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COPYRIGHT LAW REVISION

Part 2

DISCUSSION AND COMMENTS ON

REPORT

OF THE

REGISTER OF COPYRIGHTS

ON THE

GENERAL REVISION OF THE

U.S. COPYRIGHT LAW



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It seems to me that the presence of a notice there, even if we run life-plus-50-years, serves a very practical and useful purpose for those who are drawing excerpts. It does for scholars who are preparing a study, a dissertation, whether it be of doubtful value or whether it proves to be of use and can be published. Whether you are drawing excerpts from music for recording purposes, or in any other use of intellectual property where you are drawing from many sources, the presence of a notice gives you immediate and usually fairly reliable information. If it's not there you're put to a great deal of trouble. As a result you don't use it.

Mr. TANNENBAUM. I might add that, with respect to rights granted under a novel, for example, picturization rights, certainly the motion picture company should know whether it's under protection, if they want to use excerpts from others that are in the public domain. And also to secure protection of their own subsidiary rights.

Mr. KAMINSTEIN. I'd like to call on Abe Goldman, now, to turn to chapter VII and open the discussion on registration and deposit.

Mr. GOLDMAN. We're dealing in chapter VII with two related subjects: the deposit of copies, and the registration of copyrights. The proposals would make the deposit of copies for the Library of Congress mandatory. They would leave registration optional, in the sense that copyright would not depend upon registration.

With respect to the deposit of copies for the Library of Congress, the proposal is to require that two copies of published works be deposited within 3 months of publication, and to empower the Register, in much the same way as the present law does, to demand the deposit of copies; but it's proposed that the Register's demand would not require registration. Upon failure to comply with this demand, the copyright owner would be subject to a fine of \$200 plus the retail price of the two copies. The report leaves open the question of whether the provision in the present law, that the copyright would be voided for failure to make the deposit when demanded, should be continued or dropped. One other thing about deposits: the Register and the Librarian of Congress would have the authority to exclude from the deposit requirement any kinds of published works that the Library did not want for its collections.

Now, turning to registration. Registration could be applied for, of course, at the time of the deposit. And the deposit requirements would be two copies of published works (which would be the two copies for the Library of Congress) or one copy in the case of an unpublished work, with the Register having the authority to modify these requirements to take care of special cases where the general requirement of two copies or one copy would be burdensome.

Registration, as I said, would not be a requirement for copyright protection. However, registration would be required, as it is now, before instituting an infringement suit, with one change being proposed. That is, if registration is applied for—the application, the copies, and the fee being deposited—and the Register refuses to make the registration, the proposal is to permit the claimant to institute an infringement suit, giving notice of the suit to the Register, who would then be permitted to become a party.

To encourage registration, and to encourage it very strongly, the report recommends that, if registration is not made until after an in-

fringement is commenced, the copyright owner would have only limited remedies for the infringement—subject to a grace period of 3 months after first public dissemination. That is, if registration were made within 3 months of first public dissemination, all remedies would be available for any infringement commenced at any time. If registration were made, not within 3 months but at some later date, all remedies would be available for an infringement that commenced after the registration had been made, but only limited remedies would be available for an infringement that had commenced before the registration.

The limitation on remedies would be this: In the case where the infringement occurred before registration, and there had not been registration within the grace period of 3 months, the remedies for infringement would be limited to (1) actual damages, (2) an injunction against future infringement, and (3) in the court's discretion, also an injunction against the completion of the infringement commenced earlier, on condition that the infringer be reimbursed for his outlay. With respect to works registered before an infringement, the additional remedies available would be those now available under the present act: (1) The profits of the infringer, (2) statutory damages in lieu of actual damages and profits, and (3) there would be no requirement that an injunction to restrain the completion of an infringement be conditioned on reimbursement of the outlay.

One other provision that I might mention: The report proposes that the certificate of registration continue, as under the present law, to be prima facie evidence of the facts stated, if registration is made within 1 year of public dissemination. If registration is delayed beyond 1 year, there would be no requirement that the courts give prima facie force to the facts stated in the certificate, but this would be left to the discretion of the court completely.

I believe that covers the major points, Mr. Kaminstein.

