

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS, SECOND SESSION

PURSUANT TO

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STUDIES 7-10

10. False Use of Copyright Notice



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FOREWORD

This committee print is the third of a series of such prints of studies on "Copyright Law Revision" published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statutes enacted in 1909, though that statute was codified in 1947, and has been amended in a number of relatively minor respects. In the half century since 1909, far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time, there has been widespread sentiment that the present copyright law should be re-examined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains four studies, Nos. 7-10, dealing with copyright notice. Study No. 7, "Notice of Copyright," was prepared by Vincent A. Doyle of the Washington, D.C., bar (formerly Assistant Chief of the Examining Division of the Copyright Office) in collaboration with the following staff members of the Copyright Office: George D. Cary, General Counsel; Marjorie McCannon, Assistant Chief of the Reference Division; and Barbara A. Ringer, Assistant Chief of the Examining Division. Study No. 8, "Commercial Use of the Copyright Notice," was prepared by William M. Blaisdell, economist of the Copyright Office. Study No. 9, "Use of the Copyright Notice by Libraries," was prepared by Joseph W. Rogers, Chief of the Cataloging Division of the Copyright Office. Study No. 10, "False Use of Copyright Notice," was prepared by Caruthers Berger, Attorney Adviser of the Copyright Office.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private

interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
*Chairman, Subcommittee on Patents,
Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.*

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17, U.S.C.) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
*Chief of Research,
Copyright Office.*

ARTHUR FISHER,
*Register of Copyrights,
Library of Congress.*

I. QUINCY MUMFORD,
Librarian of Congress.

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STUDIES IN EARLIER COMMITTEE PRINTS

First print:

1. The History of U.S.A. Copyright Law Revision From 1901 to 1954.
2. Size of the Copyright Industries.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
4. The Moral Right of the Author.

Second print:

5. The Compulsory License Provisions in the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

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BY CARUTHERS BERGER
March 1959

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FALSE USE OF COPYRIGHT NOTICE

The present copyright law (17 U.S.C. sec. 105) makes the following provision to prevent the misuse of the copyright notice:

Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this title, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than \$100 and not more than \$1,000. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of \$100.

The purpose of this study is to examine the history, interpretation, and utility of this section with a view to considering whether a similar provision, in substantially the present form or with modifications, should be incorporated in a revised copyright law. Regardless of whether, in a new law, copyright notice is required or merely permissive, fraudulent notices would of course be possible.

1. LEGISLATIVE HISTORY

The Act of April 29, 1802, which was the first Federal statute to require a notice in copies of copyrighted works,¹ also contained a provision imposing a penalty for the use of a false copyright notice.² Some such provision has been in the copyright law ever since.³

The statutes prior to 1909 imposed a penalty of \$100 recoverable in a qui tam actions with one-half of the penalty going to the person bringing the action and the other half to the U.S. Government. Prior to 1897 this penalty was imposed only upon a person who inserted or impressed a copyright notice on copies of a work for which he had not obtained a copyright. The act of March 3, 1897, extended the same penalty to a person who knowingly issued, sold, or imported articles bearing a false notice of U.S. copyright. The latter act also specified that the penalty for insertion of a false notice was applicable whether the article was subject to copyright or not.

These provisions were modified in the act of 1909⁴ to read as they still do in the present law (17 U.S.C. sec. 105, quoted above). Fraudulent intent was made an essential element of the offense of inserting a notice in an uncopyrighted article; the removal or alteration of the notice in a copyrighted article with fraudulent intent was made an offense; and the penalty for these offenses was to be a fine of from \$100

¹ 2 STAT. 171, c. 36, § 1 (1802). The first Federal copyright statute enacted in 1790 required a notice to be published in newspapers: 1 STAT. 124, c. 15, § 3.

² 2 STAT. 172, c. 36, § 4 (1802).

³ 4 STAT. 438, c. 16, § 11 (1831); 16 STAT. 214, c. 230, § 98 (1870); REV. STAT. 1873, § 4963; 26 STAT. 1109, c. 565, § 6 (1891); 29 STAT. 694, c. 392, § 1 (1897); 35 STAT. 1075, c. 320, §§ 29, 30 (1909).

