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

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Publication date
2011

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Citation for published version (APA):

van Gompel, S. (2011). *Formalities in copyright law: an analysis of their history, rationales and possible future*.

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Chapter 7

Summary and Conclusion

In the past decade, the reintroduction of copyright formalities has been increasingly called for by copyright scholars and practitioners around the world. They assert that formalities can fulfil a number of important functions that may help to address some of the key challenges that copyright is facing in the present digital age. Whereas, in the pre-digital era, all works were locked up in physical information products and the cost of dissemination was high, the digital networked environment has enabled an interactive, simultaneous and decentralized creation, access and consumption of works. Never before have creative works been made available to the public on such a large scale. This has presented new challenges for copyright law. As observed in Chapter 1, the challenges lie in the need to create legal certainty regarding claims of copyright, to facilitate rights clearance and to enhance the free flow of information. Copyright formalities may be able to respond to these challenges, *inter alia*, because of their capacity to enlarge the number of works in the public domain.

This book examines whether reintroducing formalities in copyright law is legally feasible. Its object is not to propose a plan for implementing copyright formalities, but to establish the extent to which the copyright system allows for a reintroduction of formalities with a view to addressing the challenges for copyright in the digital era. It therefore undertakes no economic or procedural analysis, but instead focuses on studying the history of, rationales for and possible future of copyright formalities from a national and international legal and theoretical perspective.

This chapter summarizes the main findings of the study and discusses their implications in light of the possible future of copyright formalities. It first describes the role and functions of formalities, as identified in Chapter 2 (para. 7.1), and then considers the history of formalities and the rationales behind their abolition at the national and international levels, as identified in Chapters 3 and 4 (para. 7.2). Next, it looks at the findings of Chapters 5 and 6 to see whether reintroducing formalities is possible from the point of view of international copyright law (para. 7.3), as well as from a legal-theoretical point of view (para. 7.4). It concludes that, from a legal-theoretical perspective, it is entirely feasible to make the protection of the author's economic rights conditional on formalities, but that, from a practical perspective, the international prohibition on formalities offers little leeway for reintroducing

copyright formalities with a view to addressing the challenges that copyright law is facing today.

Consequently, if policymakers wish to tackle the challenges in current copyright law with a reintroduction of formalities, then the Berne Convention would have to be modified. Drawing upon this conclusion, the chapter considers the feasibility of a possible revision of the Berne prohibition on formalities. It observes that, because formalities can perform important functions in addressing the challenges in current copyright law and because, in today's digital era, the historical rationales for abolishing copyright formalities have largely disappeared, the time for changing the Berne Convention to allow for a reinstatement of formalities in copyright law is not entirely inopportune (para. 7.5). Therefore, the chapter suggests alternative rules which could streamline compliance with formalities at the international level, should the Berne prohibition on formalities ever be revised (para. 7.6). Finally, it also makes some closing remarks on future policy implications relating to the economic and practical impact of a possible reintroduction of copyright formalities (para. 7.7).

7.1 Formalities and Their Possible Role in Copyright Law

In studying whether reintroducing copyright formalities is legally feasible, the book starts from the assumption that formalities can play a useful role in addressing the challenges that copyright is facing today. This hypothesis is tested in Chapter 2, which analyzes twentieth-century US copyright formalities and draws a comparison with formalities imposed in patent law, design law and trademark law.

This analysis shows that, in intellectual property law, formalities fulfil important functions. Depending on their type and legal effects, they may help to (1) impose an initial filter separating protected from unprotected subject matter; (2) demarcate and outline the subject matter and scope of protection; (3) identify the intangible subject matter and alert people of its existence; (4) create a link between right owners and their intellectual property, thus identifying them as legal proprietors; and (5) offer a valuable source of information from which third parties, by inquiry, can ascertain the subject matter, scope and term of protection and the identity of right owners.

Thus, depending on the type of formalities and the nature and legal effects that is conferred on them, copyright formalities may be useful in responding to the challenges in modern copyright law. They can contribute to enhancing the free flow of information by enlarging the public domain and enabling third parties to distinguish between protected and unprotected works. In addition, they may help to create legal certainty regarding copyright claims by identifying copyrighted works and assisting in calculating the term of copyright protection. Finally, they can play a key role in facilitating rights clearance by supplying information about copyright ownership and other relevant information.