Mr. KAMINSTEIN. Thank you. Mr. Dubin.

Mr. DUBIN. I have one question and one comment. My first question, in view of the fact that this proposed revision is to remove obsolete items and questionable items from the law, is the provision that provides that, in the event there's a failure to deposit after demand by the Register, the fine is \$200 plus twice the retail price of the work. I'd like to know the retail price of a motion-picture film—a print. It doesn't make sense.

My second point is my comment, which will be discussed in greater detail when we reach the international phases—and I believe, Abe, you forgot to mention this—and that was the exemption for UCC works. At the present time, in view of the concept of national treatment as set forth under the UCC, there are certain minimum requirements, but the convention goes on to state that each country may require, as a condition of judicial procedure, the deposit, registration, and various other forms. I see no reason, if we continue to maintain deposit and registration as a condition of judicial enforcement for works of our own nationals, why we should relax that in favor of nonnationals of this country. I am not talking on a jingoistic basis, but why—this is very ill advised.

Mr. KAMINSTEIN. Would you clarify one thing, Joe? Do you believe that we could do this under the Universal Convention, or are you suggesting that we discard our obligations?

rate records. Since we are dealing with the creation of a tangible thing, a writing in the form of a manuscript, film, tape, or other recording which has a present existence, and not with an ephemeral public performance or rendition of which no physical traces remain, objective ascertainment of the year of creation would be no less workable than the determination under present law that some copies of an unknown work were first publicly offered for sale or distribution on a specific day 45 years ago.

3. *Eliminating the renewal and notice difficulties.*—Under the system above proposed, and particularly the “life-plus-years” concept which we understand is advocated strongly by authors and many other copyright interests, we eliminate the infinitely complicated problems of renewal, and the dangerous and debilitating factors of copyright notices, inaccurate as to content and placement, as conditioning the inception or validity of a copyright.

These are two aspects which have caused some of the greatest difficulties under existing law.

4. *Private diaries, letters, photographs, etc.*—The Register has felt that private copyrightable papers, not intended for public disclosure, must be left to the common law, and to enforcement against appropriation in the States, so as not to clutter the Federal courts. This is a very small area, as to which an exception to our concept of a unitary Federal system, would bring no serious difficulty. We do not think any courts would be cluttered by cases in this field. But if State court protection were desired, Congress could still provide a unified system of principles under which to provide for their protection under the Federal copyright statute, but leave enforcement of these principles to State courts, as Congress did in earlier copyright statutes.

CHAPTER VIII—REGISTRATION AND DEPOSIT OF COPIES

A. Registration

1. *Late registration.*—While under the Register’s proposals, registration is to be voluntary, rather than mandatory, very strong inducements to early registration are provided by severe limitations on statutory remedies if the registration is untimely, or at least not precedent to the undertaking of any infringement.

If registration is timely, that is, within 3 months of first public dissemination in the United States, or 6 months from abroad, all remedies will be available, regardless of whether the infringement takes place before or after.

However, if untimely, certain remedies are to be denied, or may be unavailing, against any infringement undertaken prior to a registration (which registration can of course be made at any time during the copyright life). Statutory damages, and the infringer’s profits would be unavailable, although actual damages would be recoverable. Instead of being required where the facts so warrant, the court would now have the “discretion” to award an injunction against future infringements, or to impound and destroy infringing materials, or to restrain undertakings commenced before registration provided the infringer was reimbursed for his outlay.

If the owner makes a late registration, the benefit would seem to go entirely to the infringer. Furthermore, such infringer need not

necessarily be an innocent infringer. He could very well be a deliberate infringer watching the indices of the Copyright Office.

Under our present statute there is no such provision. The copyright claim can be registered a day before suit, and all statutory remedies will nevertheless be available.

At common law, all the remedies in question, except only statutory damages, would have been available, without formalities such as registration or notice. Equitable relief, such as an injunction, with damages or an accounting of profits, seizure and destruction, as incidental to equitable relief, could have been obtained.

Is the desirability of early registration so vital that it is worth giving users who have neither created nor acquired licenses from creators or owners, and who otherwise would have been fully liable to all remedies at common law or under the present copyright statute, what may amount to a free ride in many cases or the ability to destroy or impair copyright values?

