



## UvA-DARE (Digital Academic Repository)

### Formalities in copyright law: an analysis of their history, rationales and possible future

van Gompel, S.

**Publication date**  
2011

[Link to publication](#)

#### **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: <https://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.

# Chapter 1

## Introduction

One of the basic principles in modern copyright law is that copyright results from creative authorship and exists independently from formalities. From the moment an original work is created, the author enjoys all the benefits that copyright protection grants, without the need to complete a registration, deposit the work, mark it with a copyright notice or comply with any other statutorily prescribed formality.

This was different in the past. For a very long time in the history of copyright, the coming into being or the exercise of copyright was conditional on formalities of some kind. Only in the early twentieth century did most countries start eliminating copyright formalities.<sup>1</sup> This was the consequence of, *inter alia*, the prohibition on formalities, which was introduced in the international copyright system by the 1908 Berlin revision of the Berne Convention for the Protection of Literary and Artistic Works. This provision states: ‘The enjoyment and the exercise of these rights shall not be subject to any formality’.<sup>2</sup> In the 1990s, the Berne prohibition on formalities was incorporated by reference in the TRIPS Agreement and the WIPO Copyright Treaty.<sup>3</sup> Therefore, it has become the norm in international copyright law.

Although the Berne prohibition on formalities applies to international situations only, thus permitting contracting states to subject domestic works to formalities, the majority of signatory countries to the Berne Convention, the TRIPS Agreement and WIPO Copyright Treaty has decided to abolish formalities and grant unconditional protection to all works, regardless of their origin. As a result, in the course of the twentieth century, copyright formalities were eliminated – or reduced to a minimum – in virtually all countries around the world. They were removed in the United Kingdom (UK) in 1911, in the Netherlands in 1912 and in France in 1925. Other countries followed later. For example, Uruguay abrogated copyright formalities only in 1979, Colombia in 1982 and Spain in 1987. The United States of America

---

<sup>1</sup> Note that, at the end of the nineteenth century, some national legislators began to limit the use or to soften the nature and legal effects of copyright formalities. See Van Gompel 2010a, at 176 et seq.

<sup>2</sup> Art. 4(2) Berne Convention (1908), currently art. 5(2) Berne Convention (1971). Hereinafter the year of the adopted or revised text of the Berne Convention is indicated in parentheses, unless reference is made to the latest (1971) text of the Berne Convention, in which case such indication is omitted.

<sup>3</sup> See art. 9(1) of the TRIPS Agreement and art. 1(4) of the WIPO Copyright Treaty (WCT).

(US) did not abandon formalities as a prerequisite for protection until it joined the Berne Convention in 1989.<sup>4</sup>

Accordingly, just around the time of the transition to the digital era, copyright formalities had been abolished in practically all countries worldwide. However, the digital revolution has caused a paradigm shift in the way copyright protected works are created and consumed. While in the pre-digital era all content was locked up in physical information products and the cost of dissemination was high, the digital networked environment has enabled an interactive, simultaneous and decentralized production and access. In addition, as digitization has considerably lowered the cost of production, storage and distribution, creative works have never before been made available to the public on such a large scale.<sup>5</sup> Hence, copyright law is now facing a number of challenges to which copyright formalities may well be able to respond. These digital challenges, which are explained in detail below, have inspired several academics to call for a reintroduction of formalities in copyright law.<sup>6</sup>

This book gives a comprehensive and thorough analysis of the history, rationales and possible future of copyright formalities in light of the increased calls for their reintroduction in the digital age. Its object is not to propose a plan for implementing copyright formalities, but to examine whether reintroducing copyright formalities is legally feasible. To this end, it studies the role and functions of formalities, revisits the history of formalities at the national and the international levels and scrutinizes the international prohibition on formalities. Additionally, it analyzes the validity of one of the main arguments against copyright formalities, namely, that copyright is a ‘natural right’ and therefore should be protected independently of formalities.

To introduce the research topic and research question, this chapter first describes the challenges that copyright is facing in the digital era (para. 1.1) and then explains how this has stirred a debate about reintroducing copyright formalities by outlining some proposals in this direction and showing the controversy they have engendered (para. 1.2). After this exposition, it presents the definition of the problem (para. 1.3) and explains the methodology and the outline of the book (para. 1.4).

