

The Scope and Advantages of Formalities in International Copyright Law in a Digital Context

April 2009

Takeshi Hishinuma (takhishinuma@gmail.com)

Introduction

The promotion of the use of copyrighted works is imminent in the Internet age. Non-formality, originally aiming at international protection, is sometimes considered as a barrier to such use. In addition, certain formalities could be beneficial for international enforcement. Although the non-formality principle is a widely accepted international norm, the scope of this principle has not been analyzed in full accordance with the generally accepted and permissible interpretation of the treaty. Thus, the dynamic approach is mainly explored in this article, and the textual and subjective approaches are discussed in the existing literature. In addition, this article considers the complementary roles shared with other instruments, such as the limitation of and exception to copyright, the duration of copyrights and compulsory license.

This article does not address issues relating to the right of publicity, which often hinders the use of cultural works. The right of publicity comes under the purview of national (dominantly Constitutional) laws rather than the international law.

I. Scope of the Non-Formality Principle in the Internet Era

1. Permissible approaches of treaty interpretation under the VCLT¹

The Vienna Convention on the Law of Treaties (VCLT) was signed but not ratified by the United States of America. Nevertheless, VCLT rules are mostly accepted as customary international law². VCLT proposes three approaches to the treaty interpretation. First, the textual approach places principal emphasis on the plain language of the treaty. This is the basic rule of the VCLT, and it integrates not only the main body of the treaty but also the connecting agreements (Art. 31.1, .2 and .3c). Secondly, the subjective approach refers to the entire course of negotiations, leading to the conclusion of the treaty and seeks to investigate the actual intentions of the parties. Legislative history can entail both 'context' (Art. 31.1), a general element of treaty interpretation, and a 'preparatory work of the treaty and the circumstances of its conclusion' (Art. 32), an element of the

supplementary means of interpretation. The former ‘determines’ the ‘ordinary meaning’ if multiple possibilities are found, whereas the latter ‘confirms’ the meaning obtained by the application of the general rule under Art. 31. Thus, ‘context’ is a more decisive element of interpretation than supplementary factors. However, the distinction is not always clear cut³.

Finally, the teleological approach seeks to interpret the treaty in the light of the objects and purposes of the parties. Individual provisions of the treaty are construed so as to give the legal effects to these objects and purposes. This approach is often called the principle of effectiveness (*ut res magis valeat quam pereat*)⁴. The term ‘object and purpose’ (Art. 31.1) indicates the teleological element applied to treaty interpretation. However, the distinction between the ‘object and purpose’ and the ‘circumstances of its conclusion’ is not always self-evident⁵.

The deletion of the limiting term ‘in force at the time of its conclusion’, found in the original 1964 draft appearing before ‘the rules of international law’, suggested that the inter-temporal law could be applied⁶. Thus, ‘international law’ (Art. 31.3c) arguably includes a subsequent interpretation after the conclusion.

2. Interpretation of copyright treaties under the VCLT and customary law

Treaty interpretation under the VCLT, though not directly applicable to the Berne Convention concluded previously, is a ‘custom’⁷, which can be referred to for the interpretation of the Berne Convention and the TRIPS Agreement. During WTO dispute settlement procedures, VCLT has been cited as the ‘customary rules of interpretation of public international law’ (DSU, Art. 3(2)). The exact meaning of customary rules is not clear, but case law indicates customary and procedural laws, though not expressly stipulated under the VCLT, such as the good-faith interpretation to avoid the redundancy and inutility of other provisions⁸. The effective interpretation of the provision of the intellectual property (IP) treaty is not unprecedented. For example, WTO dispute resolution decisions, despite lacking the binding effect of case law, recognized the principle of effectiveness as part of the general rule for treaty interpretation⁹.

The TRIPS Agreement and Berne Convention are not the ‘successive treaties relating to the same subject matter’ (VCLT Art. 30). Nevertheless, both treaties form the overall framework for multilateral protection, and a contradictory interpretation should be avoided unless explicitly provided for¹⁰. Thus, the interpretation of the TRIPS Agreement requires interpreting guidance from the legislative history of IP treaties that constitute the IP system at large¹¹.

