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Lisa Chernev

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## **The Copyright Reform Act of 1993: Will Proposed Repeals Hurt the Library of Congress?**

### I. INTRODUCTION

When the first U.S. copyright laws were passed, before the Federal Constitution was even adopted,<sup>1</sup> their underlying purpose was not so much to protect the author, but to benefit the public.<sup>2</sup> Thus, when the Constitution was passed, it provided Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>3</sup>

On February 16, 1993, United States Representative William J. Hughes (D-N.J.) introduced an amendment to the Copyright Act of 1976, (HR-897), the “Copyright Reform Act of 1993,” (the Bill) before the Subcommittee on Intellectual Property and Judicial Administration of the House Subcommittee of the Judiciary. The Bill was passed by the House on November 20, 1993.<sup>4</sup> An identical version (S-373) was introduced in the Senate with the bipartisan sponsorship of Senators Dennis DeConcini (D-Ariz.) and Orrin Hatch (R-Utah). If signed, the Bill would eliminate the requirement that copyright owners register their copyrights prior to bringing an infringement action in court. The Bill also eliminates the requirement that litigants register their copyright prior to the infringement in order to receive statutory damages and attorney’s fees. The Bill leaves intact the requirement that free copies of published and unpublished materials registered with the Copyright Office must be sent to the Library of Congress (the “Library”). However, because the Bill repeals the registration requirements for infringement actions, much of the incentive for authors to register copyrights is eliminated. Consequently, debate has surfaced over whether the collections of the Library will be adversely affected because authors will not voluntarily register their works.

Proponents of the Bill argue it will benefit the artistic community by making it easier to protect copyrights. Those opposed argue it will harm the public by diminishing the ability of the Library to maintain its vast collections. This Update discusses the current law, explores the arguments for and against the Bill and ultimately concludes that the Bill is antithetical to the primary purpose of copyright law —benefitting the public— as stated in the Constitution.

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1. Richard Wincor & Irving Mandell, COPYRIGHT, PATENTS AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 7 (1980).

2. *Id.*

3. U.S. CONST., art. I, §8(8).

4. 139 CONG. REC. H 10308 (1993)

## II. THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 is the governing statute in the United States. Section 411(a) of the 1976 Act provides that no lawsuit may be filed for infringement until after a copyright registration has been made.<sup>5</sup> An author is entitled to register a copyright after the infringement has occurred.<sup>6</sup> However, §-412 prohibits the awarding of statutory damages and attorney's fees for claims made before the registration of copyright.<sup>7</sup>

Once an author complies with sections 411 and 412, the author is then required to deposit copies of the work to the Library under sections 407 and 408. Consequently, sections 407 and 408 effectuate the Act's main purpose of benefitting the public by enabling the Library to collect free copies of all published and unpublished works by U.S. authors. Section 407(a) requires two copies of the best edition of the work be deposited to the Copyright Office within three months after publication (i.e., mandatory deposit).<sup>8</sup> Sections 408(a) and (b) allow for registration of unpublished works by completing a form, paying a nominal fee and submitting two copies of the work to the Copyright Office, which then issues a certificate of registration (i.e., registration requirement).<sup>9</sup> Thus, the

## 5. 17 U.S.C. §411(a) (1982):

Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title.

6. *Id.*

## 7. 17 U.S.C. §412 (1982):

In any action under this title, other than an action instituted under §411(b), no award of statutory damages or 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.

## 8. 17 U.S.C. §407(a) (1982):

Except as provided in subsection (c), and subject to the provisions of subsection (e), the owner of copyright or the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication—

- (1) two complete copies of the best edition; or
- (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

## 9. 17 U.S.C. §408(a),(b) (1982):

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of §405(a), such registration is not a condition of copyright protection.

deposit and registration provisions function in collaboration.<sup>10</sup> Under §407, the Library is entitled to demand copies for deposit, but there is no legal basis for demanding the deposit of any unpublished materials.<sup>11</sup> Rather, the Library relies on §408, the copyright registration process, to acquire unpublished materials.<sup>12</sup> The pending Bill seeks to repeal sections 411(a) and 412, thereby removing the Act's main obstacles to infringement claims. However, it retains the mandatory deposit requirement of §407 and the registration requirement of §408. Nevertheless, the Bill takes the "bite" out of sections 407 and 408 because the incentives to register copyright (i.e., preclusion from filing suit and recovery of statutory damages and attorney's fees) are removed. Thus, many people fear U.S. authors will not voluntarily register their copyrights, effectively denying the Library the ability to maintain its collections.