⁴ §§ 29, 30, 35 STAT. 1075 (1909).

to \$1,000, the *qui tam* action being abolished.⁵ For knowingly issuing, selling, or importing an article with a false notice the fine remained \$100.

The committee report⁶ on the bill which became the act of 1909 merely summarized these provisions with no further explanation.

The introduction in 1909 of fraudulent intent as an essential element of the offense of inserting a false notice may be explained by a change then made in the scheme for obtaining a copyright. Before 1909 copyright was obtained by registering a claim in advance of publishing copies of the work. The notice on the published copies was therefore a statement of fact that copyright had already been obtained; and it was thus appropriate to penalize the insertion of a notice when copyright had not been obtained by prior registration.

In the act of 1909, a different scheme of obtaining copyright was established. Copyright was secured upon publishing the work by inserting the copyright notice in the published copies; registration was made a subsequent act. Thus, the notice was no longer a statement of fact as to prior registration, but was not an assertion that the claimant believed he was entitled to secure copyright and that he did so by the insertion of the notice itself. Under this new scheme, the insertion of a false notice under an honest mistake—as where the claim of copyright honestly made proves to be invalid—was not to be penalized. Instead, the penalty was imposed for the insertion of a notice with fraudulent intent.

2. JUDICIAL DECISIONS

There are only a few decisions involving false notices. In *Rosenbach v. Dreyfuss*,⁷ decided in 1880, the defendant was charged with falsely affixing a copyright notice to patterned prints with lines showing how the paper was to be cut and joined to make balloons and hanging baskets. The court held that under the statute then in effect (Revised Statutes of 1873, sec. 4963) the penalty was applicable only when the false notice was placed on a copyrightable article. Holding that the prints in this case were not copyrightable, the court dismissed the action.

A similar ruling was made in *Taft v. Stephens Lithographic & Engraving Co.*⁸ in 1889. The plaintiff sought to have the penalty of \$100 for each of 10,000 copies (a total of \$1 million, of which the plaintiff would receive half) imposed upon the defendant for inserting a false notice in an uncopyrightable article. The court held, first, that the printing of many copies was a single continuous act, though done on different days, for which no more than one penalty could be recovered; and further, that since the article was admittedly not copyrightable, the statute (Revised Statutes of 1873, sec. 4963) did not apply.

The ruling in the *Rosenbach* and *Taft* cases was overturned by the act of March 3, 1897, which made the penalty for false notice applicable “whether such article be subject to copyright or otherwise.”⁹

⁵ It is interesting to note that in a recent bill for the protection of ornamental designs of useful articles, H.R. 8873, 85th Cong., 1st Sess., introduced on July 23, 1957, it was provided in § 26 that any person could sue for the penalty of \$500 for the false use of the design notice, one half of the penalty going to the person suing.

⁶ House Report No. 2222, 60th Cong., 2d Sess.

⁷ 2 Fed. 217 (D.C.N.Y. 1880).

⁸ 38 Fed. 28 (C.C.E.D. Mo. 1889).

⁹ 20 STAT. 694, c. 392, § 1 (1897).

Likewise, the present law, which refers to a notice inserted with fraudulent intent on "any uncopyrighted article," would seem to apply whether the article is copyrightable or not.

In a case decided in 1896, *Rigney v. Raphael Tuck & Sons Co.*,¹⁰ the insertion of a false notice in a book was held subject to the penalty though the notice appeared in a position other than those specified in the statutory provision requiring a notice. The court said: "The language of the [penalty] section is more broad, and seeks to prevent the insertion of a false notice 'in or upon' a book." Similiar broad language appears in section 105 of the present law.

In another case decided in 1896, *Rigney v. Dutton*,¹¹ the penalty was applied where the defendant placed a notice on a reproduction of a picture in a trade paper advertising the uncopyrighted picture for sale, although the defendant claimed that the notice had been used to inform prospective purchasers that the picture would be copyrighted. This result might not be reached in similar circumstances under the present law where fraudulent intent is a necessary element of the offense.

