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COPYRIGHT LAW REVISION

REPORT
OF THE
REGISTER OF COPYRIGHTS
ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW



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3. THE REQUIREMENT OF "PROMPT" DEPOSIT

Instead of specifying a time period for the deposit, the present statute provides that deposit shall be made "promptly" after publication. What constitutes a "prompt" deposit, and the consequences of failure to deposit "promptly," remained open questions until the decision of the Supreme Court in *Washingtonian Publishing Co. v. Pearson* (306 U.S. 30 (1939)). It is now settled by that decision that a long delay in making the deposit does not affect the validity of the copyright or its enforcement against an infringement occurring before the deposit. Consequently, deposit may be deferred until (1) the Register of Copyrights makes a demand or (2) the copyright owner needs to institute an infringement suit.

As a practical matter, the Register cannot ascertain all works published with a copyright notice, and most copyrights are never involved in litigation. The result is that for many copyrighted works deposit and registration may be withheld indefinitely or never made.

B. THE REGISTRATION SYSTEM

1. VALUES OF REGISTRATION

a. Value to copyright owners

Registration provides, for authors and other copyright owners, a permanent and official record of their copyright claims. It furnishes them with proof of the existence of their works at a particular time and the facts supporting their copyright claims. Particularly important to them is the certificate of registration, which constitutes prima facie evidence of the stated facts and is generally accepted in trade circles as proof of copyright.

b. Value to users

Registration serves other purposes, perhaps even more important, for persons who wish to use copyright materials. It provides accessible official records from which they can obtain information regarding the existence and basis of a copyright claim, the extent of the claim (e.g., in a new version of a preexisting work), its duration, and its initial ownership. In conjunction with the records of assignments and other transfers of ownership, it enables users to trace title to the copyright.

c. Other values

A registration system also has other values:

(1) It provides a means for securing the automatic deposit of copies for the collections of the Library of Congress.

(2) It provides an administrative review of copyright claims whereby—

- Many unfounded claims, usually resulting from a lack of understanding or knowledge of the law, are weeded out, thus avoiding needless controversy and litigation;
- Authors and other claimants not familiar with the law are informed of the requirements for copyright protection;

The courts and the public are assisted in construing the law.

(3) It facilitates the enforcement of certain requirements and restrictions in the law, such as those pertaining to domestic manufacture and imports (discussed below in ch. X, pts. B and C).

In the major foreign countries that have no public registry for copyrights, private organizations find it necessary to maintain much the same kind of copyright records for their own use. This is indicative of the value of a registration system, but we believe that a public registry is greatly preferable: it provides a single, comprehensive record that is official, based on an administrative review, and freely accessible to the public. Private records may serve the purpose of the particular groups that maintain them, but they do not provide, for users of copyright materials and for the public, the accessible source of authoritative information afforded by a central public registry.

2. PROPOSALS FOR A REVISED REGISTRATION SYSTEM

a. Basis of proposed system

Most interested groups in the United States appear to favor a public registration system that would provide the most complete and dependable record possible. At the same time most groups feel that failure to register should not entail forfeiture of copyright. No such forfeiture results under the present law, except where a demand by the Register of Copyrights is not complied with.

We agree with this approach. Accordingly, we propose that registration should not be required to sustain a copyright secured by publication or other public dissemination of the work, but that strong inducements to make registration within a reasonable time should be provided.

The problem of securing copies for the Library of Congress when they are not deposited for registration will be dealt with later in this chapter.

b. Inducements to register

(1) *Benefits of registration to copyright owners.*—The inherent value of the registration record to the copyright owner, and the prima facie proof afforded by the registration certificate, would probably induce a substantial number of registrations. But in those foreign countries having a wholly voluntary system of registration, where similar benefits are the only inducement, most copyrights are not registered. More compelling inducements are also needed to achieve the objective of fairly complete coverage of all copyright claims in the registration records.

(2) *Certain remedies dependent upon registration.*—We propose that these other inducements be provided by making certain remedies for infringement available only for registered copyrights.

The remedies available against copyright infringers (discussed below in ch. IX) include those comparable to the remedies usually accorded for torts in general—namely, (a) an injunction to prevent future infringement and (b) recovery of the actual damages suffered by the copyright owner. The other remedies are somewhat unusual—(c) an award of the infringer's profits, (d) an award of statutory damages in lieu of a lesser amount of actual damages and profits, and (e) the impounding and destruction of infringing articles.