### III. PROPONENTS OF THE BILL

When introducing the Bill to the House of Representatives, Rep. Hughes stated, "[T]he Copyright Reform Act of 1993 will bring needed reform to the administration of copyright in the legislative branch: it is a win-win Bill that will . . . remove bureaucratic obstacles to the enforcement of copyright."<sup>13</sup> The Bill's sponsors argue the present approach to registering copyrights is inefficient for three main reasons: first, it discriminates against U.S. copyright owners; second, it imposes disproportionate costs on certain groups and diminishes the effective enforcement of copyright by unfairly depriving authors and owners of important remedies; and third, because sections 407 and 408 are retained, the Library will not be harmed.<sup>14</sup>

First, under the current law, foreign authors are not required to register their works in the United States prior to infringement suits in compliance with The

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(b) DEPOSIT FOR COPYRIGHT REGISTRATION.—Except as provided by subsection (c), the material deposited for registration shall include—

- (1) in the case of an unpublished work, one complete copy or phonorecord;
- (2) in the case of a published work, two complete copies or phonorecords of the best edition;
- (3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;
- (4) in the case of a contribution to a collective work, on complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under §407 may be used to satisfy the deposit provisions of this §, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under subsection (e) of §407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

10. 139 CONG. REC. E810, 811 (daily ed. Mar. 30, 1993) (statement of Librarian of Cong. Billington).

11. *Id.*

12. *Id.*

13. 139 CONG. REC. E337, 337 (daily ed. Feb. 16, 1993) (statement of Rep. Hughes)

14. Alan J. Hartnick, *Gray Beards & the Copyright Reform Act of 1993*, NEW YORK L.J., May

Berne Implementation Act of 1988.<sup>15</sup> The Berne Act states that no formalities be required of foreign authors as a condition to copyright protection.<sup>16</sup> When the Berne Act was being considered, however, the United States did not want to change its existing law, so as a compromise, the registration requirement as a condition to sue was retained only for U.S. authors.<sup>17</sup> Thus, §411(a) of the Copyright Act of 1976 applies only to works first published in the United States.<sup>18</sup> The result has been termed a “two-tiered system,” in which there is a more stringent standard for U.S. authors and another, more lenient standard for foreign authors.<sup>19</sup> For example, a U.S. author of a massive computer software program is required to register the first and last twenty-five pages of a program (which is of little use to the Library since it does not serve adequate examination purposes) and costs the owner approximately \$400,000.<sup>20</sup> By contrast, the foreign author of an identical program would have the same protection under U.S. laws at no cost to the foreign author.<sup>21</sup> The proposed Bill would put U.S. authors on an even keel with foreign authors by completely eliminating §411(a).

Second, it is argued the current law denies potential litigants important remedies and imposes prohibitive costs. Often, individuals and small businesses are prevented from asserting their claims because they are unaware of the registration requirement.<sup>22</sup> Although the artist can register after an infringement, statutory damages and attorney’s fees are precluded. Consequently, meritorious claims are often dropped because the potential recovery is inadequate to cover the artist’s attorney’s fees.<sup>23</sup> Furthermore, there are situations in which an artist, aware of the registration requirement, is prevented from asserting a claim because the registration system is too cumbersome and costly. For example,

[p]hotographers on assignment typically send their negatives to the newspaper or magazine that has temporarily hired them. Because the negatives remain in the custody of the newspaper or magazine, it is generally impossible for the photographer to comply with the deposit requirements. Because they cannot readily comply with the deposit requirements, they cannot register their work. Because they cannot register their work, they cannot receive attorney’s fees and statutory damages pursuant to §412. Even if photographers could register their works, because it is impossible to know beforehand when a work — or which work — will be infringed, in the case of published photographs photographers are faced with the burden of having to register hundreds, if not thousands of photographs at an obviously prohibitive cost.<sup>24</sup>

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15. 139 CONG. REC. S1618, 1618 (daily ed. Feb. 16, 1993) (statement of Sen. DeConcini).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Kim I. Mills, *Rethink copyright law overhaul: Library of Congress*, CHICAGO DAILY L. BULL., Mar. 4, 1993, at 18.

21. *Id.*

22. 139 CONG. REC. S1618, 1618 *supra* note 15.

23. William T. McGrath, *Recent Developments in Copyright Law*, 2 CONTACT SHEET 3, 7 (1993).

24. 139 CONG. REC. 337 *supra* note 13.

Repealing sections 411(a) and 412 would remedy costly registration problems because photographers and other artists would not forego any rights by failing to register.