3. Dominant approaches in the pre-Internet era and current national system

The textual and subjective approaches have been dominant.

(1) Formality

‘Formality’ is any condition or measure without the fulfilment of which the work is not protected or loses protection¹². The Universal Copyright Convention (Art. III.1) presents examples such as deposit and registration. Legislative history states that registration is a ‘formality’, and the question of procedure or evidence such as the presumption of authorship was excluded from the formality during the Berne Diplomatic Conference (1885). When the United Kingdom was under the purview of the registration system, until 1911, the certification issued by the Stationers’ Hall was the *prima facie* proof of copyright¹³. The non-formality principle concerns only copyright measures and does not regulate evidential or procedural laws¹⁴. Fiscor (2004) presented the notion of ‘*de facto* formality’, such as the court practice of accepting only registered copyright cases. However, the boundary of the prohibited or permitted formality is not clear. Many countries¹⁵ completely abolished copyright registration after joining the Berne Convention. Many American continental countries and China maintain the copyright registration system, which has supplemental legal effects, such as *prima facie* evidence of registered information. No Berne member state considers the registration system to be a condition of the exercise of, at least foreign, copyrighted works.

It is noted that the non-formality principle concerns only rights holders’ obligation. Some argue for the compulsory registration of users who want to use the orphan works¹⁶. If the users’ registration requirement as a condition of using orphan works were actually introduced, the non-formality principle would be irrelevant.

(2) Enjoyment and exercise of rights

Rights, whether or not subdivided or bundled, mandated by a treaty are ‘rights’ to which the non-formality principle is applicable. On the other hand, rights that national law voluntarily creates are not subject to the non-formality principle. ‘Enjoyment’ concerns the creation of rights. Only subject matters that are protected by copyright can be subject to enjoyment. ‘Exercise’ includes the aspect of the enforcement of rights¹⁷. Remedies provided by an administrative authority, except border measures, are not mandated by

treaties. Unlike other countries, China's National Copyright Administration is authorized to order the suspension of infringing acts, confiscation of illegal profits and products, penalty and administrative penalty including the confiscation of materials, tools and facilities that were used to manufacture infringing goods¹⁸.

Civil remedies, such as preliminary injunction and civil damages, constituting the exercise of rights, whereas registration as a condition of criminal procedures is compatible with the non-formality principle.

4. Scope and possibility of the dynamic approach

(1) Grey zone of the non-formality principle

The Stockholm Conference clarified that the non-formality principle concerned the 'basic corpus' of rights. However, the scope of basic corpus is not self-evident. For example, first, the proposed US orphan work solution, as explained later, might put *de facto* obligation to register. Rights holders would be obliged to avoid the immunity for unauthorized uses. Second, the creation of security interests in copyright might mean exercise. When the creation of security interests refers to 'transfer', the non-formality principle does not apply. However, if such a creation is an encumbrance on copyright, registration concerns exploitation and thus enjoyment. The UNCITRAL made the recommendation that creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are basically determined by registration¹⁹. Meanwhile, the basic principle of UNCITRAL's recommendations is the supremacy of the IP law over the security interest law²⁰. Moreover, there is a consensus that where national law follows a copyright registration system that determines creation and third party effectiveness of security interests in copyright, the Guide does not apply. However, when the IP law is silent, the Guide, a mere non-binding but influential soft law, applies.

Third, domestic presumption is acceptable but cross-border presumption may concern the non-formality principle. National registration does not create offshore legal effects created by copyright law. For example, US statutory damages and attorney fees are given only to US-registered copyrights. On the other hand, effects given by non-copyright law, such as presumption of ownership, are not subject to the territorial principle. Where a UK case would deny the presumption of ownership to foreign registration²¹, Australian and Japanese case laws recognize such presumptions²².

Finally, the compulsory element of collective societies (explained later), despite its useful

notice function, could be the prohibited formality.

