REINTRODUCING COPYRIGHT FORMALITIES: CONTROVERSIES AND CHALLENGES

By Stef van Gompel

Raising the idea to reintroduce formalities in copyright law almost always triggers a fierce debate. Most people are either immediately in favor of it or against it. Very few remain completely impartial to it. Proponents argue that formalities,such as registration, deposit, copyright renewal, or the requirement to attach a copyright notice, can play an important role in copyright law in the current digital age. Some maintain that formalities may be usefulfor enhancing the free flow of information. They articulate that requiring authors to assert copyright by fulfilling a specific formalitywould enlarge the public domain and would enable third parties to better distinguish between protected and unprotected works.Others, who do not wish to go as far as making formalities a precondition for protection, contend that formalities can at least help to facilitate rights clearance. If authors and copyright owners were urged tofulfill formalities, more information onauthorship and copyright ownership, including information relevant for calculating the term of protection, would become publicly available.This could considerably ease the licensing of works and provide more legal certainty about the expiration of copyright.

Opponents, on the other hand, traditionally argue that formalities do not fit the copyright system. They believe that the act of creation is sufficient for establishing copyright and that noncompliance with formalities should not result in a loss of protection. Formalities are warned against as being traps for the unwary. Some opponents of formalities also claim that copyright is a natural right that arises automatically with the creation of an original work of authorship and therefore must not be subject to any formality. Formalities affecting the enjoyment and exercise of rights are, moreover, said to run counter to the international prohibition on formalities in Article 5(2) of the Berne Convention, which is incorporated by reference into the TRIPS Agreement and the WIPO Copyright Treaty.

The Traditional Arguments Against Formalities Debunked

That international copyright law prohibits formalities as to the enjoyment and exercise of copyright is true, but it must be emphasized that it does not preclude all formalities. As I have argued in *Formalities in Copyright Law*,[1] because the international prohibition on formalities extends to international situations only, contracting states to the above-mentioned treaties are free to subject the protection of domestic works to formalities. Furthermore, because the prohibition is copyright-specific, it does not seem to prevent contracting states from making the protection of rights management information or technological protection measures conditional on formalities, as long as this does not in any way affect the enjoyment and exercise of copyright. Likewise, contracting states are permitted to create formalities that establish the manner of effectuating a transfer of copyright or prove the existence or scope of the relevant transaction. Lastly, the international prohibition on formalities does not apply to purely voluntary formalities. Accordingly,there clearly is some space in international copyright law for reinstating formalities.

I believe that opposing formalities on the basis of the claim that copyright is a natural rightis also unconvincing. The Lockean labor theory of property, which is seen as the origin of the idea that copyright is a natural property right, explains why copyright vests in the author but does not support the idea that copyright is absolute and unconditional. If there is a legitimate public interest for doing so, natural property can always be statutorily limited or subject to formalities. Exceptions are moral rights, which aim to protect authorial dignity and therefore are more akin to personality rights than property rights.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 labor that they invest in their creations, but to protect their personality as manifested in their works.

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The justification for this theory resides in the natural right of self-expression, a personal freedom that every person enjoys by birth, and it is generally accepted that the enjoyment of personality rights cannot depend on formalities. Only in cases of conflicts of rights or competing interests can the exercise of these rights be restricted by law or made conditional on formalities. Accordingly, from a legal-theoretical viewpoint, it is unacceptable to make the protection of moral rights contingent on formalities, but subjecting the author's economic rights to formalities causes no fundamental difficulties.

A More Refined Discussion on the Future of Formalities

It follows thatdebates on reintroducing copyright formalities should not be led by ideological considerations or sentiments, but rather center on the practical, legal, and economic feasibility and desirability of such an initiative. The latter approach results in a much more nuanced debate, as was shown at the 2013 symposium, "Reform(aliz)ing Copyright for the Internet Age?" that was organized by the Berkeley Center for Law and Technology, University of California (BCLT), as part of a joint project on copyright formalities with the Institute for Information Law, University of Amsterdam (IViR). Many of the speakers at this symposiumemphasized the value of formalities for facilitatingrights clearance and for curing the problem of orphan works.[2] To strengthen the public availability of more accurate and up-to-date rights management information, various speakers suggested introducing, or reinforcing in places where it already exists, therecordation of copyright transfers. One option would be to make the validity of such transfers conditional on recordation. As Jane Ginsburg suggested, the law could further incentivize recordation by treating unrecorded transfers of copyright as effecting nonexclusive licenses rather than exclusive licenses or assignments. Other possible measures would be to subject the availability of statutory damages and/or attorney's feeson recordation or to make recordation a condition to sue for anyone claiming to be the copyright owner by virtue of a transfer of rights.[3]

All these models appear to be compliant with Article 5(2) of the Berne Convention, so there are ample opportunities for legislators to introduce information-enhancing formalities.

