

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 “accom-

pany” 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 catline.

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 the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration.

The basic requirement of the deposit provision, section 407, is that within 3 months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is authorized to exempt any category of material from the deposit requirements. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine.

Under the present law deposits for the Library of Congress must be combined with copyright registration, and failure to comply with a formal demand for deposit and registration results in complete loss of copyright. Under section 407 of the bill, the deposit requirements can be satisfied without ever making registration, and subsection (a) makes clear that deposit "is not a condition of copyright protection." A realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Although the basic deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this

country through the distribution of copies or phonorecords that are either imported or are part of an American edition. With respect to all types or works other than sound recordings, the basic obligation is to deposit “two complete copies of the best edition”; the term “best edition,” as defined in section 101, makes clear that the Library of Congress is entitled to receive copies of phonorecords from the edition it believes best suits its needs regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. Once the deposit requirements for a particular work have been satisfied under section 407, however, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

The deposit requirement for sound recordings includes “two complete phonorecords of the best edition” and any other visually-perceptible material published with the phonorecords. The reference here is to the text or pictorial matter appearing on record sleeves and album covers or embodied in separate leaflets or booklets included in a sleeve, album, or other container. The required deposit in the case of a sound recording would extend to the entire “package” and not just to the disk, tape, or other phonorecord included as part of it.

Deposits under section 407, although made in the Copyright Office, are “for the use or disposition of the Library of Congress.” Thus, the fundamental criteria governing regulations issued under section 407(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposits where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes, would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.

The Committee adopted an amendment to subsection (c) of section 407, aimed at meeting the concerns expressed by representatives of various artists’ groups concerning the deposit of expensive art works and graphics published in limited editions. Under the present law, optional deposit of photographs is permitted for various classes of works, but not for fine prints, and this has resulted in many artists choosing to forfeit copyright protection rather than bear the expense of depositing “two copies of the best edition.” To avoid this unfair result, the last sentence of subsection (c) would require the Register to issue regulations under which such works would either be exempted entirely from the mandatory deposit or would be subject to an appropriate alternative form of deposit.

If, within three months after the Register of Copyrights has made a formal demand for deposit in accordance with section 407(d), the person on whom the demand was made has not complied, that person becomes liable to a fine up to \$250 for each work, plus the “total retail price of the copies or phonorecords demanded.” If no retail price has been fixed, clause (2) of subsection (d) establishes the additional amount as “the reasonable cost to the Library of Congress of acquiring them.” Thus, where the copies or phonorecords are not available for sale through normal trade channels—as would be true of many motion picture films, video tapes, and computer tapes, for example—the item of cost to be included in the fine would be equal to the basic expense of duplicating the copies or phonorecords plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisitions procedures, if they had been available.

There have been cases under the present law in which the mandatory deposit provisions have been deliberately and repeatedly ignored, presumably on the as-

sumption that the Library is unlikely to enforce them. In addition to the penalties provided in the current bill, the last clause of subsection (d) would add a fine of \$2,500 for willful or repeated failure or refusal to deposit upon demand.

The Committee also amended section 407 [this section] by adding a new subsection (e), with conforming amendments of sections 407(a) and 408(b). These amendments are intended to provide a basis for the Library of Congress to acquire, as a part of the copyright deposit system, copies or recordings of non-syndicated radio and television programs, without imposing any hardships on broadcasters. Under subsection (e) the Library is authorized to tape programs off the air in all cases and may “demand” that the broadcaster supply the Library with a copy or phonorecord of a particular program. However, this “demand” authority is extremely limited: (1) The broadcaster is not required to retain any recording of a program after it has been transmitted unless a demand has already been received; (2) the demand would cover only a particular program; “blanket” demands would not be permitted; (3) the broadcaster would have the option of supplying the demand by gift, by loan for purposes of reproduction, or by sale at cost; and (4) the penalty for willful failure or refusal to comply with a demand is limited to the cost of reproducing and supplying the copy or phonorecord in question.

AMENDMENTS

1997—Subsec. (d)(2). Pub. L. 105-80 substituted “cost to the Library of Congress” for “cost of the Library of Congress”.

1988—Subsec. (a). Pub. L. 100-568 struck out “with notice of copyright” before “in the United States”.

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.

DEPOSITS AND REGISTRATIONS MADE AFTER DECEMBER 31, 1977, IN RESPONSE TO DEMAND UNDER PREDECESSOR DEMAND AND PENALTY PROVISIONS

Section 110 of Pub. L. 94-553 provided that: “The demand and penalty provisions of section 14 of title 17 as it existed on December 31, 1977, apply to any work in which copyright has been secured by publication with notice of copyright on or before that date, but any deposit and registration made after that date in response to a demand under that section shall be made in accordance with the provisions of title 17 as amended by the first section of this Act.”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 408, 704, 708 of this title; title 2 section 170.

§ 408. Copyright registration in general

(a) **REGISTRATION PERMISSIVE.**—At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(b) **DEPOSIT FOR COPYRIGHT REGISTRATION.**—Except as provided by subsection (c), the material deposited for registration shall include—