(2) Effective interpretation

Effective interpretation is permissible if it promotes the object and purpose of the non-formality principle. The non-formality principle is rooted in the *jus naturale* theory, which was dominant in continental Europe in the nineteenth century. However, legislative history states that the principle did not spread globally from the basic philosophy of copyright nature. Rather, the necessity for international protection was the driving factor of the non-formality principle²³. Due to the reciprocity of the national treatment before the Stockholm text (1967), rights holders had been obliged to survey the required formality in the country of origin. Thus, the non-formality principle was adopted by the Berlin Revision (1908) for easier international protection of copyrights.

It should be noted, however, that an effective interpretation cannot weigh the general purpose of the treaty over the statute. The object and purpose are ‘modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light’, but do not ‘introduce an alternative option for finding the meaning’²⁴.

II. Advantages of Permitted Formalities in the Internet Era

1. Disadvantages of the static approaches

(1) Insufficient tools to confirm the copyright ownership or encumbrance

An author’s name on a digital work may not put ‘his name to appear on the work in the usual manner’ (Article 15.1, Berne Convention). Moreover, a digitally displayed name does not create presumption of authorship, and the applicability of the presumptions depends upon the future identification customs of the Information Society²⁵. The orphan work issue has become an important agenda in various countries and regions. It is evident that legislators did not expect the advent of the Internet as a vehicle for the distribution and dissemination of works. In addition, the cross-territorial presumption of municipal registration is not supported, at least clearly, under the static approaches.

The Internet changes the legislators’ assumption. Ordinary authors can distribute contents without capital or techniques. In addition, ordinary users can access such contents without any intermediary. The confirmation of copyright ownership between ordinary

individual persons is not easy.

(2) Prolonged process to confirm ownership without registration

- Border measures

An application for border measures requires ‘in writing’ (Art. 51, TRIPS) and ‘adequate evidence’ of *prima facie* infringement (Art. 52, Id.). The conceptualization of ‘adequate evidence’ is determined by municipal laws. A soft law presents a non-exhaustive list, including the certificate of copyrights registration, for adequate evidence²⁶. No legislative history or other authoritative document seems to clarify whether or not border measures are subject to the non-formality principle. Copyrights registration is not a condition of border measures in Europe²⁷ and Japan²⁸, and registration is merely one of the tools to verify ownership. Luckily, ownership was seldom questioned. On the other hand, in the US and China²⁹, registration is practically a condition for rights holders. In the US, only registered copyrights can be protected by the customs authority³⁰ and the enforcement of the International Trade Commission³¹.

- Enforcement by an administrative authority

The administrative enforcement system in China is initiated either by the administrative authority or upon the request of the rights holder. Rights holders can claim without copyrights registration, but a considerable amount of documentary evidences are required to verify the copyright ownership³². Currently, only Chinese registration is accepted as the *prima facie* ownership of copyrights.

- Judicial provisional measures

The meaning of ‘reasonably available evidence’ (Art. 50.3, TRIPS) to confirm copyright ownership is not clear cut. Most countries do not consider copyright ownership as an independent condition for claiming provisional measures but rather as a natural precondition. In the US, copyright registration is a *prima facie* evidence of the validity and ownership of copyright for preliminary injunctions³³ and temporary restraining orders. In Europe, the judicial authorities can order an applicant to provide ‘any reasonably available evidence’ that indicate ‘a sufficient degree of certainty’ of the copyright ownership³⁴. In the UK, which abolished copyright registration, the plaintiff

needs to verify the ownership by tracing its course, starting from the original author³⁵. In France and Germany, registration is not a condition of provisional measures or a tool to verify the ownership, according to the WIPO survey (2003-2004).

- Damages

Since damages cases are less urgent, the necessity for *prima facie* evidential value of copyrights registration is lesser than provisional measures cases. Thus, formal evidential procedures are more likely to be observed in damages cases.

- Notice and takedown procedures by Internet service providers (ISPs)

The legal consequences of not only foreign but also domestic copyright registration during the notice and takedown procedures are not clear. The non-formality principle does not hinder ISPs from recognizing the legal effects of copyright registration but simultaneously does not protect ISPs from liability.

(3) Insufficient tools to discover copyrights holders

Some types of works, such as photographs and ephemera, of even original authors may not be suitable for display. The subsequent transfer of or restriction on ownership is not put to notice unless it is registered. A static understanding of the non-formality principle resulted in many countries having no registration or little legal effects.

