

an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase “relatively small number” is intended to be less restrictive than the phrase “a particular copy or copies” now in section 21 of the present law [section 21 of former title 21].

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owner make a “reasonable effort,” after discovering his error, to add the notice to copies or phonorecords distributed thereafter. This condition is specifically limited to copies or phonorecords publicly distributed in the United States, since it would be burdensome and impractical to require an American copyright owner to police the activities of foreign licensees in this situation.

The basic notice requirements set forth in sections 401(a) and 402(a) are limited to cases where a work is published “by authority of the copyright owner” and, in prescribing the effect of omission of notice, section 405(a) refers only to omission “from copies or phonorecords publicly distributed by authority of the copyright owner.” The intention behind this language is that, where the copyright owner authorized publication of the work, the notice requirements would not be met if copies or phonorecords are publicly distributed without a notice, even if he expected a notice to be used. However, if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the provisions of section 401 or 402 and of section 405 would not apply since the publication itself would not be authorized. This principle is stated directly in section 405(a)(3).

Effect of Omission on Innocent Infringers. In addition to the possibility that copyright protection will be forfeited under section 405(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 405. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice has been omitted from a large number or from a “relatively small number” of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Under section 405(b) an innocent infringer who acts “in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted”, and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to “any infringing acts committed before receiving actual notice” of registration. Thus, where the infringement is completed before actual notice has been served—as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like—liability, if any, would be limited to the profits the infringer realized from the act of infringement. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort

should check the Copyright Office registration records before starting, even where copies have been published without notice.

The purpose of the second sentence of subsection (b) is to give the courts broad discretion to balance the equities within the framework of section 405 [this section]. Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances. The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee.

Removal of Notice by Others. Subsection (c) of section 405 involves the situation arising when, following an authorized publication with notice, someone further down the chain of commerce removes, destroys, or obliterates the notice. The courts dealing with this problem under the present law, especially in connection with copyright notices on the selva of textile fabrics, have generally upheld the validity of a notice that was securely attached to the copies when they left the control of the copyright owner, even though removal of the notice at some later stage was likely. This conclusion is incorporated in subsection (c).

REFERENCES IN TEXT

The effective date of the Berne Convention Implementation Act of 1988, referred to in subsecs. (a) and (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

1997—Subsec. (b). Pub. L. 105-80 substituted “condition for permitting the continuation” for “condition or permitting the continuation”.

1988—Pub. L. 100-568, §7(e)(3), substituted “notice on certain copies and phonorecords” for “notice” in section catchline.

Subsec. (a). Pub. L. 100-568, §7(e)(1), 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, the omission of the copyright notice described in” for “The omission of the copyright notice prescribed by”.

Subsec. (b). Pub. L. 100-568, §7(e)(2), substituted “omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988,” for “omitted,”.

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.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 406 of this title.

§ 406. Notice of copyright: Error in name or date on certain copies and phonorecords

(a) **ERROR IN NAME.**—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 the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the

copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun—

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from transfers or licenses purportedly made under the copyright by the person named in the notice.

(b) **ERROR IN DATE.**—When the year date in the notice on copies or phonorecords distributed before the effective date of the Berne Convention Implementation Act of 1988 by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) **OMISSION OF NAME OR DATE.**—Where copies or phonorecords publicly distributed before the effective date of the Berne Convention Implementation Act of 1988 by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405 as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2578; Pub. L. 100-568, §7(f), Oct. 31, 1988, 102 Stat. 2858.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

In addition to cases where notice has been omitted entirely, it is common under the present law for a copyright notice to be fatally defective because the name or date has been omitted or wrongly stated. Section 406 is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date and protecting users who rely on erroneous information.

Error in Name. Section 406(a) begins with a statement that the use of the wrong name in the notice will not affect the validity or ownership of the copyright, and then deals with situations where someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice. In such a case the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice. Use of the wrong name in the notice is no defense if, at the time infringement was begun, registration had been made in the name of the true owner, or if “a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.”

The situation dealt with in section 406(a) presupposes a contractual relation between the copyright owner

and the person named in the notice. The copies or phonorecords bearing the defective notice have been “distributed by authority of the copyright owner” and, unless the publication can be considered unauthorized because of breach of an express condition in the contract or other reasons, the owner must be presumed to have acquiesced in the use of the wrong name. If the person named in the notice grants a license for use of the work in good faith or under a misapprehension, that person should not be liable as a copyright infringer, but the last sentence of section 406(a) would make the person named in the notice liable to account to the copyright owner for “all receipts, from transfers or licenses purportedly made under the copyright” by that person.