In contrast with *Rigney v. Raphael Tuck & Sons Co.*, where misplacement of the notice was held no defense, it was held in *Hoertel v. Raphael Tuck & Sons Co.*,¹² that the penalty was not applicable where the false notice did not contain the year date required for a valid notice. The statute in question, section 4963 of the 1873 Revised Statutes, like the present statute, referred to a false use of the notice "or words of the same purport."¹³

In a dictum in *G. & C. Merriam Co. v. United Dictionary Co.*, it was said that where a dictionary was copyrighted and published in the United States, the insertion of the notice in a British edition containing additional uncopyrighted matter would have violated the false notice provision.¹⁴ This dictum seems questionable at best. Under the present law, at least, such a notice could serve to secure copyright in the additional matter, or could be used appropriately to indicate an existing copyright in material incorporated in a new edition.¹⁵ In any event such a notice would not be a violation of section 105 unless inserted with fraudulent intent.

No reported cases since 1909 have been found involving a prosecution for violation of the fraudulent notice provisions. In *Penn Sportservice v. Goldstein*,¹⁶ a suit for infringement, the court held that the defendant's compilation of the names and numbers of baseball players was not copied from the plaintiff's compilation but was derived from common sources in the public domain. Regarding the plaintiff's contention that the copyright notice in the defendant's compilation was fraudulent, the court, without deciding that question, said: "If that be true, it would mean only that defendant is subject to proceedings for violation of the copyright statute, and would not of itself entitle the plaintiff to relief by injunction."

¹⁰ 77 Fed. 173 (C.C.S.D.N.Y. 1896).

¹¹ 77 Fed. 176 (C.C.S.D.N.Y. 1896).

¹² 94 Fed. 844 (C.C.S.D.N.Y. 1899).

¹³ Mention may be made, in passing, of another case which seems to have little present significance: it was held in *McLaughlin v. Raphael Tuck & Sons Co.*, 191 U.S. 267 (1903) that in accordance with the proviso in the Act of March 3, 1897, the offense of knowingly selling articles containing a false notice, newly provided for in that Act, did not apply to the sale thereafter of articles imported before the passage of that Act.

¹⁴ 146 Fed. 354 (7th Cir. 1906). The main question in this case was whether the notice was required in the British edition to preserve the United States copyright, the court holding it was not.

¹⁵ Copyright notices frequently pertain to a copyright claim in a part only of the material in a publication. See, for example, *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374 (S.D.N.Y. 1952); and see 17 U.S.C. § 7.

¹⁶ 35 F. Supp. 706 (D.C. Pa. 1940).

3. LEGISLATIVE PROPOSALS SINCE 1909

A number of bills for general revision of the copyright law were introduced between 1924 and 1940. These bills differed as to whether a copyright notice was to be required or merely permissive. Nevertheless, in either case, all of the bills contained provisions substantially similar to those in the present law, penalizing the fraudulent insertion or removal of a notice, and the issue or sale knowingly of articles bearing a false notice.¹⁷

4. OTHER FEDERAL STATUTES PENALIZING FALSE MARKING

(a) The patent law provides for the marking on patented articles of a notice of patent consisting of the word "patent" or the abbreviation "pat." together with the number of the patent.¹⁸ It further provides penalties for false marking as follows:¹⁹

(a) Whoever, without the consent of the patentee, marks upon, or affixes to, or uses in advertising in connection with anything made, used, or sold by him, the name of any imitation of the name of the patentee, the patent number of the word "patent," "patentee," or the like, with the intent of counterfeiting or imitating the mark of the patentee, or of deceiving the public and inducing them to believe that the thing was made or sold by or with the consent of the patentee; or

Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word "patent" or any word or number importing that the same is patented, for the purpose of deceiving the public, or

Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—

Shall be fined not more than \$500 for every such offense.

(b) Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.

Inasmuch as patents are obtained by application to, and issuance by the Patent Office²⁰ the situation here is similar to that of copyrights before 1909 when copyright was obtained by a registration before publication of the work so that a copyright notice reflected a prior registration. Copyright is now obtained by inserting the notice in the published copies of the work.²¹

(b) There are various other Federal statutes providing criminal penalties for false marking, which may be somewhat analogous to false notice of copyright. For example, section 333 of title 21, United States Code, provides criminal penalties for the violation of section 331 which prohibits, among other things, the misbranding of any food, drug, device, or cosmetic in interstate commerce. Another example is section 2074 of title 18, United States Code, which provides criminal penalties for knowingly issuing or publishing any counterfeit weather forecast falsely representing it to have been issued or published by the Weather Bureau or other Government agency.