2. Relation to the *raison d'être* of the copyrights system

There are several theories or justifications for the copyright system³⁶, but it can be safely generalized that the copyright system seeks to balance the stakeholders' interests. Such stakeholders include authors, publishers, performers, film production companies, phonogram producers, Internet service providers and broadcasters, in the sense that their interests are affected by copyrights³⁷. In addition, consumers are increasingly important stakeholders. The three main stakeholders are authors and their successors, producers and consumers³⁸. The former two stakeholders are 'rights holders'.

(1) Rights holders' perspectives

Without a tool to verify or obtain a presumption of ownership, prompt enforcement –in particular cross-border injunction— may be hampered. A rights holder possesses the legitimate interest to hide his/her identity and to put notice. The current system cannot accommodate the necessity of an international notice. A domestic apostille is not available for rights holders in a country without a national registration system. In addition, the use of apostille requires that it be translated into all the foreign languages of the countries of protection, which diminishes the apostille’s convenience.

Registration is an effective tool of notice, and an online survey of national registrations is costless. Voluntary registration can be beneficial for rights holders by promoting the verification of ownership during enforcement procedures.

(2) Users’ perspectives

International law seems to indicate the primacy of human rights over IP rights³⁹. The Universal Declaration of Human Rights (UDHR, 1948) and International Covenant on Civil and Political Rights (ICCPR, 1966) maintains a balance among the stakeholders’ interests. UDHR recognizes the right to participate in the cultural life of the community as well as the authors’ rights (Art. 27.1 and .2), and ICCPR permits the freedom to seek, receive and impart information and ideas, which is subject to the rights or reputations of others (Art. 19.2 and .3).

The copyrights system does not protect users’ interests directly, for copyright law itself cannot be the cause of action for users. Nevertheless, the system incorporates the need for balance rather than to maximize the protection of copyright. The term ‘as possible’ in the Preamble of the Berne Convention incorporates the public interest⁴⁰.

Users possess the legitimate interest to know the ownership of copyrights. Without such information, users would hesitate to use the work for fear of being sued. On the other hand, ownership is often invisible to users. In addition, derivative activities based on the original work are commonly found in digital contexts. Compound audiovisual contents, which include music, performance and art, are increasingly available on the Internet.

3. Contribution to the object and purpose of the non-formality principle

In the Internet era, the immediate removal of infringing contents is a must to avoid serious damages. Ownership of copyrights is a precondition of the application for such a removal, but verification of the ownership is not always easy, in particular regarding international cases and non-registered works. Once the ownership is disputed, the claimant will be

asked to present the verification, or at least to present the basis of the presumption of the ownership. In countries where the registration system is abolished, a rights holder may not be able to find a tool to create such a presumption. Ironically, the non-formality principle, despite its original purpose of promoting international protection, could be harmful to international protection.

The contribution to the object and purpose of the non-formality principle is judged on the basis of the comparisons among (i) the costs and burdens associated with the compliance of formality, (ii) the benefits for rights holders, provided the formality is voluntarily accepted and (iii) other legitimate interests such as users' interests.

4. Limitation of a vitalized formality to the solution

First, as long as the permitted formality is not harmonized internationally, the nonuniformity of information emanating from each country of origin would reduce its utility⁴¹. In addition, searching for registration as an automatic immune measure to the use of orphan works is incompatible with the non-formality principle. Under this formal approach, rights holders would be eventually obliged to register copyrights⁴². Thus, reference to registration is a mere, rather than decisive, factor to determine a 'reasonably diligent search', a condition to be free from infringement by the use of orphan works.

Secondly, there is tension regarding rights holders' interests for privacy. In general, registered information is standardized by administrative regulations and, once registered, is subject to the public eye. Full disclosure might discourage the incentives of registration for rights holders. Partial disclosure could be a possible policy choice, if such an option would be beneficial for stakeholders. However, privacy is also in conflict with the necessity of ensuring correct information. Due to a lack of substantive examination, registration could be provided to non-rights holders⁴³. The presumption of ownership is based on the rights holders' opportunities to check registered information.