We propose that where a copyright has not been registered within a prescribed period of time, the remedies available for an infringement commenced before registration should be limited as follows:

(a) The copyright owner should recover the actual damages shown to have been suffered by him.

(b) No award of profits as such or of statutory damages should be allowed. (In some cases the infringer's profits may be a measure of the actual damages.)

(c) The court should have discretion to enjoin future infringements.

(d) The court should also have discretion to enjoin the completion of an infringing undertaking commenced before registration, or to order the impounding and destruction of infringing articles, but only on condition that the infringer be fully reimbursed for his outlay.

We believe that the matter of awarding costs and attorney's fees to the prevailing party (see ch. IX, pt. D) should be left to the court's discretion in any case.

In addition to these civil remedies, a willful infringement for profit would be subject to criminal penalties (see ch. XI, pt. B 1) even though the copyright had not been registered.

c. Time period for registration

To be most useful and reliable as a source of information, registration should be made shortly after the first public dissemination of the work. We believe that a period of 3 months after dissemination in the United States, or 6 months after dissemination abroad, would allow the copyright owner a reasonable period of time to apply for registration.

All the remedies for infringement—including the infringer's profits, statutory damages, and injunctions without reimbursement—would be available where the copyright is registered within the 3- or 6-month period. Where registration is delayed beyond that period, all the remedies would still be available for an infringement commenced after registration, but only the limited remedies would be available for an infringement commenced before registration.

d. Exemption for U.C.C. works

The Universal Copyright Convention provides that foreign works covered under the convention, if they are unpublished or if they are published with a prescribed notice, are to be protected without deposit or registration. Their registration may be required, however, as a prerequisite to suit. The statute (sec. 9(c)) exempts these works from the present registration requirements, except before suit.

It might be argued that as long as registration is not a condition of copyright protection, and reasonably adequate remedies are provided for infringement of unregistered works, the withholding of additional remedies where the work is not registered would be consistent with the U.C.C. This, however, may be open to some question. It would comport better with the spirit of the U.C.C., if not its letter, to continue exempting foreign works covered under the convention from the consequences of failure to register. These works should therefore be excluded from the proposed limitations on the remedies for infringement of unregistered works.

e. Registration as prerequisite to suit

The present law (sec. 13) provides that no infringement action shall be maintained until the work has been registered. Since the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law, we believe the requirement of registration before suit should be maintained, but with one important modification.

Where registration has been applied for, but has been refused by the Register of Copyrights on the ground that the claim is invalid, the claimant may now bring an action in the nature of mandamus against the Register, seeking to establish that the claim is valid and entitled to registration. In *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.* (260 F. 2d 637 (1958)), the Second Circuit Court construed the present law as meaning that the claimant whose application had been refused could not maintain a suit against an infringer until registration had been secured through an action against the Register.

We believe this result is unfortunate. If the infringement continues, the delay involved in proceeding first against the Register may aggravate the injury. And two successive actions—usually in different jurisdictions—may be an expensive burden.

Where a claimant has deposited the required copies, application, and fee, and registration has been refused, we believe he should be entitled to maintain a suit against an infringer. The validity of the claim would be determined in that suit. But the Register should be notified of the suit and given the opportunity to advise the court of the reasons for refusing registration.

f. Probative effect of registration

The present law (sec. 209) makes the certificate of registration prima facie evidence in any court of the facts stated. The certificate is not conclusive proof but, if not controverted, the facts stated supply the basis for determining the subject matter, ownership, and subsistence of the copyright.

The facts shown in the certificate are derived from the claimant's application, after an administrative examination of the application and deposit copies. They have generally proved to be reliable, and the prima facie proof afforded by the certificate simplifies judicial proceedings.

The reliability of the facts supplied by the claimant, however, is less certain when registration is made long after the copyright claim originated. This is true particularly when registration is made on the eve of an infringement suit, or is made by a claimant who is not the original owner.

We propose that registration certificates should continue to be prima facie proof when registration is made within 1 year after the first public dissemination of the work. When registration is delayed for more than 1 year, the probative effect of the certificate should be left to the discretion of the court.

g. Authority of the Register of Copyrights to refuse registration

The Register of Copyrights has for many years exercised the authority to refuse registration when he finds that the article deposited is not copyrightable, or that the requirements for securing copyright

or for registration have not been fulfilled. A recent survey shows, in round figures, that out of 250,000 applications received in a year, 6,000 or 2.4 percent were rejected. Of the rejections, 40 percent were for articles considered not copyrightable, 35 percent for articles not bearing the required notice, 17 percent for unpublished material of classes not eligible for registration, and the remaining 8 percent for miscellaneous reasons.

