Formalities in copyright law: an analysis of their history, rationales and possible future
van Gompel, S.J.

Citation for published version (APA):
van Gompel, S. (2011). Formalities in copyright law: an analysis of their history, rationales and possible future

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
# Table of Contents

Acknowledgements ................................................................................................................................. iii

Table of Contents ................................................................................................................................. v

List of Abbreviations .............................................................................................................................. xi

Chapter 1 ................................................................................................................................................. 1
Introduction ............................................................................................................................................... 1
1.1 The Challenges for Copyright in the Digital Era ............................................................................. 2
1.1.1 Establishing Legal Certainty Regarding Copyright Claims .................................................. 3
1.1.2 Improving the Clearance of Copyright ................................................................................. 5
1.1.3 Enhancing the Free Flow of Information ............................................................................ 6
1.2 The Current Debate about Copyright Formalities ........................................................................ 8
1.3 Definition of the Problem ............................................................................................................. 9
1.4 Methodology and Outline of the Book ........................................................................................... 11

Chapter 2 ................................................................................................................................................. 13
The Role and Functions of Formalities in Intellectual Property Law .................................................. 13
2.1 The Different Types of Formalities ............................................................................................... 15
2.1.1 Registration ......................................................................................................................... 15
2.1.2 Renewal ............................................................................................................................... 16
2.1.3 Recordation .......................................................................................................................... 18
2.1.4 Deposit .................................................................................................................................. 19
2.1.5 Notices ................................................................................................................................. 21
2.2 The Nature and Legal Effects of Formalities ............................................................................. 24
2.2.1 Constitutive Formalities ....................................................................................................... 24
2.2.2 Maintenance Formalities ...................................................................................................... 25
2.2.3 Declaratory Formalities ....................................................................................................... 25
2.2.4 Situation Specific Formalities ............................................................................................. 27
2.3 The Functions of Formalities ...................................................................................................... 27
2.3.1 Filtering Function ................................................................................................................ 28
2.3.2 Demarcation Function ......................................................................................................... 31
2.3.2.1 The Applicant’s Claim for Protection ............................................................................. 31
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3.2.2 The Examination Procedure</td>
<td>34</td>
</tr>
<tr>
<td>2.3.2.3 Opposition or Invalidat ion by the Court</td>
<td>37</td>
</tr>
<tr>
<td>2.3.3 Signalling and Publicity Function</td>
<td>38</td>
</tr>
<tr>
<td>2.3.4 Evidentiary Function</td>
<td>40</td>
</tr>
<tr>
<td>2.3.5 Information Function</td>
<td>42</td>
</tr>
<tr>
<td>2.4 Conclusion</td>
<td>44</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>47</td>
</tr>
<tr>
<td>The History of Formalities in National Copyright Law</td>
<td>47</td>
</tr>
<tr>
<td>3.1 The Origins of Formalities in the Pre-History of Copyright Law</td>
<td>49</td>
</tr>
<tr>
<td>3.1.1 The System of Book Privileges</td>
<td>51</td>
</tr>
<tr>
<td>3.1.1.1 Licence to Print From the Censor</td>
<td>53</td>
</tr>
<tr>
<td>3.1.1.2 Early Notice Requirements</td>
<td>56</td>
</tr>
<tr>
<td>3.1.1.3 Registration of Licences and Book Privileges</td>
<td>58</td>
</tr>
<tr>
<td>3.1.1.4 Legal Deposit of Copies of Books</td>
<td>59</td>
</tr>
<tr>
<td>3.1.2 The System of Stationers’ Copyright</td>
<td>63</td>
</tr>
<tr>
<td>3.1.3 The Dual Nature of the Early Book Formalities</td>
<td>66</td>
</tr>
<tr>
<td>3.2 Formalities in Early Modern Copyright Law</td>
<td>67</td>
</tr>
<tr>
<td>3.2.1 An Overview of Formalities in National Copyright Law</td>
<td>68</td>
</tr>
<tr>
<td>3.2.1.1 United Kingdom</td>
<td>68</td>
</tr>
<tr>
<td>3.2.1.2 Continental Europe</td>
<td>69</td>
</tr>
<tr>
<td>3.2.1.3 United States of America</td>
<td>70</td>
</tr>
<tr>
<td>3.2.2 The Nature and Legal Effects of the Early Copyright Formalities</td>
<td>71</td>
</tr>
<tr>
<td>3.2.2.1 United Kingdom</td>
<td>71</td>
</tr>
<tr>
<td>3.2.2.2 Continental Europe</td>
<td>73</td>
</tr>
<tr>
<td>3.2.2.3 United States of America</td>
<td>74</td>
</tr>
<tr>
<td>3.2.3 Explaining the Differences in Attitude Towards Formalities</td>
<td>76</td>
</tr>
<tr>
<td>3.2.3.1 The Influence of ‘Old’ Book Formalities</td>
<td>76</td>
</tr>
<tr>
<td>3.2.3.2 The Position of the Author</td>
<td>77</td>
</tr>
<tr>
<td>3.2.3.3 The Focus on Public Welfare and Social Utility</td>
<td>78</td>
</tr>
<tr>
<td>3.3 Formalities in Modern Copyright Law</td>
<td>80</td>
</tr>
<tr>
<td>3.3.1 The Development of Formalities in National Copyright Law</td>
<td>80</td>
</tr>
<tr>
<td>3.3.1.1 United Kingdom</td>
<td>80</td>
</tr>
<tr>
<td>3.3.1.2 Continental Europe</td>
<td>82</td>
</tr>
<tr>
<td>3.3.1.3 United States of America</td>
<td>84</td>
</tr>
<tr>
<td>3.3.2 The Change of Perspective vis-à-vis Formalities in Europe</td>
<td>87</td>
</tr>
<tr>
<td>3.3.2.1 The Increased Person-Oriented Nature of Copyright</td>
<td>87</td>
</tr>
<tr>
<td>3.3.2.2 The Functions of Copyright Formalities</td>
<td>90</td>
</tr>
<tr>
<td>3.3.2.3 Some Important Conceptual Innovations and Transformations</td>
<td>95</td>
</tr>
<tr>
<td>3.3.2.4 The Negligible Effects on Dutch and UK Copyright Law</td>
<td>98</td>
</tr>
<tr>
<td>3.3.3 The Continuation of Formalities in the US</td>
<td>100</td>
</tr>
<tr>
<td>3.4 Conclusion</td>
<td>102</td>
</tr>
</tbody>
</table>
**Chapter 4**