Lastly, registration of all copyrighted works created and distributed on the Internet is not realistic in view of administrative ability and registration costs.

III. Future of the Non-formality Principle

1. Revision, modification or status quo?

Revising the Berne Convention or the TRIPS Agreement is a theoretical rather than a

foreseen event. Revising the Berne Convention requires all the members' unanimity (Art. 27.3) and has not been revised since 1979. Changing the packaged TRIPS Agreement is even more difficult. A new international custom that negates the non-formality principle requires two elements of international custom, that is, the general practice (*usus* or *diuturnitas*) and corresponding views of States (*opinio juris* or *opinio necessitatis*); however, there are none. Considering the recent repetition of the non-formality principle under the WCT and WPPT (1996), a new treaty, international custom and even a Special Agreement (Art. 20, Berne Convention) cannot be foreseen to modify the principle. A fundamental change of circumstances could terminate the treaty under VCLT (Art. 62) and the customary international law (*rebus sic stantibus*). Besides the strong criticism against such termination, even if it is permitted, there is yet no such circumstance, as evidenced by the current national laws.

2. Role of the collective administration and other intermediaries

Collective societies manage the database of copyright-related information, thus possessing registration function. However, there are several limitations. First, collective societies' database is normally not provided with legal effects such as the *prima facie* evidence of ownership. Due to limited access to the private database, the accuracy of the database is not checked. In some countries, the function of collective societies are presumed even for non-trusted copyrighted works, as seen in 'legal presumption', 'extended collective licenses', or 'compulsory collective management'⁴⁴. Such a presumption is not extended to foreign territories. Second, collective societies handle only limited types of copyrighted works. Finally, the geographical scope is limited. Collective societies have been established in each country. International cooperation among collective societies is often scrutinized from the viewpoints of competition policy.

In China, the International Copyright Trading Center (国际版权交易中心) inaugurated in February 2009, where the Copyright Protection Center of China (CPCC) registers all types of copyrighted works, represents rights holders⁴⁵ and provides copyright ownership information to potential users, particularly regarding all types of contents, both electronically and physically.

3. Complementary roles with other systems

As explained, the dynamic approach alone does not provide perfect solutions to promote

ownership notice.

(1) Limitations and exceptions

Use of the orphan works means using copyrighted works without the rights holder's authorization. Limitations and exceptions could reduce or eliminate the orphan works by obliging rights holders to clarify the ownership. If a certain use were a limitation or an exception, the user would defend him/herself against a future enforcement.

Legitimate use of an orphan work without the rights holder's authorization has been drafted in the US. The core concept of the drafts is as follows: 'if the user has performed a reasonably diligent search for the copyright owner but is unable to locate that owner, then that user should enjoy a benefit of limitations on the remedies that a copyright owner could obtain against him if the owner showed up at a later date and sued for infringement.'⁴⁶ The US Copyright Office's Report (2006) assumed that compatibility with the three-step test of this concept was supported by dominant opinions. However, the Report was based on only three comments⁴⁷, and there was strong opposition to such views⁴⁸.

(2) Duration of the protection

Prolonged copyright protection is one of causes for the problems associated with orphan works. The duration of copyright is controversial and there is severe conflict of interests among stakeholders, so policy makers hesitate to combine the two issues.

(3) Canadian and Japanese compulsory license systems

A compulsory license system is authorized by the Appendix of the Berne Convention and the TRIPS Agreement (Art. 9.1). Japan has a compulsory license system for orphan works, after a due diligent search has been conducted (Art. 67.1). The use of this system is stagnant⁴⁹ because of the fee for the application, the hurdle involved in clearing the due diligent search and the difficulty in searching in newspapers and journals⁵⁰. The compulsory license system is slightly more in Canada than in Japan, but is still far from being used on a regular basis by users⁵¹. Canada has relatively clearer criteria for a reasonable search, but cannot be free from the substantive administrative procedures. Even the most efficient compulsory license system would not be able to handle the massive amount of copyrighted works that are daily created and distributed on the

Internet, as well as commensurate increases in the demands for uses.