## 1.1 The Challenges for Copyright in the Digital Era

The calls for a reintroduction of copyright formalities are clearly a response to the change in the production and use of copyrighted works caused by the advent of digital technologies. While creating and commercially exploiting works used to be

---

<sup>4</sup> Van Gompel 2010b, at 396-397. See also Lipszyc 2010, for an extensive overview of the historical appearances and disappearances of copyright formalities at the national and international levels.

<sup>5</sup> See Gibson 2005, at 212 et seq. and Rosloff 2009, at 54.

<sup>6</sup> The reintroduction of copyright formalities has been called for, inter alia, by Lessig 2001, at 251-252, Landes & Posner 2003a, Kuhne 2004, at 549-563, Lessig 2004, at 287-290, Lévêque & Ménière 2004, at 105, Sprigman 2004, Gibson 2005, Goldman 2006, at 705-740, Samuelson 2007, at 562-563, Lessig 2008, at 260-265, Rosloff 2009, Fagundes 2009, at 179-182 and Tamura 2009, at 72-73.

the almost exclusive province of creative industries, it has now become something that nearly anyone can undertake. The widespread availability of computers, digital recording devices and online networks as media for distribution has enabled and, in fact, encouraged people to create and disseminate works to a potentially worldwide audience. Authors and creators, more than ever before, reuse pre-existing works as raw material for new creative efforts. This undeniably has presented new challenges for copyright. Above all, it has increased the need to create legal certainty regarding the claim of copyright, to improve rights clearance and to enhance the free flow of information. This section describes these three challenges in more detail.

### 1.1.1 ESTABLISHING LEGAL CERTAINTY REGARDING COPYRIGHT CLAIMS

Because copyright arises automatically upon the creation of an original work, it is not always easy to establish *ex ante* whether a particular object is protected by copyright. Even for experienced copyright lawyers this may be difficult, as the definition of what constitutes a work of authorship is broad and open-ended and the standard of originality required for protection is uncertain.<sup>7</sup>

A wide array of different types of creations may thus be protected. In fact, in the past decades, the subject matter of copyright has been extended both by legislatures and the courts. This has brought all kinds of industrial and technical creations, such as software and databases, within the realm of copyright law. In some countries, the courts have also opened the door for protecting trivial works, such as blank forms,<sup>8</sup> the scent of a perfume<sup>9</sup> and even transcripts of a simple conversation.<sup>10</sup> And these are just examples. As one scholar asserts, copyright currently seems to spring up ‘to protect nearly every creation of the human mind, be it ever so trivial’.<sup>11</sup>

This may cause legal uncertainty for authors, copyright owners and users. Unlike other intellectual property rights, such as patents, designs and trademark rights, the subject matter and scope of protection of which are defined through registration, the absence of copyright formalities, plus the ‘lack of legislative definitional closure’ of copyright-protected subject matter, makes an *ex ante* definition of copyright claims immensely difficult.<sup>12</sup> For authors and copyright owners, the fact that it can only *ex*

<sup>7</sup> Art. 2(1) of the Berne Convention defines a ‘work of authorship’ as ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’ and gives a non-exhaustive list of examples of types of works. It includes no definition of ‘originality’.

<sup>8</sup> See *Kalamazoo (Australia) Pty Ltd v. Compact Business Systems Pty Ltd*, 5 IPR 213 (Supreme Court of Queensland, 1985), holding that collections of blank accounting forms can be copyright protected.

<sup>9</sup> See the ruling of the Dutch Supreme Court of 16 June 2006, *Kecofa v. Lancôme, NJ* 2006, 585, note J.H. Spoor. But see the ruling of the French Court of Cassation of 13 June 2006, *Mme Nejla Bsiri-Barbir v. Sté Haarmann et Reimer* (Arrêt No. 1006), refusing copyright to the scent of a perfume.