7.2 Copyright Formalities and Their Abolition in Historical Context

Recent proposals for reintroducing copyright formalities are not a legal anomaly without precedent in copyright law and theory. Although, today, most countries protect copyright without formalities, Chapter 3 demonstrates that the laws of many countries, including France, Germany, the Netherlands and the UK, imposed mandatory copyright formalities until the late nineteenth or early twentieth century at least. The US retained copyright formalities as a prerequisite for protection until well into the second part of the twentieth century. At present, the enforcement of copyright in the US is still conditional on mandatory formalities, at least for works of US origin.

The reasons why copyright formalities began to fall out of favour in Europe are both ideological and pragmatic. During the nineteenth century, the belief emerged that the foundation of copyright exists solely in the quality of the author's personal creation. Under the influence of the natural rights theory, copyright was thought to arise automatically with the creation of a work. There was a growing consensus that the *existence* of copyright should not be subject to formalities and that a failure to fulfil formalities should never be the occasion of a loss of copyright. This proved fatal for constitutive formalities. Yet, there was no absolute resistance against formalities in nineteenth-century Europe. They were believed to perform important functions in relation to the *exercise* of copyright. This is consistent with the, at that time, widely accepted and prevalent idea that, while copyright should indeed be secured, this must always be done with due regard for the public interest and societal order.

Other than this ideological reason, there were pragmatic reasons that added to the gradual weakening of the connection between copyright law and formalities. First, formalities did not fit well with the concept of abstract authored works. By means of formalities, it was impossible to capture the essence of the author's expression in order to define the nature and limits of protection. Moreover, formalities could not be fulfilled unless a work was fixed in a tangible medium. This clashed with the idea that copyright exists in a work irrespective of the mode or form of expression. For certain newly protected categories of works, completing formalities also proved difficult or overly costly. In addition, formalities were rendered redundant by the availability of alternative legal means for establishing authorship and calculating the term of protection.

Additionally, in the nineteenth century, securing international copyright proved to be burdensome, as it required that authors fulfil different formalities in different countries. To free authors from this burden, the Berne Convention initially required contracting states to grant copyright to foreign works for which the formalities in the country of origin were completed. In 1908, along with the introduction of the rule of independence of protection, it prohibited contracting states from subjecting the protection of foreign works to formalities (Chapter 4). For most states adhering to the Berne Convention, the introduction of this prohibition on formalities was the

ultimate reason for abolishing national copyright formalities. Thus, while Germany already eliminated formalities in 1907, the UK abolished formalities in 1911, the Netherlands in 1912 and France in 1925. When the US joined the Berne Convention in 1989, it also removed several statutory copyright formalities or limited their application to domestic works.

7.3 Reintroducing Formalities: An International Law Perspective

Although formalities can be useful to respond to the challenges in modern copyright law, their reintroduction is likely to encounter difficulties from the perspective of international copyright law. Taking into account the prohibition on formalities that is laid down in the Berne Convention and incorporated by reference into the TRIPS Agreement and the WCT, international copyright law seems to provide little leeway for contracting states to reinstate copyright formalities, at least at first glance.

However, the international copyright framework does not render a reintroduction of copyright formalities completely impossible. As we have seen in Chapter 5, there is some space in international copyright law for reinstating copyright formalities. For one thing, the prohibition on formalities extends to international situations only. This means that contracting states are at liberty to subject the protection of domestic works to formalities. Additionally, the international copyright treaties seem to allow contracting states to adopt particular piecemeal approaches. They arguably permit them to make the protection of rights management information conditional on the registration or deposit of such information in a publicly accessible database. This is because the prohibition on formalities seems to extend only to formalities that affect the protection of *copyright*, not to formalities that relate to the adjunct protection of rights management information. Moreover, the international copyright system does not seem to prohibit formalities that establish the manner of effectuating a transfer of copyright or prove the existence or scope of the relevant transaction. This would permit contracting states to introduce a system that gives legal effect to transfers of copyright only if such transfers are recorded in a publicly accessible register.