¹⁷ *E.g.*, Dallinger bill of 1924, H.R. 9137, 68th Cong., 1st Sess. § 33 (notice permissive, § 20); Perkins bill of 1925, H.R. 11258, 68th Cong., 2d Sess. § 44 (notice permissive, § 44); Vestal bill of 1930, H.R. 12549, 71st Cong., 2d Sess. § 34 (notice permissive, § 34); Dill bill of 1932, S. 3985, 72d Cong., 1st Sess. § 7 (notice required, § 6); Duffy bill of 1935, S. 3047, 74th Cong., 1st Sess. (§§ 29 and 30 of 1909 Act left unchanged; notice required, § 7); Strovich bill of 1936, H.R. 11430, 74th Cong., 2d Sess. § 30 (notice required, § 9); Thomas bill of 1940, S. 3043, 76th Cong., 3d Sess. § 18 (notice not required, §§ 2, 17(3)).

¹⁸ 35 U.S.C. § 287 (1952). Failure to affix the notice precludes the recovery of damages for infringements occurring before the infringer was notified.

¹⁹ 35 U.S.C. § 292 (1952).

²⁰ See 35 U.S.C. §§ 111, 131, 151 (1952).

²¹ See *supra*, p. 114.

5. PROVISIONS IN OTHER COUNTRIES PENALIZING FALSE INFORMATION
IN COPYRIGHT WORKS

The Philippine copyright law,²² which was patterned after the U.S. law with modifications, requires the placement of a copyright notice on published copies of works for which copyright has been obtained by registration (sec. 11); and criminal penalties are provided for a false notice (sec. 21).

The copyright laws in several other countries provide criminal penalties for false information given in copies of works. The following are examples of various provisions of this character.

The Mexican law²³ provides that published copies should contain a copyright notice (art. 23) and certain information regarding the author, publisher, printer, and the edition (arts. 54-58). Criminal penalties are imposed upon publishers or printers who insert false statements of any of these items (art. 137).

The law of Chile²⁴ requires registration to acquire copyright (art. 1); and authors or publishers who issue copies of a work bearing a false indication that copyright has been acquired, or "who in any other manner mislead third parties with regard thereto," are liable to a fine (art. 23). Similarly, Peru appears to impose a fine on an author who indicates that his work is copyrighted without having made the required registration.²⁵

The law of Argentina²⁶ imposes a penalty upon any person who publishes a work with a false designation of the publisher, author, or title of the work (art. 72 (b), (c)). Similar provisions are found in the law of Paraguay.²⁷

The law of the Netherlands²⁸ penalizes anyone who intentionally and unlawfully changes the indication of the author or the title of the work. The German law²⁹ imposes a fine upon any person who intentionally affixes the name of an author of a work upon a reproduction not made by him. Japan³⁰ penalizes the false attribution of authorship in published copies of a work (art. 40) and the alteration of the author's name or the title of the work without his consent (art. 38).

The United Kingdom³¹ provides civil remedies for the false attribution of authorship. Canada³² imposes criminal penalties upon anyone who changes the title or the name of the author of a dramatic or operatic or musical work in connection with its public performance.

6. ANALYSIS OF SECTION 105

Section 105 of the present copyright law imposes criminal penalties for three kinds of acts involving false copyright notices: (1) inserting a notice in an uncopyrighted article with fraudulent intent, (2) removing or altering the notice in a copyrighted article with fraudu-

²² Philippine Act No. 3134 of March 6, 1924.

²³ Mexican Federal Copyright Law of Dec. 29, 1956.

²⁴ Chile Decree-Law No. 345 of March 17, 1925, as amended by Law No. 9549 of Dec. 28, 1949.

²⁵ Peru Supreme Resolution of Feb. 5, 1915, Article 8.

²⁶ Argentine Law No. 11,723 of Sept. 28, 1933, as amended by Legislative Decree No. 12,063 of Oct. 2, 1957.

²⁷ Paraguay Decree Law No. 3642 of March 31, 1951, as approved by Law No. 94 of July 5-10, 1951, Article 62.