<sup>10</sup> See the ruling of the Dutch Supreme Court of 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam, NJ* 2008, 556, note E.J. Dommering, *Ars Aequi* 2008, at 819-822, note P.B. Hugenholtz.

<sup>11</sup> Laddie 1996, at 257.

<sup>12</sup> Bowrey 2001, at 85.

*post* be determined whether, and to what degree, they have acquired a copyright in their creations may generate significant legal insecurity. Similarly, users face legal uncertainty when they use a particular object believing no copyright subsists in it, only to be informed *ex post* by the courts that it is protected by copyright.<sup>13</sup>

With the recent expansion of the domain of copyright to industrial and technical creations (e.g. software) and creations of a more obscure character (e.g. the scent of perfume and transcripts of a conversation), the need for an *ex ante* qualification of creations as copyright-protectable subject matter has become increasingly pressing. The vaguer the substantive threshold requirements for copyright protection are, the more ambiguous the claim of copyright is.<sup>14</sup> This explains why, in some countries, voluntary registers have been created for the registration of, e.g., television formats, websites and slogans.<sup>15</sup> Moreover, the recent calls for registering the source code of computer programmes must probably be understood against this background.<sup>16</sup>

For users of pre-existing works, a further complexity for establishing the validity of a copyright claim exists in the uncertainty surrounding copyright terms. Even if a creation may reasonably be assumed to come within the subject matter definition of copyright and be sufficiently original, it is not protected by copyright if the term of protection has expired. The term of protection is difficult to establish, however, if a work contains no information about the author or the date of first publication.<sup>17</sup> For various types of works, including photos and film footage, it is not uncommon that such information is lacking. Moreover, because the rules for calculating the term of protection vary from the one country to the other, it may occur that a work is in the public domain in the one country, while it is still protected in the other.<sup>18</sup> For users, the calculation of terms can be a considerable source of legal uncertainty.<sup>19</sup>

<sup>13</sup> See e.g. Sherman & Bently 1999, at 192-193, arguing that 'to this extent, unlike the other areas of intellectual property law, copyright law remains pre-modern'. See also Guibault 2006, at 95.

<sup>14</sup> See Quaedvlieg in: Dutch Supreme Court, ruling of 24 February 2006, *Technip v. Goossens*, *AMI* 2006-5, no. 13, 153-161, note A.A. Quaedvlieg, at 156, concluding that, while the boundaries of the 'objective domain' of intellectual creations (e.g., patent law) are fairly strict, the opposite is the case for the boundaries of the 'subjective domain' of intellectual creations (e.g., copyright law).

<sup>15</sup> See e.g. the UK Copyright Service's registration centre, where television formats and websites can be registered: <<http://www.copyrightservice.co.uk/>>. See also the Dutch *GVR/slagzinnenregister*, for the registration of slogans: <<http://www.gvr-slagzinnenregister.nl/>>.

<sup>16</sup> See e.g. Bond 1995 and Gibson 2005.

<sup>17</sup> In most countries, the term of copyright protection is calculated from the date of death of the author and, in specific cases, from the date of creation or the date of first publication of the work.

<sup>18</sup> See Van Eechoud et al. 2009, at 235-262.

<sup>19</sup> See e.g. Guibault 2006, at 95, questioning 'How can an average user easily know whether a work has fallen into the public domain or whether an element of information qualifies for protection?'

## 1.1.2 IMPROVING THE CLEARANCE OF COPYRIGHT

Another area in which current copyright law presents challenges is the clearance of rights. In the digital environment, reutilizing creative content has become easy, inexpensive and commonplace. Unless the use in question is covered by a copyright exception or limitation, copyright protected works cannot be used legally without the consent of the copyright owners. Identifying and locating copyright owners may be difficult, however, since not all works carry a statement indicating the authorship or ownership of rights and, even if they do, this information may be outdated due to a change of copyright ownership.<sup>20</sup> Often such information cannot be obtained from other sources, either. In the absence of copyright formalities, adequate and up-to-date copyright registers are scarce.<sup>21</sup> This problem of unidentifiable and untraceable copyright owners, also known as the problem of ‘orphan works’, may obstruct both mass-digitization and small-scale reutilization projects, thus impeding public access to cultural and scientific materials to the detriment of society at large.<sup>22</sup>