There have been several mandamus actions against the Register. In two cases, where he had refused registration on the ground that the materials deposited were not the copies required by the statute, the court held the deposit adequate and ordered registration. In other cases the courts have sustained his refusal to make registration on the ground that the articles were not copyrightable. Because the Register's authority to refuse registration is not stated explicitly in the statute, unsuccessful claimants have sometimes challenged his authority to reject applications for any reason.

We believe that if claims were registered without regard to their validity, the registration records and certificates would lose much of their probative value to claimants, the public, and the courts.

We suggest that the statute should state explicitly what we believe it now implies: (1) That the Register is required to make registration of any claim appearing to be valid under the statute, upon compliance with the procedural requirements for registration; and (2) that he is authorized, subject to review by the courts, to refuse registration for any claim he finds invalid.

As indicated above, his refusal should not prevent the claimant from bringing an infringement suit in which the validity of the claim can be determined by the court.

3. RECOMMENDATIONS

(a) Registration should not be a requirement for copyright protection, but it should be available for any valid copyright claim.

(b) The Register of Copyrights should be required to make registration of any copyright claim that appears to be valid, upon deposit of the prescribed copies, application, and fee. His authority to refuse registration of any claim he finds invalid, subject to review by the courts, should be stated expressly.

(c) Registration should continue to be a prerequisite to an action for copyright infringement. But where the procedural requirements for obtaining registration have been fulfilled and the Register of Copyrights refuses registration, the claimant should be entitled to bring an infringement suit if the Register is notified and permitted to become a party to the suit.

(d) The certificate of registration should continue to be admitted in any court as prima facie evidence of the facts stated, if registration is made within 1 year after the first public dissemination of the work. In the case of a later registration, the probative weight to be given to the certificate should be left to the discretion of the court.

(e) If registration is made within 3 months after the first public dissemination of the work in the United States, or within 6 months after its first public dissemination abroad, or at any time before an infringement is commenced, all remedies for the infringement

should be available to the copyright owner. If registration is not made within that time, the civil remedies for an infringement commenced before registration should be limited to the following:

- (1) The actual damages suffered by the copyright owner.
- (2) In the discretion of the court, an injunction against future infringements.
- (3) In the discretion of the court, an injunction against completion of the infringing undertaking commenced before registration, and the impounding and destruction of infringing articles made in the course of the undertaking, but only on condition that the infringer be fully reimbursed for his outlay.
- (f) Foreign works entitled to protection under the Universal Copyright Convention, if they are unpublished or if published with the notice prescribed by the convention, should have all remedies for infringement without regard to the time of registration.
- (g) An award of costs and attorney's fees to the prevailing party should be left to the court's discretion in all cases.
- (h) The criminal penalties against a willful infringement for profit should be applicable without regard to the time of registration.

C. DEPOSIT OF COPIES

1. PURPOSES OF DEPOSIT

Under the present law, the deposit of copies of copyrighted works is required for two purposes: (1) to identify the work being registered, and (2) to enrich the collections of the Library of Congress. A single deposit, accompanied by an application for registration, now serves both purposes.

2. DEPOSIT FOR THE LIBRARY OF CONGRESS

Most of the major countries of the world have established a deposit system of some kind to obtain copies of domestically published works for one or more libraries. In those countries having no copyright registration or a purely voluntary registration system, the deposit of copies is required apart from copyright. In other countries, as in the United States, copyright registration is a means of obtaining copies for the national library.

The deposit of copies in conjunction with copyright registration has been a principal source of acquisitions for the Library of Congress. Since 1909 about 7 million copies of various kinds of works have been supplied for the Library's collections out of copyright deposits. While the Library must acquire many uncopyrighted works from other sources—by gift, exchange, or purchase—the great bulk of the significant works published commercially in the United States have come to the Library through the copyright registration system.

3. DEPOSIT REQUIRED FOR REGISTRATION

a. In general

We believe that under the registration system recommended above most copyrighted works published in the United States will be registered. And it is economical for all concerned to have a single deposit that serves both for registration and for the Library of Congress.