This shows that, when it comes to policy action in this area, there are some quite interesting avenues to pursue more thoroughly. The challenge is todetermine which types of formalities fit which objectives and to ensure that the regime conforms to the requirements of international law. My book and the scholarly works of others present various examples of Berne-compliant formalities. These examples may inspire policymakers from around the world who are investigating ways to use and leverage the benefits of formalities in the online environment. For example, in her lecture delivered 4 March 2013 at Columbia University and entitled "The Next Great Copyright Act," Maria A. Pallante, the United States Register of Copyrights, urged the U.S. legislature to provide better incentives for rights owners to register their copyright interests. Likewise, in its 2013 "Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy," the Internet Policy Task Force of the U.S. Department of Commerce indicated that it would further examine how to encourage public registration and recordation at the U.S. Copyright Office. In Europe, copyright registration is also cautiously discussed as a way to facilitate licensing and alleviate the problem of orphan works. For example, itwasmentioned as a key recommendation by the Greens/European Free Alliance in the European Parliament in its 2011position paper,"Creation and Copyright in the Digital Era" and by theComité des Sages, an expert committee established by the European Commission to advise on bringing Europe's cultural heritage online, in its 2011 report,"The New Renaissance." More important from a political perspective is the consultation on the review of the EU copyright rules, which was launched by the European Commission at the end of 2013 and ran until March 2014, and which posed questions about the utility and possible advantages and disadvantages of a registration system for works and other subject matter. Accordingly, even in Europe, there is a growing political interest in copyright registries.

As long as they are sufficiently flexible and efficient,in the sense that they are straightforward, easy to apply, and not unreasonablyonerous for authors and rights owners,formalities promise significant benefits for a more efficient and focused copyright law. They shouldnot be viewed as relics of the past, but as possible strategies for reconciling copyright law with the challenges of the present digital age.■

Stef van Gompel
Senior Researcher, Institute for Information Law,
University of Amsterdam
Amsterdam, The Netherlands

vangompel@ivir.nl

www.ivir.nl/staff/vangompel.html

1 Stef van Gompel, Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future(Information Law Series 23, Kluwer Law International 2011).

2 An orphan work is a work for which the copyright owner cannot be traced. This creates difficulties for an individual who wants to use that work and requires permission from the copyright owner to do so.

3 See the various contributions to the symposium issue of the Berkeley Technology Law Journal, 28 Berkeley Tech. L.J.1415 (2013).

Registration of a work with a national copyright office (such as the U.S. Copyright Office) and using the copyright symbol © are two copyright formalities that used to be required under the U.S. copyright law for a work to be protected by copyright. Since the United States joined the leading copyright treaty, the Berne Convention, in 1989, these copyright formalities have been eliminated in the United States. Copyright protection is now automatic in the United States upon creation of a work in a fixed format. There is automatic copyright protection in Canada, the European Union countries, and in the 167 countries that belong to the Berne Convention.

Editor's Note on Copyright Formalities

News Brief
AEREO STREAMING CASE

On 25 June 2014, the U.S. Supreme Court ruled that New York-based Aereo Inc. may not stream television without permission of copyright owners. In American Broadcasting Companies, Inc. et al v. Aereo, Inc., the court held that Aereo's streaming and storage service is a public performance (a right that exclusively belongs to copyright owners.) The decision is at www.supremecourt.gov/opinions/13pdf/13-461_l537.pdf.

News Brief
HATHITRUST DIGITAL LIBRARY WINS LATEST ROUND

On 10 June 2014, the U.S. Court of Appeals for the Second Circuit, in New York, confirmed that HathiTrust's searchable, full-text database creation is legal. In addition, making texts available in different formats for the vision-impaired and other disabled users is also legal. The decision is at www.tc.umn.edu/~nasims/HathivAG10_10_12.pdf.

News Brief
NOTICE AND NOTICE REGIME IN CANADA

The coming into force of the Notice and Notice regime in Canada will take place on 1 January 2015. This formalization of a voluntary practise in Canada will require Internet intermediaries like ISPs and website owners to take action upon receiving a notice of alleged infringement from a copyright owner. This is the final piece of the 2012 Copyright Modernization Act to come into force. See government press release at http://news.gc.ca/web/article-en.do?nid=858099.