Finally, Rep. Hughes argued that the Library's collections will not be adversely affected by the Bill.<sup>25</sup> The Bill retains the mandatory deposit requirement of §407 and the registration requirement for unpublished works under §408. Therefore, authors who register will still be required to submit copies to the Library. Although it would appear the incentive to register has been eliminated, the Bill's authors argue U.S. artists will continue to register their copyrights. In 1991, 634,797 claims to copyright were filed with the Copyright Office, while only 1,831 suits for copyright infringement were filed.<sup>26</sup> This seemingly indicates the vast majority of claimants register for reasons unconnected with litigation.<sup>27</sup>

Furthermore, the current Act does not require the deposit of many types of works and the Library does not necessarily retain copies of the works it does receive. The Register of Copyrights may exempt any category of material from the deposit requirement of §407.<sup>28</sup> In fact, twelve categories of works are exempted from the §407 deposit requirement<sup>29</sup>, a decision that was approved by

25. *Id.*

26. *Id.*

27. *Id.*

28. 17 U.S.C. §407(c) (1982):

The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

29. 139 CONG. REC. E337, 337-38, *supra* note 13:

(1) Diagrams and models illustrating scientific or technical works or formulating scientific or technical information in linear or three-dimensional form, such as an architectural or engineering blueprint, plan, or design, a mechanical drawing, or anatomical model; (2) Greeting cards, picture postcards, and stationery; (3) Lectures, sermons, speeches, and addresses when published individually and not as a collection of the works of one or more authors; (4) Literary, dramatic, and musical works published only as embodied in phonorecords; (5) Automated databases available only online in the United States; (6) Three-dimensional sculptural works, and any works published only as reproduced in or on jewelry, dolls, toys, games, plaques, floor coverings, wallpaper and similar commercial wall coverings, textiles and other fabrics, packaging material, or any useful article; (7) Prints, labels, and other advertising matter, including catalogs published in connection with the rental, lease, lending, licensing, or sale or articles of merchandise, works of authorship, or services; (8) Tests, and answer material for tests when published separately from other literary works; (9) Works first published as individual contributions to collective works; (10) Works first published outside the United States and later published in the United States without change in copyrightable content if registration is made under section 408; (11) Works published only as embodied in a soundtrack that is an integral part of a motion picture; and (12) Motion pictures that consist of television transmission programs and that have been published if at all by reason of a license or grant to a nonprofit institution of the right to

the Copyright Office and Library.<sup>30</sup> According to Rep. Hughes, a cursory review of reported court opinions reveals a significant amount of litigation involves works falling within one of these exemptions.<sup>31</sup> Also, in 1983 the Copyright Office and the Librarian of Congress made a policy decision that permits the destruction of deposit copies of published works submitted for registration after five years, except works of visual art which may be destroyed after ten years.<sup>32</sup> Accordingly, even under the current Act, the Library's collections are not totally comprehensive.

#### IV. OPPONENTS OF THE BILL

The introduction of the Bill angered members of the intellectual property bar, the Librarian of Congress and the Register of Copyrights because it was introduced without any advanced warning.<sup>33</sup> According to Michael W. Bloomer, executive director of the American Intellectual Property Law Association, the Bill came out of the blue; nobody knew anything about it.<sup>34</sup> It was introduced in the House on February 16 and the House Judiciary subcommittee hearings were held on March 3 and 4, only two weeks later. According to Ralph Oman, the Register of Copyrights, the hearings were scheduled with unprecedented quickness.<sup>35</sup>

Although the Bill was introduced hastily, the Librarian of Congress did testify at the hearings. He argued that although the Bill retains the deposit and registration requirements of sections 407 and 408, the Bill effectively repeals those provisions because registration is only required when an author brings an infringement suit.<sup>36</sup> Thus, the Bill will harm, if not destroy, the Library's collections, and deplete the public record of valuable information, which is the main purpose of copyright law.<sup>37</sup> He also argued the alternative means of maintaining the Library's collections will be extremely costly.<sup>38</sup>

The Library, established in 1800, is the national Library of the United States.<sup>39</sup> Although it was initially intended to serve Congress, it is now a public reference library.<sup>40</sup> The Library's collections began to grow when the Copyright Act of 1870 was passed, because the 1870 Act was the first copyright act requiring deposit of materials to the Library.<sup>41</sup> Subsequent amendments to the

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make a fixation of the program directly from a transmission to the public.

30. *Id.*

31. *Id.* at 338.

32. *Id.*

33. Victoria Slind-Flor, *Congress Considers Sweeping Revisions in Copyright Law*, THE NAT'L L.J., Mar. 15, 1993, at 19.

34. *Id.*

35. *Id.*

36. 139 CONG. REC. E810, *supra* note 10.

37. *Id.*

38. *Id.* at 811.