²⁸ Netherlands Copyright Law approved by Royal Decree of Sept. 23, 1912, as amended, Article 34.

²⁹ German Act of Jan. 9, 1907, as amended (Concerning Copyright in Works of Art and Photography) § 33.

³⁰ Japanese Law No. 39 of March 4, 1899, as amended.

³¹ U.K. Copyright Act, 1956, 4 & 5 Eliz. 2, Ch. 74, § 43.

³² Revised Statutes of Canada, 1952, Ch. 55, § 26(2).

lent intent, and (3) knowingly issuing, selling, or importing an uncopyrighted article bearing a notice.

Leaving aside for the moment any question regarding the detailed language of section 105, some observations may be made regarding its substance.

(a) The reason why the U.S. copyright law has continuously provided penalties for false copyright notices seems fairly obvious. The notice is expected to inform the public that the work is copyrighted, and also to identify the copyright owner at the time of publication and the year from which the copyright dates. Notices should be as reliable as possible, and the public should be protected against false assertions of copyright.

As long as the notice reflected an existing fact within the claimant's knowledge, as it did before 1909 when the notice constituted a statement that the prior registration then required to obtain copyright had been made, it was logical to penalize the act of placing a notice of copyright on a work that had not in fact been copyrighted. But the gist of the offense is different where, as under the present law, copyright is not obtained prior to the insertion of the notice, but is obtained by the very act of inserting the notice in published copies. Under the present system, the notice is not a representation of an existing fact, but is an assertion of the claimant that he is entitled to, and does, claim copyright in the work. Assuming that the claim is made in good faith, there would seem to be no justification for imposing a criminal penalty on the claimant if his claim is ultimately held invalid.

The assertion of a claim of copyright which the claimant knows to be false, however, would appear to warrant a criminal penalty. This was evidently the basis for the present provision of 17 U.S.C. 105 penalizing the insertion of a notice "with fraudulent intent."

In view of the importance of the notice, both to the claimant and to the public, the same premise has apparently been thought to justify the present provision of 17 U.S.C. 105 penalizing the removal or alteration of a notice "with fraudulent intent."

Prevention of the circulation of articles bearing a false copyright notice has also been thought desirable; but persons who circulate such articles innocently should not be penalized. Thus, the present provisions of 17 U.S.C. 105 impose a penalty on any person who "knowingly" issues, sells, or imports any article bearing a false notice.

Though section 105 has rarely been invoked before the courts, it may be salutary for its deterrent effect. As indicated by the previous revision bills of 1924-40, whether in a new law the copyright notice is required or merely permissive, it has apparently been considered desirable to provide penalties for fraudulent notices.

(b) In practice, the Copyright Office receives a number of applications for the registration of copyright claims which it finds to be unfounded. This suggests the question of the propriety of a claimant's continuing to issue copies bearing the notice after the Copyright Office has denied his application for registration on the ground that his copyright claim is invalid.

The conclusion of the Copyright Office that a claim is invalid cannot be regarded as a final determination. Its denial of registration

is subject to review by the courts,³³ and a court might hold valid a claim deemed invalid by the Copyright Office.³⁴

A claimant who is denied registration may believe that his copyright claim is nevertheless valid. If he continues thereafter to publish copies of the work, the notice on the copies is necessary to preserve his claim; publication without the notice would constitute an abandonment of his claim. He might bring an action against the Register to compel registration, and have the validity of his claim adjudicated in such action;³⁵ but in addition to the expense involved, in order to preserve his claim he would need to suspend publication or to continue using the notice during the pendency of that action.

In a case where the claim is unquestionably invalid, the fact that registration was refused for that reason might conceivably be considered some evidence that continued use of the notice thereafter was made with fraudulent intent. But the question of the validity of a copyright claim in any particular case may not be a matter of fact, but one of judgment on which persons could differ in good faith. If the claimant believes, in good faith, that his claim is valid notwithstanding the refusal of registration, his continued use of the notice would not be with fraudulent intent. Nor would there seem to be any justification for making him criminally liable for continuing to use the notice in good faith in order to preserve a claim he believes valid.

