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FORMALITIES IN COPYRIGHT LAW

An Analysis of their History, Rationales and Possible Future

Stef van Gompel

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Law & Business

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Except for a few references that have been added later, the research for this book was completed on 1 November 2010. Throughout the book, male pronouns should be understood to include the female gender, unless the pronoun in question is meant to refer specifically to a male person. If not otherwise indicated, I bear the responsibility for the translation of Dutch, French or German texts.

Stef van Gompel
Amsterdam, 1 February 2011

List of Abbreviations

Actes	*Actes de la Conférence internationale pour la protection des droits d'auteur*; later: *Actes de les Conférences (de l'Union) internationale pour la protection des œuvres littéraires et artistiques* (records of the diplomatic conferences adopting and revising the Berne Convention) (see Bibliography)
ALAI	*Association Littéraire et Artistique Internationale*
AMI	*Tijdschrift voor Auteurs-, Media- & Informatierecht*
Berne Centenary	*Berne Convention Centenary: 1886-1986*, WIPO publication No. 877(E), Geneva: WIPO, 1986 (see Bibliography)
CMO(s)	collective rights management organization(s)
COM	European Commission document number
DG	Directorate-General of the European Commission
ECHR	European Convention on Human Rights
ECL	extended collective licensing
ECR	European Court Reports
EIPR	European Intellectual Property Review
EPC	European Patent Convention
EU	European Union
F.2d	Federal Reporter, second series
F.3d	Federal Reporter, third series
F.Supp.	Federal Reporter, supplement
GRUR (Int.)	*Gewerblicher Rechtsschutz und Urheberrecht (Internationaler Teil)*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IER	*Intellectuele Eigendom & Reclamerecht*

IIC	International Review of Intellectual Property and Competition Law (previously: International Review of Industrial Property and Copyright Law)
NJ	*Nederlandse Jurisprudentie*
NJV	*Nederlandse Juristen-Vereniging*
OJ	Official Journal
Recueil	*Recueil des conventions et traités concernant la propriété littéraire et artistique* (see Bibliography)
RIDA	*Revue Internationale du Droit d'Auteur*
RMI	rights management information
S.Ct.	Supreme Court Reports
TPM(s)	technological protection measure(s)
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UFITA	*Archiv für Urheber- und Medienrecht* (previously: *Archiv fur Urheber-Film- (Funk-) und Theaterrecht*)
UK	United Kingdom
US	United States (of America)
USC	United States Code
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Table of Contents

Chapter 1
Introduction

One of the basic principles of modern copyright law is that copyright results from creative authorship and exists independently of 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.[1] 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'.[2] In the 1990s, the Berne prohibition on formalities was incorporated by reference in the TRIPS Agreement and the WIPO Copyright Treaty.[3] Therefore, it has become the norm in international copyright law.

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1. 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.
2. 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.
3. See art. 9(1) of the TRIPS Agreement and art. 1(4) of the WIPO Copyright Treaty (WCT).

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 have 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 (US) did not abandon formalities as a prerequisite for protection until it joined the Berne Convention in 1989.[4]

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.[5] 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.[6]

This book gives a comprehensive and thorough analysis of the history, rationale 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 analyses the validity of one of the main arguments against

4. 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.
5. See Gibson 2005, at 212 et seq. and Rosloff 2009, at 54.
6. 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, Tamura 2009, at 72-73, Samuelson et al. 2010 (forthcoming) and Patry 2011 (forthcoming).

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 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 presents 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.[7]

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

7. 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'.

legislature 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,[8] the scent of a perfume[9] and even transcripts of a simple conversation.[10] 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'.[11]

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.[12] For authors and copyright owners, the fact that it can only *ex 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.[13]

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.[14] This explains why, in some countries, voluntary registers have been created for

8. 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.
9. 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.
10. 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.
11. Laddie 1996, at 257.
12. Bowrey 2001, at 85. See also Samuelson et al. 2010 (forthcoming).
13. 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.
14. 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).