Thus, under the current framework of international copyright law, it is factually feasible to introduce specific copyright formalities. This, at least, enables contracting states to address some of the most pressing current rights clearance problems. The clearance of rights would surely be facilitated if reliable publicly accessible databases of rights management information existed. Likewise, if all transfers of copyright were recorded in a public register, the ownership of copyright could more easily be ascertained by consulting the register. If it contains no record of any transfer, the copyright may be assumed to reside with the author. Moreover, countries might also choose to subject the protection of domestic works to copyright formalities, such as registration or the requirement to mark the copies of a work with a copyright notice. Provided that the national register is universally accessible and the copyright notice remains attached to the work, this may have the

effect of facilitating rights clearance even beyond the national borders of the country in which these formalities are imposed.

On the other hand, the current international copyright framework is not geared towards adequately addressing the challenges of creating legal certainty over copyright claims and enhancing the free flow of information, at least at the international level. While it permits contracting states to subject domestic works to formalities, even if a state chooses to make their protection conditional on constitutive formalities, these works would nonetheless be protected independently of formalities outside the country of origin. Failure to complete domestic formalities would thus cause works to enter the public domain in their home country, but not in the rest of the world. Conversely, in countries that adopt a purely domestic regime of formalities, foreign works would not be affected by it, because these works cannot be subject to formalities.

Similarly, outside the country of origin, domestic formalities cannot create legal certainty regarding copyright claims. The copyrightability of a work is determined exclusively on the basis of the substantive criteria of protection (e.g. the standard of originality) in the protecting state. This is irrespective of whether the relevant formalities in the home country have been completed. At most, domestic formalities may provide useful information facilitating the calculation of the copyright terms of works for which these formalities have been fulfilled. If the term is calculated on the basis of the author's life, for instance, copyright registers may contain information about the names of authors of works that bear no signature. This may aid in determining the status of their protection even in countries other than the country of origin.

In conclusion, as things currently stand, states adhering to the Berne Convention, the TRIPS Agreement and the WCT are free to reintroduce copyright formalities, albeit in limited form. There are some models that would enable contracting states to address some of the current rights clearance difficulties. This varies from the registration or deposit of rights management information to the recordation of copyright transfers and the subjection of domestic works to formalities. However, unless the aim is to limit the practical utility of formalities to domestic works in their country of origin only, the existing possibilities for reintroducing formalities are insufficient for universally addressing the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information.

7.4 Reintroducing Formalities: A Legal-Theoretical Exposition

Reinstating copyright formalities also hinges on their legal-theoretical acceptability. One of the core arguments against copyright formalities, which has been raised both in historical and contemporary contexts, is that copyright, as a 'natural' property or personality right, ought to arise automatically upon creation and therefore cannot be subject to formalities. This book demonstrates that this argument is based on an

incorrect understanding of the philosophy of natural law (Chapter 6). The Lockean labour theory of property, which lays the groundwork for the idea of copyright as a ‘natural authorial property right’, may explain why copyright vests in the author as creator, but it does not support the idea that copyright is absolute and unconditional. In fact, if this theory is interpreted in the full context of Locke’s *Second Treatise*, then it becomes clear that the Lockean concept of property by labour does not prevent property from being subject to formalities. If there is a legitimate public interest for doing so, natural property rights can always be limited by the law.

The situation is somewhat different when copyright is perceived as a personality right. The personality rights theory of copyright, which originates from the writings of Kant, Fichte and Hegel, suggests that authors merit protection, not because of the intellectual labour that they invest in their creations, but to protect their personality, which is manifested in their works. As the justification for copyright is founded on the author’s natural right of self-expression, a personal freedom that every person enjoys by birth, it is generally accepted that the (coming into) existence of this right cannot be subject to formalities. Only in specific circumstances, namely, when there is a conflict of rights or a competing interest, can the exercise of personality-related rights be statutorily restricted or made conditional on mandatory formalities.

