

What Constitutes “Manufacture in the United States” or Canada. A difficult problem in the manufacturing clause controversy involves the restrictions to be imposed on foreign typesetting or composition. Under what they regard as a loophole in the present law, a number of publishers have for years been having their manuscripts set in type abroad, importing “reproduction proofs,” and then printing their books from offset plates “by lithographic process * * * wholly performed in the United States.” The language of the statute on this point is ambiguous and, although the publishers’ practice has received some support from the Copyright Office, there is a question as to whether or not it violates the manufacturing requirements.

In general the book publishers have opposed any definition of domestic manufacture that would close the “repro proof” loophole or that would interfere with their use of new techniques of book production, including use of imported computer tapes for composition here. This problem was the focal point of a compromise agreement between representatives of the book publishers and authors on the one side and of typographical firms and printing trades unions on the other, and the bill embodies this compromise as a reasonable solution to the problem.

Under subsection (c) the manufacturing requirement is confined to the following processes: (1) Typesetting and platemaking, “where the copies are printed directly from type that has been set, or directly from plates made from such type”; (2) the making of plates, “where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies”; and (3) in all cases, the “printing or other final process of producing multiple copies and any binding of the copies.” Under the subsection there would be nothing to prevent the importation of reproduction proofs, however they were prepared, as long as the plates from which the copies are printed are made here and are not themselves imported. Similarly, the importation of computer tapes from which plates can be prepared here would be permitted. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States or Canada.

Effect of Noncompliance with Manufacturing Requirement. Subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright with respect to reproduction and the distribution of copies. The bill does away with the special “ad interim” time limits and registration requirements of the present law and, even if copies are imported or distributed in violation of the section, there would be no effect on the copyright owner’s right to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly. Even the rights to reproduce and distribute copies are not lost in cases of violation, although they are limited as against certain infringers.

Subsection (d) provides a complete defense in any civil action or criminal proceeding for infringement of the exclusive rights of reproduction or distribution of copies where, under certain circumstances, the defendant proves violation of the manufacturing requirements. The defense is limited to infringement of the “nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material.” This means, for example, that the owner of copyright in photographs or illustrations published in a book copyrighted by someone else who would not be deprived of rights against an infringer who proves that there had been a violation of section 601.

Section 601(d) places the full burden for proving violation on the infringer. The infringer’s defense must be based on proof that: (1) copies in violation of section 601

have been imported or publicly distributed in the United States “by or with the authority” of the copyright owner; and (2) that the infringing copies complied with the manufacturing requirements; and (3) that the infringement began before an authorized edition complying with the requirements had been registered. The third of these clauses of subsection (d) means, in effect, that a copyright owner can reinstate full exclusive rights by manufacturing an edition in the United States and making registration for it.

Subsection (e) requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint. Correspondingly, section 409 would require the manufacturers to be identified in applications for registration covering published works subject to the requirements of section 601.

AMENDMENTS

1997—Subsec. (a). Pub. L. 105-80, §12(a)(15), substituted “nondramatic” for “nondramtic”.

Subsec. (b)(1). Pub. L. 105-80, §12(a)(16), substituted “substantial” for “subsustantial” before “part of the work”.

1982—Subsec. (a). Pub. L. 97-215 substituted “1986” for “1982”.

TRANSFER OF FUNCTIONS

For transfer of functions, personnel, assets, and liabilities of the United States Customs Service of the Department of the Treasury, including functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 203(1), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 409, 602 of this title.

§ 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to—

(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;

(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person’s personal baggage; or

(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any

other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the United States Customs Service has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Customs Service of the importation of articles that appear to be copies or phonorecords of the work.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2589.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Scope of the Section. Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of “piratical” articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the United States Customs Service to prohibit importation only of “piratical” articles.

Section 602(a) first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords “have been acquired outside the United States”, but then enumerates three specific exceptions: (1) importation under the authority or for the use of a governmental body, but not including material for use in schools or copies of an audiovisual work imported for any purpose other than archival use; (2) importation for the private use of the importer of no more than one copy or phonorecord of a work at a time, or of articles in the personal baggage of travelers from abroad; or (3) importation by nonprofit organizations “operated for scholarly, educational, or religious purposes” of “no more than one copy of an audiovisual work solely for archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes.” The bill specifies that the third exception does not apply if the importation “is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).”

If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

Importation of “Piratical” Copies. Section 602(b) retains the present statute’s prohibition against importation of “piratical” copies or phonorecords—those whose making “would have constituted an infringement of copyright if this title has been applicable.” Thus, the Customs Service could exclude copies or phonorecords that were unlawful in the country where they were made; it could also exclude copies or phonorecords which, although made lawfully under the domestic law of that country, would have been unlawful if the U.S.

copyright law could have been applied. A typical example would be a work by an American author which is in the public domain in a foreign country because that country does not have copyright relations with the United States; the making and publication of an authorized edition would be lawful in that country, but the Customs Service could prevent the importation of any copies of that edition.

Importation for Infringing Distribution. The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner’s exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the United States Customs Service to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Service has no authority to prevent importation, “where the copies or phonorecords were lawfully made.” The subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Customs Service to notify them wherever articles appearing to infringe their works are imported.

TRANSFER OF FUNCTIONS

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SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 501, 511, 603 of this title.

§ 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the United States Postal Service shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602—

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that the person seeking exclusion furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which such person claims an interest is valid and that the importation would violate the prohibition in section 602; the person seeking exclusion may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2590; Pub. L. 104-153, §8, July 2, 1996, 110 Stat. 1388.)