Although these licensing difficulties are certainly not new, they have exacerbated in recent times. In the pre-digital era, the production and dissemination of creative content was restricted to the relatively few authors that could exploit their works via publishers or content producers. Nowadays, almost anyone can become a creator and a distributor of creative works.<sup>23</sup> Modern technologies have enabled people to digitally record, assemble and reproduce works and make them available online. As a result, ‘[with] the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded’.<sup>24</sup> In addition, in the online world, works are increasingly exploited across borders. This means that, when reutilizing works, the rights might need to be cleared in potentially unknown foreign territories.<sup>25</sup> Hence, the number of occasions where the clearance of rights causes difficulties has grown exponentially.

Furthermore, the licensing difficulties have intensified due to the expansion of the traditional domain of copyright in recent decennia. Over the years, various new categories of rights have been introduced to adapt copyright law to the emergence of new technologies. This has added new layers of protection to existing creations and has brought new categories of right holders – software producers, performers, producers of phonograms and films, broadcasters and database producers – into the

---

<sup>20</sup> See e.g. US Copyright Office 2006, at 23 et seq., summarizing the main obstacles for identifying and locating copyright owners in the current copyright system.

<sup>21</sup> See Ginsburg 2008, at 176-177 (note 8), noting that, even in the US, the information that the registers currently make available in relation to ‘old’ works may not be accurate, because, under US copyright law, the recordation of ownership has never been a prerequisite to effectuate a transfer of copyright.

<sup>22</sup> See Van Gompel 2007, at 678 and Van Eechoud et al. 2009, at 271-272.

<sup>23</sup> Gibson 2005, at 213-214.

<sup>24</sup> Samuelson 2007, at 563.

<sup>25</sup> See Hugenholtz et al. 2006, at 163-164, Van Eechoud et al. 2009, at 268 and Beunen 2010.

realm of copyright. Thus, a single object now may be protected by various layers of overlapping rights, each of which may potentially be owned by a different right holder.<sup>26</sup> Moreover, since most countries have extended the term of copyright, the practical difficulties of clearing rights have increased even more.<sup>27</sup> Not only has this term extension resulted in an increased number of works covered by an exclusive right, but with the passage of time, the ownership of rights may have also become more obscure as a result of the transferability and divisibility of copyright.<sup>28</sup>

### 1.1.3 ENHANCING THE FREE FLOW OF INFORMATION

A third important challenge for copyright law lies in preventing the automatic ‘lock up’ in the copyright system of all creative works. Without formalities, the threshold for obtaining copyright is rather low. Any literary or artistic work that is sufficiently original (and fixed in a tangible medium of expression) is protected. Consequently, copyright attaches to the vast majority of creative output.<sup>29</sup> Regardless of whether authors want to avail themselves of protection, they enjoy exclusivity in their works until fifty years and, in many countries, seventy or more years after their death. This allows them or their successors in title, to the exclusion of all others, to authorize or prohibit the reproduction and communication to the public of their works.

In the pre-digital era, it may not have made such a great difference that copyright attached to all creations that were sufficiently original. The costs of disseminating works were so high that it could well be assumed that anyone engaged in exploiting creative works desired protection against free-riding by others. While not all works merited copyright protection, especially if they were not aimed at being exploited commercially, it did not harm if they were protected. Most creations that were not exploited were simply not publicly available. Because all content was locked up in physical information products, it was accessible only to those few people that could obtain a copy of the work. Furthermore, since ‘analogue’ works do not easily lend themselves to being used as building blocks for new creative efforts, little transformative use was made of pre-existing works. Most content was still passively consumed by the public.<sup>30</sup>

---

<sup>26</sup> See Hugenholtz et al. 2006, at 164, Van Gompel 2007, at 675-676 and Van Eechoud et al. 2009, at 268-269.

<sup>27</sup> In the EU, the copyright term was harmonized upward to the author’s life plus 70 years by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *OJ L* 290/9 of 24 November 1993. In the US, the copyright term has been extended by the Sonny Bono Copyright Term Extension Act, Pub.L. 105-298, 112 Stat. 2827, 27 October 1998.