**The Prohibition on Formalities in International Copyright Law**

- **4.1 International Copyright Prior to the Berne Convention**
  - 4.1.1 The Recognition of Copyright in Foreign Works
  - 4.1.2 The Plethora of Formalities in Early Bilateral Agreements
  - 4.1.3 The Growing Resistance Against the Excess of Formalities
- **4.2 The Pre-Berne Debates on International Copyright**
  - 4.2.1 The Necessity of Formalities for Copyright Protection
    - 4.2.1.1 The 1858 Conference on Literary and Artistic Property
    - 4.2.1.2 The 1878 International Conference on Artistic Property
  - 4.2.2 The Necessity of Subjecting Foreign Authors to Formalities
    - 4.2.2.1 The 1858 Conference on Literary and Artistic Property
    - 4.2.2.2 The 1878 Conferences on Literary and Artistic Property
- **4.3 The Berne Convention and the Prohibition on Formalities**
  - 4.3.1 The 1886 Berne Convention
    - 4.3.1.1 The Choice for a Treaty Based on National Treatment
    - 4.3.1.2 The Country of Origin Rule With Respect to Formalities
    - 4.3.1.3 Supplementary Provisions
  - 4.3.2 The 1896 Paris Revision
  - 4.3.3 The 1908 Berlin Revision
    - 4.3.3.1 The Continuing Problems Caused by Formalities
    - 4.3.3.2 The Prohibition on Formalities
- **4.4 Subsequent Revisions**
- **4.5 Formalities in Subsequent Treaties**
  - 4.5.1 The Film Register Treaty
  - 4.5.2 The TRIPS Agreement
  - 4.5.3 The WIPO Copyright Treaty
- **4.6 Conclusion**

**Chapter 5**

**Contextualizing the International Prohibition on Copyright Formalities**

- **5.1 The Scope of Application of the Prohibition on Formalities**
  - 5.1.1 The Territorial Scope of the Prohibition on Formalities
  - 5.1.2 The Substantive Scope of the Prohibition on Formalities
    - 5.1.2.1 Preliminary Observations
    - 5.1.2.2 Subject Matter of Protection
    - 5.1.2.3 Exclusive Rights
    - 5.1.2.4 Duration of Protection
  - 5.1.3 The Addressees of the Prohibition on Formalities
- **5.2 The Formalities to Which the Prohibition Applies**
  - 5.2.1 The ‘Conditions and Formalities’ in the 1886 Text
  - 5.2.1.1 Formalities (‘Conditions Formelles’)