(c) Assuming that penalty provisions similar to those in section 105 are to be retained in the law, there may be some question as to whether the language of that section is entirely appropriate. It refers to the fraudulent insertion of a notice in any "uncopyrighted" article, the fraudulent removal or alteration of the notice in a "duly copyrighted" article, and the issue, sale or import, knowingly, of an article bearing "a notice of U.S. copyright which has not been copyrighted in this country." These references to notices in "copyrighted" or "uncopyrighted" articles appear to be vestiges of the pre-1909 law under which the existence of copyright depended upon whether registration had been made before the work was published with the notice. Under the present law, if a work is eligible for copyright, it is copyrighted by inserting the notice in the published copies. It seems anomalous to speak now of a notice on an "uncopyrighted" work, as if copyright depended upon an act to be completed prior to the use of the notice.

Moreover, it is conceivable that a notice might be placed on copies of a copyrighted work (e.g., as reissued) in which a false name or date is given with fraudulent intent; and query whether a person who removes or alters a notice with fraudulent intent should escape liability if the copyright claim is ultimately held invalid. Section 105, since it refers to "uncopyrighted" articles in the first instance, and to

³³ Denial of registration was held erroneous in *King Features Syndicate, Inc. v. Bowé, Register of Copy rights*, 48 USPQ 237 (D.C.D.C. 1940) and in *Twentieth Century Fox Film Corp. v. Bowé*, 33 F. Supp. 463 (D.C.D.C. 1940), *aff'd* in 122 F. 2d 51 (D.C. Cir. 1941). However, no question of copyrightability was involved in those cases, the question being the adequacy of page proofs as deposits and whether they had been published.

³⁴ No case has been found so holding. In a dissenting opinion in *Vacheron v. Benrus Watch Co.*, 260 F. 2d 637 (2d Cir. 1958) Judge Clark considered copyrightable an ornamented watch which the Copyright Office had refused to register as not copyrightable.

³⁵ In the few cases where such actions have been brought, the Register's finding that the work was not copyrightable has been sustained: *Everson v. Young*, 26 Wash. L. Rep. 546 (Sup. Ct. D.C. 1898); *Brown Instrument Co. v. Warner*, 121 F. 2d 910 (D.C. Cir. 1947), *cert. denied* 332 U.S. 801 (1947); *Bailie and Fiddler v. Fisher*, 258 F. 2d 425 (D.C. Cir. 1958).

“copyrighted” articles in the second instance, might be construed as not applicable in these situations.

Consideration might therefore be given to amending the language of section 105 to refer to the insertion of a false notice with fraudulent intent, the removal or alteration of any notice with fraudulent intent, and the issue, sale or importation of copies bearing a notice known to be false—without reference to whether the work is “copyrighted.”

7. RESTATEMENT OF THE ISSUES

In a general revision of the copyright law, it is suggested that consideration be given to the following questions regarding the present section 105:

(1) Should provisions be retained in the law to impose criminal penalties for—

(a) placing a false copyright notice in an article with fraudulent intent?

(b) removing or altering the copyright notice in an article with fraudulent intent?

(c) knowingly issuing, selling, or importing an article bearing a false copyright notice?

(2) If so, should the language of section 105 be amended? (See pp. 119–120 above.)

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
FALSE USE OF COPYRIGHT NOTICE

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT
OFFICE ON FALSE USE OF COPYRIGHT NOTICE

By Harry R. Olsson, Jr.

APRIL 22, 1959.

* * * * *
False use of copyright notice

(a), (b), and (c) The criminal penalties should be retained for placing of false copyright notice on an article with fraudulent intent, or for removing or altering the notice with fraudulent intent or knowingly issuing, selling or importing an article bearing a false copyright notice.

(d) The language of section 105 should not have reference to whether a work is "copyrighted" since the adjectives now there make clear what is intended and "copyrighted" leads to confusion.

* * * * *

HARRY R. OLSSON, Jr.

By Richard H. Walker

(The Curtis Publishing Co.)

MAY 4, 1959.

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False use of copyright notice

Even though the problem here posed does not appear to be a large one, the criminal penalties should be retained for whatever good they do in keeping the problem small. The amending language suggested in the study would be an improvement over the existing statute.

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RICHARD H. WALKER.

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