

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

HOUSE REPORT NO. 94-1476

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.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 404, 405 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.)

HISTORICAL AND REVISION NOTES

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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 requirement 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.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

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

(2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered. Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides that, as long as the omission is from "no more than a relatively small number of copies or phonorecords," there is no effect upon the copyright owner's rights except in the case of 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