Applying these findings to current copyright law, it can be concluded that, from a legal-theoretical perspective, reintroducing copyright formalities is acceptable, but only if limited to the author’s economic rights. Since moral rights aim to protect authorial dignity, they are akin to personality rights and therefore must be protected without formalities. By contrast, the author’s economic rights are property-related. This implies that there is ample room for subjecting the protection of these rights to formalities. This finds support in the framework of human rights. The fundamental right of property permits subjecting private property to both constitutive formalities and formalities that limit the exercise of property rights. Thus, from the perspective of legal theory and legal philosophy, it is entirely feasible to make the enjoyment or the exercise of the author’s economic rights conditional on formalities.

7.5 The Way Forward: Changing the Prohibition on Formalities?

As the previous sections illustrate, while reintroducing formalities is utterly feasible from a legal-theoretical viewpoint, international copyright law currently offers little leeway for reinstating formalities with the object of addressing the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information. While contracting states are allowed to impose formalities on domestic works, the legal consequences would not extend further than to such works inside their country of origin. From an international point of view, therefore, reintroducing copyright formalities along these lines would have a fairly marginal impact.

The challenges that formalities are supposed to address, however, have important international dimensions and thus require an international approach. In the online

environment, where content distribution is international by nature, a solution that is limited to domestic works in their home country cannot be truly effective. The free flow of information is not really enhanced if a work enters the public domain in the country of origin but not in the rest of the world. Likewise, legal certainty regarding copyright claims is impossible to create for works outside the home country. Inside the home country, an omission of domestic formalities to determine the validity of a copyright claim cannot always be relied upon either, because it is not always easy to ascertain which country qualifies as the country of origin of the work.

It follows that, if the object is to establish legal certainty over copyright claims or to advance the free flow of information, then the Berne prohibition on formalities would need to be altered or perhaps even be abolished altogether. This is easier said than done. A substantive revision of the Berne Convention requires the unanimous support of all contracting states. Moreover, because the prohibition on formalities is incorporated by reference in the TRIPS Agreement and the WCT, consensus about modifying the existing international legal framework would also have to be reached in the context of these two treaties. This may well prove to be very difficult.

However, the suggestion of changing or perhaps abolishing the Berne prohibition on formalities is not merely academic and theoretical. Sooner or later, policymakers might realize that the situation in current copyright law is no longer sustainable and thus warrants a solution. If so, the option of reintroducing copyright formalities may be amongst the models to be explored. As observed, formalities can fulfil important functions, which may help to address the challenges that copyright is facing today. If policymakers sought to address these challenges, then changing or abolishing the Berne prohibition on formalities to enable contracting states to subject copyright to formalities at full scale could perhaps be an option worthy of consideration.

This is particularly so now that the historical rationales behind the elimination of formalities at the national and international levels seem to have largely disappeared. As already concluded, the claim that copyright as a 'natural right' cannot be subject to formalities can easily be refuted. Moreover, the pragmatic arguments that inspired the abolition of formalities from national and international copyright law have also largely evaporated in the digital age. Nowadays, registration and deposit can be organized much more efficiently and made applicable to virtually any type of work. Due to modern technologies for digital recording and reproduction, such as digital photo and video cameras, copyrighted works can be easily and cost-effectively reproduced verbatim so as to capture their distinctive – i.e. subjective and original – features.

Furthermore, in the digital era, it no longer appears to be absolutely necessary to prohibit contracting states from subjecting copyright to formalities to guarantee an efficient protection of copyright at the international level. The success and ubiquity of the world wide web has enabled the creation of online registers, which allow anyone with a computer and internet access to register copyright or to digitally deposit works even at a distance. It would thus be possible to create an international registration system. Alternatively, international copyright protection could be made

conditional on a uniform formality, akin to the copyright notice under the Universal Copyright Convention. These and other legal instruments to ease compliance with formalities in the international context are discussed in the next section, which presents alternative rules for the prohibition on formalities.

7.6 Alternative Rules for Formalities at the International Level

If international policymakers ever decide to change or abolish the Berne prohibition on formalities to allow the challenges in current copyright law to be addressed, then the question remains with what rule it can be replaced. To prevent a fall-back to the situation before the Berne Convention, in which authors had to complete different and sometimes incompatible formalities in various countries to secure international protection, an international rule is indispensable. Two types of rules, both of which have been described, albeit in a different context, in Chapter 4 of the book, seem fit to adequately substitute the Berne prohibition on formalities.

