need to be worked around the prohibition on formalities in the Berne Convention. Many commentators have suggested various ways of implementing formalities around the Berne prohibition, which could be adopted. In the end, if nothing works, formalities can be reintroduced for at least domestic works since the Berne Convention does not prohibit the imposition of formalities on domestic artistic or literary works.

Finally, there already exists a “voluntary copyright formalities system”, whereby copyright owners are required to voluntarily register their work, register the transfer of their rights or affix notice to their work.¹³¹ As a result, reintroducing mandatory copyright formalities even after a century without formalities, will not seem like an alien development in copyright law.

¹³¹ See “WIPO Summary of the Responses to the Questionnaire for Survey on Copyright Registration and Deposit Systems” (2010) World Intellectual Property Organisation <www.wipo.int>.

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