

tion 402 thus sets forth requirements for a notice to appear on the “phonorecords” of “sound recordings” that are different from the notice requirements established by section 401 for the “copies” of all other types of copyrightable works. Since “phonorecords” are not “copies,” there is no need to place a section 401 notice on “phonorecords” to protect the literary or musical works embodied in the records.

In general, the form of the notice specified by section 402(b) consists of the symbol “©”; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Where the record producer’s name appears on the record label, album, sleeve, jacket, or other container, it will be considered a part of the notice if no other name appears in conjunction with it. Under subsection (c), the notice for a copyrighted sound recording may be affixed to the surface, label, or container of the phonorecord “in such manner and location as to give reasonable notice of the claim of copyright.”

There are at least three reasons for prescribing use of the symbol “©” rather than “©” in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol “©” has also been adopted as the international symbol for the protection of sound recordings by the “Phonograms Convention” (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971), to which the United States is a party.

AMENDMENTS

1988—Subsec. (a). Pub. L. 100-568, §7(b)(1), (2), substituted “General provisions” for “General requirement” in heading, and “may be placed on” for “shall be placed on all” in text.

Subsec. (b). Pub. L. 100-568, §7(b)(3), substituted “If a notice appears on the phonorecords, it” for “The notice appearing on the phonorecords”.

Subsec. (d). Pub. L. 100-568, §7(b)(4), added subsec. (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

§ 403. Notice of copyright: Publications incorporating United States Government works

Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting predominantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2577; Pub. L. 100-568, §7(c), Oct. 31, 1988, 102 Stat. 2858.)

HISTORICAL AND REVISION NOTES

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Section 403 is aimed at a publishing practice that, while technically justified under the present law, has

been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been the practice to add some “new matter” in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.

To make the notice meaningful rather than misleading, section 403 requires that, when the copies or phonorecords consist “preponderantly of one or more works of the United States Government,” the copyright notice (if any) identify those parts of the work in which copyright is claimed. A failure to meet this requirement would be treated as an omission of the notice, subject to the provisions of section 405.

AMENDMENTS

1988—Pub. L. 100-568 amended section generally. Prior to amendment, section read as follows: “Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.”

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

§ 404. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient to invoke the provisions of section 401(d) or 402(d), as applicable with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2577; Pub. L. 100-568, §7(d), Oct. 31, 1988, 102 Stat. 2858.)

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In conjunction with the provisions of section 201(c), section 404 deals with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is threefold:

(1) To permit but not require a separate contribution to bear its own notice;

(2) To make a single notice, covering the collective work as a whole, sufficient to satisfy the notice re-

quirement for the separate contributions it contains, even if they have been previously published or their ownership is different; and

(3) To protect the interests of an innocent infringer of copyright in a contribution that does not bear its own notice, who has dealt in good faith with the person named in the notice covering the collective work as a whole.

As a general rule, under this section, the rights in an individual contribution to a collective work would not be affected by the lack of a separate copyright notice, as long as the collective work as a whole bears a notice. One exception to this rule would apply to “advertisements inserted on behalf of persons other than the owner of copyright in the collective work.” Collective works, notably newspapers and magazines, are major advertising media, and it is common for the same advertisement to be published in a number of different periodicals. The general copyright notice in a particular issue would not ordinarily protect the advertisements inserted in it, and relatively little advertising matter today is published with a separate copyright notice. The exception in section 404(a), under which separate notices would be required for most advertisements published in collective works, would impose no undue burdens on copyright owners and is justified by the special circumstances.

Under section 404(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice. The case is governed by section 406(a), which means that an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent.

REFERENCES IN TEXT

The effective date of the Berne Convention Implementation Act of 1988, referred to in subsec. (b), is Mar. 1, 1989, see section 13 of Pub. L. 100-568, set out as an Effective Date of 1988 Amendment note under section 101 of this title.

AMENDMENTS

1988—Subsec. (a). Pub. L. 100-568, § 7(d)(1), substituted “to invoke the provisions of section 401(d) or 402(d), as applicable” for “to satisfy the requirements of sections 401 through 403”.

Subsec. (b). Pub. L. 100-568, § 7(d)(2), substituted “With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where” for “Where”.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

§ 405. Notice of copyright: Omission of notice on certain copies and phonorecords

(a) **EFFECT OF OMISSION ON COPYRIGHT.**—With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) **EFFECT OF OMISSION ON INNOCENT INFRINGERS.**—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) **REMOVAL OF NOTICE.**—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2578; Pub. L. 100-568, § 7(e), Oct. 31, 1988, 102 Stat. 2858; Pub. L. 105-80, § 12(a)(10), Nov. 13, 1997, 111 Stat. 1535.)

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Effect of Omission on Copyright Protection. The provisions of section 405(a) make clear that the notice requirements of sections 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.

Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

(1) if “no more than a relatively small number” of copies or phonorecords have been publicly distributed without notice; or