<sup>28</sup> See Hugenholtz et al. 2006, at 165, Van Gompel 2007, at 674 and Van Eechoud et al. 2009, at 269.

<sup>29</sup> See Laddie 1996, at 9: ‘Another of the problems with copyright law is that ... the requirements for qualification are so low to be virtually non-existent. Virtually any written material, any sketch and any film footage or sound recording is automatically protected.’

<sup>30</sup> Gibson 2005, at 212-213.

All this has changed dramatically. Modern digital networked technologies offer the capacity to create and distribute works on a large scale and at a modest expense. Because anyone with a computer and internet access can upload content and make it available on the world wide web, works have never been more readily accessible to the public than they have now. Digitally distributed works can be used by other persons for studies, work and leisure or as raw material for new creative efforts, e.g. user-created content. Ordinary people are now able to participate in the creation and distribution of works. A key indicator is the success of personal websites, weblogs, social networking sites and online audio, photo or video communities where content is uploaded, viewed, shared and reused for the creation of derivative works.

Given this social participation in the creative process, it is questionable whether, in the digital era, all works should immediately warrant copyright protection. In the online environment, the old maxim that ‘what is worth copying is prima facie worth protecting’<sup>31</sup> seems to become ever more irrelevant. While copyright aims to protect creators and creative industries against free-riding by others, the costs of producing and disseminating content have fallen so significantly that it is doubtful whether all works necessarily merit the strong and long-term protection that copyright presently grants.<sup>32</sup> As more and more works are created, not for commercial purposes, but for the benefit of social sharing and remixing, it seems wrong to assume that ‘most of the most useful and valuable creative content’ should be protected by copyright.<sup>33</sup>

Obviously, this does not imply that copyright has now become redundant. Many works still warrant protection, because ‘[without] the law, the incentives to produce creative work would be vastly reduced. Large-budget films could not be produced; many books would not get written’.<sup>34</sup> However, that certain creations do deserve the protection of copyright is not the issue here. The point is that copyright law lacks the flexibility to assure that those works that do not necessarily merit protection – or at least not for the full duration of copyright – are not unnecessarily locked up in the copyright regime but remain free to be used by others. Although the significance of the problem depends on the degree to which copyright owners enforce their rights, users might be unwilling to take the risk of being exposed to copyright enforcement claims. The current ‘automatic’ copyright regime may thus have a chilling effect on reutilizing existing works for making new creations.<sup>35</sup> This has inspired the idea of reintroducing formalities to create additional thresholds for copyright protection.

---

<sup>31</sup> See Peterson J in *University of London Press Ltd v. University Tutorial Press Ltd*, [1916] 2 Ch 601 (Chancery Division, 1916), at 610.

<sup>32</sup> See e.g. Gibson 2005, at 212 et seq.

<sup>33</sup> Lessig 2001, at 107.

<sup>34</sup> *Ibid.*, at 107

<sup>35</sup> On the ‘chilling effect’ on creativity resulting from ownership control powers conferred on copyright owners and high licensing costs, see Marshall 2005, at 92 and Elkin-Koren 2006, at 329.

## 1.2 The Current Debate about Copyright Formalities

In the last decade, various initiatives have been launched to address the challenges that copyright is facing in the digital era. One example is Creative Commons, which aims to create a more reasonable and flexible system of copyright licensing.<sup>36</sup> Apart from introducing a set of standardized licencing terms that copyright owners can attach to their works to enhance their reusability,<sup>37</sup> various supporters of the Creative Commons initiative and other open content movements have called for a reintroduction of formalities in copyright law.<sup>38</sup> Lessig, for example, has proposed subjecting copyright in published works to registration and periodic renewal, either from the outset or fifty years after first publication.<sup>39</sup> Also, he has suggested making the enforcement of copyright conditional on the use of a copyright notice.<sup>40</sup>