4. Possibility of global registration

Global registration of copyrights is a quest not only for users but also for other stakeholders such as creditors and insolvency administrators⁵². The voluntary nature of registration can avoid the non-formality issue, but theoretical and practical problems would need to be solved.

Conclusion

The non-formality principle, originally aimed at effective international protection, is presently not always beneficial for international protection. The solution to emerging issues depends upon the willingness and flexibilities of international and national legislators, assuming that treaty obligations will not be negated under generally accepted interpretation methodologies.

¹ Jacobs, Francis G. (1969), 'Varieties of Approach to Treaty Interpretation', *International and Comparative Law Quarterly* (ICLQ), 18(2), pp.319-325.

² Gardiner, K. Richard (2008), *Treaty Interpretation*, Oxford University Press, p.134.

³ *Id.*, p.178 and pp.307-310.

⁴ Cassese, Antonio (2005), *International Law*, 2nd ed., Oxford University Press, p.179.

⁵ Gardiner (2008), *supra* note 2, p.194.

⁶ Waldock, Humphrey (1966), 'Special Rapporteur, 5th Report on the Law of Treaties', in *Yearbook of The International Law Commission*, Vol.II, United Nations, p.97.

⁷ Art. 38.1(b), Statute of the International Court of Justice. 'Custom' has two elements: state practice and the corresponding views of states. See Cassese (2005), *supra* note 4, pp.156-160.

⁸ Yamane, Hiroko (2007), '*TRIPS Ronso wo Meguru Ronso* (Disputes on the Interpretation of the TRIPS Agreement)', *Nihon Kokusai Keizaiho Nenpo* (Yearbook of International Economic Law), Vol.16, pp.136-139.

⁹ WTO (2000), *Canada-Pharmaceutical Patents, Panel Report*, WT/DS114/R, pp.153-54; Gardiner (2008), *supra* note 2, p.160, referring to an Appellate Body decision (1996, *Japan-Taxes on Alcoholic beverages*).

¹⁰ WTO (2000), 'Section 110(5) of the US Copyright Act, Report of the Panel', WT/DS160/R,

para.6.66.

¹¹ Yamane (2007), supra note 8, pp.140-141.

¹² Ficsor, Mihály (2004), 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms', WIPO, p.41.

¹³ *Hole v. Bradbury*, 1878 H. 91, 12 Ch D 886, June 17, 1879.

¹⁴ Ricketson, Sam and Ginsburg, Jane (2006), *International Copyright and Neighbouring Rights*, 2nd ed., Oxford University Press, pp. 326-27. Presumptive effects of registration in thirteen countries were surveyed by WIPO in 2003-4.

¹⁵ The United Kingdom is such an example. See *Loi de 1911 sur le droit d'auteur (1re et 2e année Georges V, chap.46)*, in BIRPI (1912), 'Législation intérieure –Grande-Bretagne', *Le Droit d'Auteur*, 15 Février 1912, pp.17-26.

¹⁶ US Copyright Office, Library of Congress (2006), *Report on Orphan Works*, pp.112-113

¹⁷ Ficsor (2004), supra note 12, p.42.

¹⁸ Law on the Measures for the Implementation of Copyright Administrative Penalty (2003). With regard to an urgent case, the Administration can take immediate measures to suspend illegal acts or revert to the original situation. The alleged infringer cannot stop the administration's enforcement even by appealing to judicial courts.

¹⁹ United Nations General Assembly (2005), *Security Interests, Recommendations of the draft Legislative Guide on Secured Transactions, Note by the Secretariat*, A/CN.9/WG.IV/WP.24, para.137.

²⁰ UNCITRAL (2008), *Legislative Guide on Secured Transactions*, Recommendation 4(b): The Guide does not apply to '[i]ntellectual property in so far as the provisions of the law are inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property'.

²¹ *Columbia Picture Industries Inc. et al v. Robinson et al*, [1987] Ch 38, [1986] 3 ALL ER 338, [1986] 3 WLR 542, 19 December 1985.

²² The Attorney-General's Department, *Copyright Law in Australia, A Short Guide*, 2005, para.14; and Tokyo District Court, 1976 (Wa), 10039, judged on 20 April 1981.