One possibility is to revert to the country of origin rule that was laid down in the Berne Convention until 1908. That would imply that the enjoyment of copyright at the international level is subject to compliance with the domestic formalities in the home country. The country of origin rule essentially makes an exception to the rules of national treatment and independence of protection with respect to the application and legal effects of domestic formalities in international copyright law.

Materially, the country of origin rule would not bring much change to the way in which contracting states can apply formalities at the international level. Akin to the current prohibition on formalities, formalities cannot be imposed on foreign works and subjecting domestic works to formalities is purely a matter at the discretion of contracting states. The legal consequences of the country of origin rule, on the other hand, are more far-reaching. In contrast to the present situation, in which domestic formalities have legal effect at the national level only, under the country of origin rule, the legal effects of domestic formalities extend to the international level.

Consequently, a country of origin rule would allow the challenges of creating legal certainty regarding copyright claims and enhancing the free flow of information to be addressed more efficiently. Even so, it is the willingness of contracting states to subject national works to formalities that eventually determines the degree to which these issues can actually be resolved on a global scale. This may perhaps be seen as a weakness of the model. However, if consensus can be reached about changing the Berne Convention to enable a reintroduction of formalities, then countries are likely to also approach the idea of reinstating copyright formalities more positively.

A known disadvantage of the country of origin rule, however, is that it requires knowledge of foreign law and, depending on the type of formality, access to foreign registries to establish whether authors of foreign works have duly complied with the

domestic formalities. As observed, this was one of the main reasons for abandoning the country of origin rule and introducing the prohibition on formalities in 1908.

At present, however, due to international private law and contractual choice of law provisions, foreign law is fairly often applied to international cases. The exigence of knowing foreign law, therefore, cannot be used as an argument against adopting a country of origin rule. On the other hand, for a successful operation of the country of origin rule, anyone should be able to ascertain whether the domestic formalities have been fulfilled. To this end, the application of the rule could be limited to registers that are publicly accessible online and to formalities that do not require access to registries, such as copyright notices. It would also be possible to adopt a variant of the country of origin rule, pursuant to which the formalities that contracting states may impose on domestic works must have a specific form and satisfy prescribed criteria. Such a regime that standardizes domestic formalities would have an important harmonizing effect, thus bypassing the adverse effects that a hodgepodge of domestic formalities at the national level would have on international copyright protection.

An alternative would be to adopt a uniform formality that is universally applicable. This would mean that international copyright protection would be conditional on one formality established at the international level. One example of such a regime can be found in the Universal Copyright Convention, which exempts foreign works that are eligible for protection under this Convention from completing the domestic formalities of a contracting state, provided that all copies are marked with a prescribed copyright notice. A variant would be to subject the enjoyment or the exercise of international protection to a universal formality directly, rather than to confer on such a formality the effect of exempting foreign works from compliance with domestic formalities. This would give it a broader and more general application internationally.

In comparison to the country of origin rule, the uniform formality would have an advantage in that reintroducing copyright formalities may not be left to the discretion of contracting states, but would be a matter of international policymaking. Although this also complicates things, as each contracting state will ultimately have a say in deciding on the matter, it would give the opportunity to develop a coherent international policy regarding copyright formalities. Policy decisions that would have to be taken would include, *inter alia*, the type of formality to be imposed and the legal effects to be conferred on it. It would be possible, for example, to introduce a universal copyright notice, akin to the notice under the Universal Copyright Convention, or to create a central register at the international level. Moreover, it would have to be decided whether the formality would have a constitutive or merely a declaratory effect. Although constitutive formalities have the capacity of more effectively addressing some of the challenges discussed in this book, an adequate system of declaratory formalities certainly can also provide relief (para. 2.3.1). Whatever formality would be most suitable depends on the objectives

pursued and, of course, on the consensus that can be reached between contracting states.