Moreover, calls for a reintroduction of copyright formalities have been voiced by defenders of the law and economics approach in copyright law. Landes and Posner, for example, have proposed a system of indefinitely renewable copyright, in which the copyright term is perpetual but subject to periodic renewal.<sup>41</sup> Sprigman, on the other hand, has recommended a two-tier copyright system in which full copyright is conditional on technically voluntary formalities (registration, notice and recordation of transfer), while, in default of their compliance, the system would allow works to be used under a compulsory licence against a low royalty fee.<sup>42</sup>

The advocates of copyright formalities believe that formalities may have a useful role to play in addressing the current challenges in copyright law.<sup>43</sup> They emphasize that by ‘making claims on the ownership of property clear’, formalities assure ‘that the property can be allocated in a way that makes everyone better off’.<sup>44</sup> They assert that the costs of tracing the right owner and obtaining a licence to use a work may

---

<sup>36</sup> See <<http://creativecommons.org/>>.

<sup>37</sup> See Guibault 2008, at 75-77.

<sup>38</sup> See Dusollier 2011 (forthcoming), stating that the idea of reintroducing formalities so as to introduce a threshold for copyright protection has mostly appeared on the agenda of open content proponents.

<sup>39</sup> Lessig 2001, at 251-252 and Lessig 2004, at 248 et seq. and 289-290. This idea was transformed into a US bill, the Public Domain Enhancement Act (PDEA), H.R. 2601, 108th Cong., 1st Sess., 25 June 2003; H.R. 2408, 109th Cong., 1st Sess., 17 May 2005. See also Kuhne 2004, at 562.

<sup>40</sup> Lessig 2004, at 290-291.

<sup>41</sup> Landes & Posner 2003a and Landes & Posner 2003b, at 210-249. See also Goldman 2006, at 718 et seq.

<sup>42</sup> Sprigman 2004, at 554 et seq. See also Rosloff 2009, arguing for a copyright system in which authors retain an attribution right and protection against unrestricted, for-profit copying upon creation, while other rights are conditional on compliance with formalities, including registration and deposit.

<sup>43</sup> See Samuelson 2007, at 563, arguing that ‘copyright formalities may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years’.

<sup>44</sup> Lessig 2008, at 265.

be significantly reduced should copyright be conditional on formalities.<sup>45</sup> Moreover, they argue that, if the existence of copyright depends on formalities, then less works would be captured in the proprietary regime and more works would be available for everyone to be freely used and built upon in new creative efforts.<sup>46</sup> Formalities may thus reduce the ‘chilling effect’ on creativity caused by the uncertainty surrounding copyright claims in the current legal system and, in addition, boost the creative – i.e., the cultural and scientific – economy to the benefit of society at large.<sup>47</sup>

The opponents of copyright formalities, on the other hand, assert that formalities may be detrimental, in particular, for individual authors – as compared to corporate copyright owners. They maintain that copyright formalities have not been abolished for nothing.<sup>48</sup> They refer to the practical implications of formalities, arguing that it can be very burdensome and costly for individual authors to fulfil them.<sup>49</sup> Also, they contend that it is unfair that individual authors may lose protection because of mere ignorance, innocent mistakes or careless failure to complete formalities.<sup>50</sup> In support of this claim, they often entertain the theoretical argument that copyright is a natural right that arises upon the creation of a work and, consequently, ought to be protected independently from compliance with formalities.<sup>51</sup> Furthermore, they state that reintroducing copyright formalities is close to impossible, given the prohibition on formalities that is contained in the main international copyright treaties.<sup>52</sup>

### 1.3 Definition of the Problem

The previous section has demonstrated that the calls for reintroducing formalities in copyright law have engendered quite some controversy. While many scholars agree that copyright formalities are ‘unquestionably beneficial and desirable’,<sup>53</sup> various scholars are also concerned about the legal and practical-economic implications of

---

<sup>45</sup> See e.g. Lessig 2001, at 252, Landes & Posner 2003a, at 477-480, Lessig 2004, at 249, Lévêque & Ménière 2004, at 105, Sprigman 2004, at 500-502, Gibson 2005, Goldman 2006, at 720-721, Khong 2007, at 61, Netanel 2008, at 141-142 and Rosloff 2009, at 45-51.