Previously existing common law works will now be taken into the Federal statute. Why should not the statutory remedies equivalent to those previously available at common law, be available under the statute, regardless of the time of registration?

We believe the report has gone entirely too far, in the interests of inducing early registration, and that only the remedy of statutory damages might be denied a late registrant against a prior infringer. The only beneficiary of the proposals will be infringers, to the serious detriment of copyright interests, and we see no compelling reasons for any such provisions.

Foreign works of U.C.C. origin are to be exempted from any such consequences of failure to register, according to the recommendations, and we see no justifiable reason in this situation for such discrimination.

2. *Registration as condition precedent to suit.*—We concur with the proposal that registration be required as a condition precedent to suit for infringement, as is now the case under present law.

3. *Denials of registration to be adjudicated in infringement suits.*—We concur in the view that a mandamus action should not have to be brought where registration has been refused, despite the deposit of required copies, application, and fee, and that the copyright owner should be able to determine the validity of his claim in a suit brought against the infringer, with the Register being given appropriate notice to advise the court of reasons for the refusal.

4. *Certificates as prima facie evidence, and presumptions.*—We feel, as below discussed in connection with remedies, that not enough consideration has been given to the necessity of better presumptions for proof in connection with copyrights, particularly where authors and original owners, as well as other parties concerned may long be dead, and there may have been innumerable dealings over the years in rights, licenses and otherwise in and under the original copyright. The British have faced this in their 1956 act, with quite elaborate provisions for presumptions as to authorship, ownership, validity, place of first publication, etc. Here the proposal of the report, instead, is not only to continue to confine prima facie proof to facts stated in the copyright certificate, but to dilute and water down the probative effect of the certificate unless registration is made within 1 year after first

public dissemination. There is no such time limitation on the use of the copyright certificate for probative purposes under the present law. In the interests of authors, owners, users, and the time of courts, the presumptions should be built up. More facts should be recorded in the certificate. It should be made better evidence.

We think the Register's approach as to the evidentiary use of the certificate is entirely too limited and unrealistic.

B. Deposit

The Register of Copyrights recommends that the deposit of copies be mandatory; that deposit be made within 3 months after publication in the United States; and that failure to make deposit results in a fine of \$200 plus twice the retail price of the work.

We do not believe deposit should be mandatory in the case of motion picture prints. A print of a motion picture such as *Ben Hur* may cost thousands of dollars, and it would be inequitable for the Register of Copyrights to require the deposit of two copies of a print. This hardship is not imposed upon book publishers since, at most, the best edition of a newly published book would cost from \$50 to \$60. The 3-month provision is particularly inappropriate in the case of motion pictures in view of the Register's recommendation that public dissemination be the equivalent of publication. This would mean that we would be required to deposit two copies of a print within 3 months after the first sneak previews of a motion picture since this sneak preview would constitute the first public dissemination of the work. At the present time, deposit of prints is generally handled by the Washington Exchange Office of each of the motion picture companies. When the prints reach the exchange in their usual routine of distribution, and this may very well occur after the expiration of 3 months from the first release of the picture, the Washington Exchange arranges for tendering deposit of two copies of the print. Mandatory deposit would be particularly onerous in the case of film television programs. In the case of a film television series produced for initial network broadcast, there are generally only four prints made of the program, and these are the prints that are used for the network broadcast. Mandatory deposit would require the manufacture of special prints for deposit purposes only. Additionally, such prints do not normally reach the Washington Exchange, and special arrangements would have to be made for their deposit. The penalty for failure to make deposit would also be particularly onerous and discriminatory against motion picture companies because of the cost of the prints involved.

We feel that for the purposes of deposit under registration, there should be some provisions which would permit the deposit of an identifying description in lieu of the motion picture print.

CHAPTER VIII—OWNERSHIP OF COPYRIGHT

Perhaps the most disturbing portions to us of the Register's proposals are in his recommendations (ch. VIII, D. 3) to permit authors and their heirs to recapture and renegotiate their assignments to rights under copyright after 20 years, by placing such a time limit on the validity of lump-sum transfers which did not provide for payment of continuing royalties after such 20 years.