Error in Date. The familiar problems of antedated and postdated notices are dealt with in subsection (b) of section 406. In the case of an antedated notice, where the year in the notice is earlier than the year of first publication, the bill adopts the established judicial principle that any statutory term measured from the year of publication will be computed from the year given in the notice. This provision would apply not only to the copyright terms of anonymous works, pseudonymous works, and works made for hire under section 302(c), but also to the presumptive periods set forth in section 302(e).

As for postdated notices, subsection (b) provides that, where the year in the notice is more than one year later than the year of first publication the case is treated as if the notice had been omitted and is governed by section 405. Notices postdated by one year are quite common on works published near the end of a year, and it would be unnecessarily strict to equate cases of that sort with works published without notice of any sort.

Omission of Name or Date. Section 406(c) provides that, if the copies or phonorecords “contain no name or no date that could reasonably be considered a part of the notice,” the result is the same as if the notice had been omitted entirely, and section 405 controls. Unlike the present law, the bill contains no provision requiring the elements of the copyright notice to “accompany” each other, and under section 406(c) a name or date that could reasonably be read with the other elements may satisfy the requirements even if somewhat separated from them. Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself had been omitted altogether.

REFERENCES IN TEXT

The effective date of the Berne Convention Implementation Act of 1988, referred to in text, 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—Pub. L. 100-568, §7(f)(4), substituted “date on certain copies and phonorecords” for “date” in section catchline.

Subsec. (a). Pub. L. 100-568, §7(f)(1), 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”.

Subsec. (b). Pub. L. 100-568, §7(f)(2), inserted “before the effective date of the Berne Convention Implementation Act of 1988” after “distributed”.

Subsec. (c). Pub. L. 100-568, §7(f)(3), inserted “before the effective date of the Berne Convention Implementation Act of 1988” after “publicly distributed” and “as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988” after “section 405”.

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.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 404 of this title.

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication—

- (1) two complete copies of the best edition; or
- (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable—

- (1) to a fine of not more than \$250 for each work; and
- (2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them; and

(3) to pay a fine of \$2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.

(e) With respect to transmission programs that have been fixed and transmitted to the public in the United States but have not been published, the Register of Copyrights shall, after consulting with the Librarian of Congress and other interested organizations and officials, establish regulations governing the acquisition, through deposit or otherwise, of copies or phonorecords of such programs for the collections of the Library of Congress.

(1) The Librarian of Congress shall be permitted, under the standards and conditions set forth in such regulations, to make a fixation of a transmission program directly from a transmission to the public, and to reproduce one copy or phonorecord from such fixation for archival purposes.

(2) Such regulations shall also provide standards and procedures by which the Register of Copyrights may make written demand, upon the owner of the right of transmission in the United States, for the deposit of a copy or phonorecord of a specific transmission program. Such deposit may, at the option of the owner of the right of transmission in the United States, be accomplished by gift, by loan for purposes of reproduction, or by sale at a price not to exceed the cost of reproducing and supplying the copy or phonorecord. The regulations established under this clause shall provide reasonable periods of not less than three months for compliance with a demand, and shall allow for extensions of such periods and adjustments in the scope of the demand or the methods for fulfilling it, as reasonably warranted by the circumstances. Willful failure or refusal to comply with the conditions prescribed by such regulations shall subject the owner of the right of transmission in the United States to liability for an amount, not to exceed the cost of reproducing and supplying the copy or phonorecord in question, to be paid into a specially designated fund in the Library of Congress.

(3) Nothing in this subsection shall be construed to require the making or retention, for purposes of deposit, of any copy or phonorecord of an unpublished transmission program, the transmission of which occurs before the receipt of a specific written demand as provided by clause (2).

(4) No activity undertaken in compliance with regulations prescribed under clauses (1) or (2) of this subsection shall result in liability if intended solely to assist in the acquisition of copies or phonorecords under this subsection.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2579; Pub. L. 100-568, §8, Oct. 31, 1988, 102 Stat. 2859; Pub. L. 105-80, §12(a)(11), Nov. 13, 1997, 111 Stat. 1535.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The provisions of sections 407 through 411 of the bill mark another departure from the present law. Under