<sup>46</sup> See e.g. Lessig 2001, at 252, Landes & Posner 2003a, at 517-518, Lessig 2004, at 252, Gibson 2005, Goldman 2006, at 721-722, Boyle 2008, at 48 and Rosloff 2009, at 51-52. For empirical evidence in support of this, see Sprigman 2004, at 502-521 and Landes & Posner 2003a, at 473 and 499-500.

<sup>47</sup> See Netanel 2008, at 55, explaining this from a historical US perspective.

<sup>48</sup> See Levine 1995, Karp 1995, Perlmutter 1995 and Austin 2005, at 414 et seq.

<sup>49</sup> See Karp 1995, at 522, Austin 2005, at 416, Ginsburg 2010a, at 342-343 and Ginsburg 2010b, at 457.

<sup>50</sup> See Perlmutter 1995, at 573, Ginsburg 2010a, at 342 and Ginsburg 2010b, at 457. See also Rosloff 2009, at 38-39.

<sup>51</sup> See e.g. Dietz 1978, at 24-25 (nos 53 and 54), Ginsburg 1994, at 133-134 and 147 and Von Lewinski 2008, at 43 (no. 3.25) and 119 (no. 5.58). See also Lessig 2004, at 250-251, Sprigman 2004, at 543 et seq., Austin 2005, at 415, Rosloff 2009, at 57-58 and Hishinuma 2010, at 466, referring to such ‘natural rights’ claims in relation to (the abolition of) copyright formalities.

<sup>52</sup> See Austin 2005, at 416-417.

<sup>53</sup> Ginsburg 2010a, at 342 and Ginsburg 2010b, at 457.

copyright formalities. This book contributes to this debate by examining, from a legal perspective, whether and to what degree reintroducing formalities in copyright law is feasible. By so doing, it aims to establish the extent to which the current copyright system allows for a reintroduction of copyright formalities with a view to addressing the three challenges in copyright law considered above.

To answer the main research question, the book focuses on a number of separate but interrelated topics. First it explains how formalities can contribute to addressing the challenges that copyright is facing by describing the role and functions that they can fulfil. Second, it explores the rationales behind the abolition of formalities and the adoption of the Berne prohibition on formalities by conducting a legal-historical analysis. Third, it analyzes the substantive legal framework of the Berne prohibition on formalities to establish how much space the international copyright framework leaves for reintroducing formalities. Fourth, to determine if reintroducing copyright formalities is acceptable from a legal-theoretical point of view, it examines whether copyright, even if it does qualify as a natural right, can be subject to formalities.

Hence, the book addresses some key preliminary questions to determine whether reintroducing copyright formalities is legally feasible. Its purpose is not to devise a concrete plan for implementing a system of copyright formalities. Therefore it does not look at the question of which type of copyright formalities should be introduced to most adequately address the challenges that copyright law is facing today.

Because the objective of the book is not to propose an actual implementation of a regime of copyright formalities, it undertakes neither an economic analysis nor an analysis of their procedural aspects. Only if the features of a system of formalities are concretized in more detail can the practical and economic implications be tested accurately. Although the practical and economic feasibility of reinstating copyright formalities certainly must also be studied before the idea is taken to the next level, such assessment can be made at a later stage.<sup>54</sup> To see whether formalities actually fit the substantive legal framework and the doctrine of copyright, however, the legal feasibility of reintroducing copyright formalities should first be explored. Since this question has been neglected or only marginally addressed in recent proposals, it is time to examine it now. This is where this book aims to make a contribution.

For the purpose of the book, the term ‘copyright formalities’ is defined as 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. Examples include registration, deposit and notice requirements. Domestic manufacturing clauses, which require that (foreign) works have to be manufactured in the territory of the protecting state before they acquire copyright protection, are not considered, since they are aimed not at addressing the challenges for which this book attempts to find a solution, but at protecting the local content industries.<sup>55</sup> The

---

<sup>54</sup> For a good and interesting example of an economic study of copyright formalities, see King et al. 1986, examining the costs and benefits of formalities in US copyright law in the 1980s.