---

vii
# Table of Contents

5.2.1.2 Conditions (‘Conditions Matérielles’) ...........................................162  
5.2.1.3 Some Explicit Exceptions ..............................................................164  
5.2.2 The ‘Formalities’ in the 1908 and Current Texts...............................165  
5.2.2.1 The Need for Adjustment of Terminology.....................................166  
5.2.2.2 The German Proposition ................................................................167  
5.2.2.3 The Interpretation of the Word ‘Formalities’ in Practice...............169  
5.2.2.4 Examples of ‘Conditions’ Excluded from the Prohibition.............170  
5.2.3 Conclusion .........................................................................................173  
5.3 Formalities as to the Enjoyment and the Exercise of Copyright........174  
5.3.1 Formalities as to the ‘Enjoyment’ of Copyright ................................175  
5.3.1.1 The Coming Into Existence of Copyright ......................................176  
5.3.1.2 The Maintenance of Copyright ......................................................179  
5.3.2 Formalities as to the ‘Exercise’ of Copyright ....................................180  
5.3.2.1 The Enforcement of Copyright ......................................................181  
5.3.2.2 The Transfer of Copyright .............................................................182  
5.3.2.3 The Management of Copyright......................................................185  
5.4 Conclusion .........................................................................................190  

Chapter 6...........................................................................................................193  
Relativizing the Legal-Theoretical Concerns with Copyright Formalities....193  
6.1 Introduction to the Concept of Copyright as a Natural Right ..........194  
6.2 The Property Rights Theory of Copyright .........................................196  
6.2.1 The Philosophical Foundation of Property ........................................197  
6.2.1.1 The Lockean Labour Theory of Property.......................................198  
6.2.1.2 The Regulation of Property in the Civil Society............................200  
6.2.1.3 Property by Labour in the Civil Society ........................................202  
6.2.1.4 Conclusion .....................................................................................204  
6.2.2 The Idea of Copyright as a Natural Property Right .......................205  
6.2.2.1 The Recognition of Property in Intellectual Works .......................206  
6.2.2.2 The Disentanglement of Copyright and Formalities .....................211  
6.2.3 The Regulation of Private Property Rights ........................................214  
6.2.3.1 The Codification of Natural Property Rights ..................................214  
6.2.3.2 Justifications for Limiting Private Property ...................................217  
6.2.3.3 Formalities Associated With Property Rights ..............................219  
6.3 The Personality Rights Theory of Copyright.....................................222  
6.3.1 The Philosophical Foundation of Personality Rights .......................222  
6.3.1.1 Kant’s ‘On the Injustice of Reprinting Books’ ..............................223  
6.3.1.2 Fichte’s ‘Proof of the Illegality of Reprinting’ ..............................225  
6.3.1.3 Hegel’s ‘Elements of the Philosophy of right’ ...............................227  
6.3.2 The Idea of Copyright as a Right of Personality ...............................232  
6.3.2.1 The Recognition of a Copyright Deriving From Personality...........233  
6.3.2.2 The Disentanglement of Copyright and Formalities .....................235  
6.3.3 The Regulation of Other Personality-Related Rights ......................237
### Table of Contents

6.3.3.1 The Codification of Personality-Related Rights ..................................237
6.3.3.2 The Natural Inherent Limitations of Personal Liberties .....................238
6.3.3.3 Formalities Associated With Personality Rights .............................240
6.4 The Idea of Copyright as a Fundamental Right ........................................242
6.4.1 The Fundamental Right to Protection of Creations of the Mind ...............243
6.4.2 The Fundamental Right of Property ..................................................245
6.4.2.1 Formalities Establishing Title Conditions .......................................246
6.4.2.2 Formalities Affecting the Exercise of Rights ....................................247
6.4.2.3 Formalities Affecting the Enforcement of Rights .............................250
6.4.2.4 Formalities Affecting Pre-Existing Rights .......................................251
6.4.3 The Fundamental Rights Related to Personality .....................................252
6.5 Evaluation and Assessment .....................................................................255

Chapter 7 .............................................................................................................257
7.1 Formalities and Their Possible Role in Copyright Law .............................258
7.2 Copyright Formalities and Their Abolition in Historical Context ...............259
7.3 Reintroducing Formalities: An International Law Perspective .....................260
7.4 Reintroducing Formalities: A Legal-Theoretical Exposition .......................261
7.5 The Way Forward: Changing the Prohibition on Formalities? .........................262
7.6 Alternative Rules for Formalities at the International Level .........................264
7.7 Closing Remarks ..................................................................................266

Samenvatting en conclusie .............................................................................269

Bibliography ......................................................................................................283