²³ Ricketson (2006), supra note 14, p.38.

²⁴ Gardiner (2008), supra note 2, pp.190-192.

²⁵ Dusollier, Severine (2003), 'Some Reflections on Copyright Management Information and Moral Rights', 25 *Colum. J.L. & Arts* 377, pp. 391-95.

²⁶ World Customs Organization (2003), 'Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights'.

²⁷ Article 2, Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

²⁸ Customs Format C-5840.

²⁹ Art. 5, Decree No.54 of the Customs General Administration on September 28, 1995.

³⁰ 19 C.F.R. § 133.32, T.D. 87-40, 52 FR 9474, 1987, as last amended by T.D. 99-27, 64 FR 13673, 13675, 1999; and 19 C.F.R. § 133.33, T.D. 72-266, 37 FR 20678, Oct. 3, 1972, as last amended by T.D. 99-24, 64 FR 11376, 1999.

³¹ 19 C.F.R. § 210.12(a)(6)(i) & (f), 53 FR 33055, 1988, as last corrected at 59 FR 64286, 1994.

³² Japan External Trade Organization (2005), 'Case documentary'.

³³ Donald Frederick Evans & Assocs. Inc. v. Continental Homes, Inc., 785 F.2d 897, 1986 U.S. App. LEXIS 23620, March 31, 1986; and Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1977 U.S. App. LEXIS 12494, July 12, 1977.

³⁴ Art. 9.3, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

³⁵ Columbia Picture Industries Inc. et al v. Robinson et al, [1987] Ch 38, [1986] 3 ALL ER 338, [1986] 3 WLR 542, 19 December 1985.

³⁶ See, for example, Dutfield, Graham and Suthersanen, Uma (2008), *Global Intellectual Property Law*, Edward Elgar, Chapter 3.

³⁷ *Id.*, pp.39 and 44.

³⁸ *Id.*, p.51.

³⁹ *Id.*, p.226, referring to ECOSOC (2001), *Economic, Social and Cultural Rights*, E/CN.4/Sub.2/2001/13.

⁴⁰ Ficsor (2004), supra note 12, p.21.

⁴¹ Ricketson and Ginsburg (2006), supra note 14, p.322.

⁴² US Copyright Office (2006), supra note 16, pp.72-75.

⁴³ An administrative decision made by the National Copyright Administration over the ownership of a famous folk song 'Oriental Serenade', <http://www.newiplaw.com/html/2008-01/1329.htm> (in Chinese), 25 March 2009, referred by Professor Guan Yuying, Intellectual Property Center, China Academy of Social Sciences (CASS).

⁴⁴ Olsson, Henry (2005), 'The Importance of Collective Management of Copyright and Related Rights', WIPO/CR/KRT/05/4, pp.3-4; Spurgeon, C. Paul (2003), 'License or Limit? On-line Educational Uses: Alternatives for Preserving the Exclusive Rights of Copyright Owners', *Copyright Bulletin of UNESCO*, pp.12-13; and Gervais, Daniel J. (2001), 'Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective',

Department of Canadian Heritage, pp.35-40.

⁴⁵ Copyright Agency of China (CAC).

⁴⁶ US Copyright Office (2006), *supra* note 16, p.95.

⁴⁷ *Id.*, pp.88-89.

⁴⁸ Goldstein, Paul and Ginsburg, Jane (2005), *Comments on 'Orphan Works' Inquiry* (Federal Register), p.2.

⁴⁹ From 1972 to 2005 only thirty compulsory licenses were issued. See Subdivision on Copyrights, Council for Cultural Affairs at the Agency for Cultural Affairs (2005).

⁵⁰ Subdivision on Copyrights, Council for Cultural Affairs at the Agency for Cultural Affairs (2008).

⁵¹ From 1990 to January 2009, 232 licenses were issued by the Copyright Board of Canada.

⁵² International Insolvency Institute (2007), 'Submission to UNCITRAL Working Group VI, Colloquium on Financing of Intellectual Property', EBL 1-2-7, p.1. Information relating to the copyright ownership is crucial for security interest transactions.