<sup>55</sup> See e.g. Samuels 1993, at 153.

definition is clearly focused on mandatory formalities. Purely voluntary formalities are excluded from the scope of this book,<sup>56</sup> because they can produce limited effects only, given that their compliance relies on good will and proactivity on the part of authors and copyright owners.<sup>57</sup> Furthermore, the book is limited to formalities in copyright law. It does not consider formalities in related areas of protection, such as the protection of related ('neighbouring') rights of performers, phonogram and film producers and broadcasters or the *sui generis* database protection in the EU.

## 1.4 Methodology and Outline of the Book

In questioning whether reintroducing copyright formalities is legally feasible, the book assumes that formalities can play a useful role in addressing the challenges that copyright is facing today. This hypothesis is tested in Chapter 2, which studies the possible role and functions of formalities by analyzing twentieth-century US copyright formalities and drawing a comparison with formalities imposed in other fields of intellectual property law. The results of this analysis allow a distinction to be made between the various types of formalities, the differences in nature and legal effects and the functionalities of formalities in the rest of the book.

Next, a legal-historical analysis is conducted to unravel the rationales behind the abolition of formalities in national copyright law (Chapter 3) and the introduction of the prohibition on formalities in international copyright law (Chapter 4). The book examines the history of copyright formalities in France, Germany, the Netherlands, the UK and the US from the time of the invention of the printing press until the present day. The international part focuses on copyright formalities in nineteenth-century bilateral agreements, the debates on formalities at the main international conferences preceding the adoption of the Berne Convention and the development of rules on formalities in the Berne Convention and the other key copyright treaties that were adopted in the twentieth century, including the Universal Copyright Convention, the TRIPS Agreement and the WIPO Copyright Treaty.

After the reasons behind the abolition of formalities at the national level and the prohibition of formalities at the international level are explained, the book explores how much leeway exists for reintroducing formalities in current copyright law. To this end, it examines the substantive requirements of the prohibition on formalities in the main international copyright treaties (Article 5(2) of the Berne Convention as incorporated by reference in the TRIPS Agreement and WIPO Copyright Treaty) so as to define its scope and limits (Chapter 5). The chapter concludes that, while the international copyright treaties do not completely ban formalities, they provide too

---

<sup>56</sup> For a global overview of voluntary copyright registers, see WIPO, 'Survey of national legislation on voluntary registration systems for copyright and related rights', WIPO document (SCCR/13/2), 9 November 2005.

<sup>57</sup> See Sprigman 2004, at 518.

little room for contracting parties to reinstitute copyright formalities with the aim of addressing the challenges that copyright is facing in the current digital age.

Therefore, the book also looks beyond the existing legal framework. It questions whether the idea that copyright is a natural right stands in the way of subjecting this right to formalities (Chapter 6). If not, that would – at least from a theoretical point of view – open the door for altering or even abrogating the international prohibition on formalities so as to enable contracting states to reintroduce copyright formalities. To resolve whether copyright as a natural right ought to be protected independently from formalities, the book examines the property and personality rights theories of copyright, which lie at the heart of the natural rights claim. It analyzes from a philosophical, a legal-historical and a legal-theoretical viewpoint whether copyright formalities are compatible with these theories. Since this analysis steers close to the idea of copyright as a human right, it also examines whether copyright can be made conditional on formalities, if this right is accorded the status of a human right.

Chapter 7 concludes with an assessment of the research findings, answering the question of whether it is legally feasible to reintroduce copyright formalities, taking account of the challenges that copyright is facing in the digital era. It deduces from Chapters 5 and 6 that, while from a theoretical perspective, subjecting the economic aspect of copyright to formalities is perfectly acceptable, in practice, the prohibition on formalities does not allow the challenges identified in Chapter 1 to be adequately addressed by means of a reintroduction of copyright formalities. This culminates in a discussion of the future sustainability of the prohibition on formalities, taking into consideration the functions that formalities can perform to tackle the challenges in current copyright law, as evidence in Chapter 2, and the validity of the historical rationales behind the abolition of formalities in national and international copyright law, as identified in Chapters 3 and 4, in today's digital environment.