39. THE CONCISE COLUMBIA ENCYCLOPEDIA 464 (2d ed. 1989).

40. *Id.*

41. *Id.*

Copyright Act in 1909 and 1976 continued this procedure, and consequently the Library grew into the largest library in the world, with over seventy million items in three buildings.<sup>42</sup> According to Representative Charlie Rose (D-N.C.), chairman of the Joint Committee on the Library of Congress, the Library is the library of last resort for the safekeeping of our cultural and literary heritage, which would otherwise be lost to history.<sup>43</sup> The library has been able to accomplish this monumental task for 120 years because of the copyright registration requirement.<sup>44</sup> According to the Librarian of Congress, without the registration requirement, we could never have built up the world's most comprehensive collections in all formats.<sup>45</sup>

According to the Librarian of Congress, the Library receives the majority of its collection from voluntary registration stimulated by the statutory incentives of recovering damages and attorneys fees, not through the current mandatory deposit requirement for published works (which would not be changed by the proposed Bill).<sup>46</sup> In fiscal year 1992, over eighty five percent of books received via the Copyright Office were registered.<sup>47</sup>

The Librarian of Congress also argued the Bill will increase the cost of maintaining the Library's collections by:

endanger[ing] the ability of the Library to collect copyright materials as thoroughly, as quickly, or as comprehensively across all information formats as it does today. The result will be a less usable, less comprehensive, and more costly record of the nation's cultural and intellectual heritage. Even if adequate measures are taken to ensure the Library's collections are not diminished by the proposed changes, the Bill, in the long run, is likely to cost the nation much more than its sponsors say it will save.<sup>48</sup>

The Library is supported mainly by Congressional appropriations.<sup>49</sup> Under the current system, the Copyright Office is charged with placing demands with noncompliant publishers.<sup>50</sup> The proposed Bill would increase the workload of the Office with respect to securing deposits and issuing demands.<sup>51</sup> The Library will need to budget for the cost of employing additional bibliographers, subject specialists, and others to ensure the universality and high quality of the collections, and enforcement.<sup>52</sup>

In sum, opponents of the Bill argue that the Library is one of our nation's most important resources. It is the culmination of a 120-year-old system of collecting published and unpublished works. The proposed Bill will gravely harm

42. *Id.*

43. 139 CONG. REC. E810, 810 (daily ed. Mar. 30, 1993) (statement of Rep. Rose).

44. *Id.*

45. 139 CONG. REC. E810, 810, *supra* note 10.

46. *Id.* at 811.

47. *Id.*

48. *Id.*

49. THE NEW COLUMBIA ENCYCLOPEDIA 1575 (4th ed. 1975).

50. 139 CONG. REC. E810, *supra* note 10.

51. *Id.*



the Library and the proposed alternative is a more costly and less efficient system.

#### V. CONCLUSION

Although there is much debate over the Bill, both sides agree the effects will be substantial. Registration deposits<sup>53</sup> in the Library have been growing consistently.<sup>54</sup>

The Copyright Act of 1976 was passed after nearly twenty years of study and revision, culminating in 1975 when the House Judiciary Subcommittee conducted extensive hearings at which nearly 100 witnesses testified. The Register of Copyrights presented the "Secondary Supplementary Report on General Revision of the United States Copyright Law," which discussed policy and technical issues of the revision legislation.<sup>55</sup> However, no such studies were made for the 1993 revisions, even though the proposed changes to the Copyright Act are major.

Ultimately, the price the public is asked to pay for this Bill is too high. The Library is a national treasure that should be safeguarded. It is the culmination of 120 years of gathering U.S. resources and history. Despite speculation that artists will continue to register, the Copyright Act should not be amended without assurances that the Library will continue to flourish. The availability of compromise legislation should not be ignored. One possibility is to amend §412 to allow statutory damages and attorney's fees at the discretion of the judge. If the artist has a legitimate reason for failing to register, as in the case of a photographer, then the artist will be protected. Also, the artistic community can work with the Register of Copyrights to exempt more types of works from the registration requirement, thereby solving the problem encountered by authors of computer programs. Congress should work with the Library and the Register of Copyrights to study the long-term effects of the Copyright Reform Act of 1993 before any further action is taken.

*Lisa Chernev*

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53. Donald F. Johnston, COPYRIGHT HANDBOOK 96 (1982). In 1950, 200,000 works were registered; in 1970, 300,000 works were registered; in 1980, 450,000 works were registered.

54. 139 CONG. REC. E337, *supra* note 13. In 1991, 634,797 works were registered in the Copyright Office.

55. 3 PAUL GOLDSTEIN, COPYRIGHT 108-105 (1989).