

corded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2582.)

#### HISTORICAL AND REVISION NOTES

##### HOUSE REPORT NO. 94-1476

The first two subsections of section 410 set forth the two basic duties of the Register of Copyrights with respect to copyright registration: (1) to register the claim and issue a certificate if the Register determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," and (2) to refuse registration and notify the applicant if the Register determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration issued by the Register under subsection (a). Under its provisions, a certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded. This five-year period is based on a recognition that the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate.

Under section 410(c), a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions, and it is a sound one. It is true that, unlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued. On the other hand, endowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of the copyright does not deprive the defendant in an infringement suit of any rights, it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

Section 410(d), which is in accord with the present practice of the Copyright Office, makes the effective date of registration the day when an application, deposit, and fee "which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration" have all been received. Where the three necessary elements are received at different times the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate, but it also recognizes the possibility that a court might later find the Register wrong in refusing registration.

#### REGISTRATION OF CLAIMS TO COPYRIGHTS AND RECORDATION OF ASSIGNMENTS OF COPYRIGHTS AND OTHER INSTRUMENTS UNDER PREDECESSOR PROVISIONS

Section 109 of Pub. L. 94-553 provided that: "The registration of claims to copyright for which the required deposit, application, and fee were received in the Copy-

right Office before January 1, 1978, and the recordation of assignments of copyright or other instruments received in the Copyright Office before January 1, 1978, shall be made in accordance with title 17 as it existed on December 31, 1977."

#### § 411. Registration and civil infringement actions

(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b),<sup>1</sup> no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b)(1) A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless—

(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and

(B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.

(2) In any case in which inaccurate information described under paragraph (1) is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.

(3) Nothing in this subsection shall affect any rights, obligations, or requirements of a person related to information contained in a registration certificate, except for the institution of and remedies in infringement actions under this section and section 412.

(c) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 505 and section 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

<sup>1</sup> See References in Text note below.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2583; Pub. L. 100-568, § 9(b)(1), Oct. 31, 1988, 102 Stat. 2859; Pub. L. 101-650, title VI, § 606(c)(1), Dec. 1, 1990, 104 Stat. 5131; Pub. L. 105-80, § 6, Nov. 13, 1997, 111 Stat. 1532; Pub. L. 105-304, title I, § 102(d), Oct. 28, 1998, 112 Stat. 2863; Pub. L. 109-9, title I, § 104(b), Apr. 27, 2005, 119 Stat. 222; Pub. L. 110-403, title I, § 101(a), title II, § 209(a)(6), Oct. 13, 2008, 122 Stat. 4257, 4264.)

#### HISTORICAL AND REVISION NOTES

##### HOUSE REPORT NO. 94-1476

The first sentence of section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.

The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before suit can be brought against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; the Register would be a party on the issue of registrability only, and a failure by the Register to join the action would “not deprive the court of jurisdiction to determine that issue.”

Section 411(b) is intended to deal with the special situation presented by works that are being transmitted “live” at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the material included in the “live” transmission.

#### REFERENCES IN TEXT

Subsection (b), referred to in subsec. (a), was redesignated subsec. (c) of this section by Pub. L. 110-403, title I, § 101(a)(3), Oct. 13, 2008, 122 Stat. 4257.

#### AMENDMENTS

2008—Pub. L. 110-403, § 101(a)(1), inserted “civil” before “infringement” in section catchline.

Subsec. (a). Pub. L. 110-403, § 101(a)(2), substituted “no civil action” for “no action” in first sentence and “a civil action” for “an action” in second sentence.

Subsec. (b). Pub. L. 110-403, § 209(a)(6), which directed amendment of subsec. (b) by substituting “section 510” for “sections 509 and 510”, could not be executed because of prior amendment by Pub. L. 110-403, § 101(a)(3), (4). See below.

Pub. L. 110-403, § 101(a)(5), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 110-403, § 101(a)(4), substituted “505 and section” for “506 and sections 509 and” in introductory provisions.

Pub. L. 110-403, § 101(a)(3), redesignated subsec. (b) as (c).

2005—Subsec. (a). Pub. L. 109-9 inserted “preregistration or” after “shall be instituted until”.

1998—Subsec. (a). Pub. L. 105-304, in first sentence, struck out “actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and” after “Except for” and inserted “United States” after “copyright in any”.

1997—Subsec. (b)(1). Pub. L. 105-80 amended par. (1) generally. Prior to amendment, par. (1) read as follows:

“serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and”.

1990—Subsec. (a). Pub. L. 101-650 inserted “and an action brought for a violation of the rights of the author under section 106A(a)” after “United States”.

1988—Pub. L. 100-568, § 9(b)(1)(A), substituted “Registration and infringement actions” for “Registration as prerequisite to infringement suit” in section catchline.

Subsec. (a). Pub. L. 100-568, § 9(b)(1)(B), substituted “Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States, and subject” for “Subject”.

Subsec. (b)(2). Pub. L. 100-568, § 9(b)(1)(C), substituted “work, if required by subsection (a),” for “work”.

#### EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101-650, set out as an Effective Date note under section 106A of 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.

### § 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2583; Pub. L. 101-650, title VI, § 606(c)(2), Dec. 1, 1990, 104 Stat. 5131; Pub. L. 109-9, title I, § 104(c), Apr. 27, 2005, 119 Stat. 222; Pub. L. 110-403, title I, § 101(b)(1), Oct. 13, 2008, 122 Stat. 4258.)

#### HISTORICAL AND REVISION NOTES

##### HOUSE REPORT NO. 94-1476

The need for section 412 arises from two basic changes the bill will make in the present law.

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently avail-