7.7 Closing Remarks

The idea of reintroducing copyright formalities has been voiced only fairly recently. Even though the topic is not yet high on the agenda of policymakers, it has received increased attention in (inter)national political and academic circles. Since 2005, for example, WIPO has conducted two surveys into national legislation on (voluntary) copyright registration and deposit systems.¹⁶⁴⁴ In 2009, the UK Intellectual Property Office also discussed formalities in its report on a copyright strategy for the digital age¹⁶⁴⁵ and the ALAI devoted an entire afternoon session to formalities at its 2009 conference in London.¹⁶⁴⁶ Lastly, in 2011, the Comité des Sages, a Reflection group on bringing Europe's cultural heritage online, recommended that, to avoid future orphan works, some form of registration should be considered as a prerequisite for a full exercise of copyrights. To this end, it called upon the European Commission to prompt a debate at WIPO on adapting the Berne Convention on this point to make it fit for the digital age.¹⁶⁴⁷ These examples show that the debate is shifting, both at the national level and at the international level. This is particularly due to the awareness that formalities may play an increasingly important role in the digital era.

Studying the legal feasibility and legal-theoretical implications of a reinstatement of copyright formalities, this book seeks to contribute to the current debate. Legal questions, however, constitute only one dimension of the complexities surrounding a possible reintroduction of formalities. Before a new regime of copyright formalities can be implemented, the economic impact on authors, users and society at large must also be examined. Additionally, there are practical and organizational issues that require scrutiny. Yet, the practical feasibility and economic viability of a reintroduction of copyright formalities cannot be assessed generally, but depends entirely on the kind of formalities that will be imposed and the legal consequences that are conferred on it. Therefore, these questions arise only at the stage of implementation, which in this book has been deliberately ignored, given that the

¹⁶⁴⁴ WIPO, 'Survey of national legislation on voluntary registration systems for copyright and related rights', WIPO document (SCCR/13/2), 9 November 2005. The final report of the 'Second Survey on Voluntary Registration and Deposit Systems' has not yet been published, but the replies received to the questionnaire, including some additional background information, can already be obtained from: <http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html>.

¹⁶⁴⁵ Intellectual Property Office, '© the way ahead: A Copyright Strategy for the Digital Age' (2009), <<http://www.ipo.gov.uk/c-strategy-digitalage.pdf>>, at 41-42.

¹⁶⁴⁶ See the papers presented at this conference in Bently et al. 2010, at 367-477.

¹⁶⁴⁷ Report of the Comité des Sages, 'The New Renaissance', Brussels, 10 January 2011, <http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf>, at 5, 18-19 (paras 5.3.3 to 5.3.5) and 20-21 (Key recommendation no. 2).

actual reintroduction of copyright formalities is subject to policy decisions and objectives to be achieved.

Another question that this book leaves open is whether it is desirable or 'fair' to impose formalities on authors, given the practical problems and costs inflicted upon them by formalities. This question requires a qualitative judgment, which can better be made by national or international policymakers. Ultimately, however, the desirability of formalities will hinge again on the type of formalities imposed and their nature and legal consequences. To mitigate the adverse effects and lower the risk of innocent mistakes in the process of fulfilling them, copyright formalities should be relatively easy to complete. This may be a reason for policymakers not to take as an example the pre-1989 US copyright system, which contained various formalities and was the occasion of a loss of protection in many instances.¹⁶⁴⁸ To prevent a future regime of copyright formalities from unnecessarily encroaching on the rights and interests of authors, it should ideally consist of one simple formality that is universally applicable and easy to complete at very low cost.

Regardless of the outcome of an economic and practical assessment, from a legal perspective, formalities may help to address the current challenges in copyright law. Provided that they are unambiguous and easy to fulfil, formalities may contribute to creating a fair balance between protecting the rights of authors and safeguarding the interests of users to the advantage of the public at large. Even though reintroducing copyright formalities requires a significant change of approach and may well arouse controversy, the idea is worthy of further exploring. This is something that national and international policymakers should keep in mind when devising a plan, adopting new policies or implementing measures to make copyright law fit for the digital age.

¹⁶⁴⁸ See Ginsburg 2010a and Ginsburg 2010b, presenting a 'reality check' in reply to the recent calls for a reintroduction of copyright formalities, by drawing a comparison with the old US copyright system.