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Copyrights--Right to Maintain Infringement Suit--Sufficiency of Compliance with Section 12, Copyright Act 1909 (The Washington Publishing Company, Inc. v. Drew Pearson, Robert S. Allen and Van Rees Press, Inc., 306 U.S. 30 (1939))

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The Second Amendment is a limitation upon the power of Congress and not upon the states.[15] However, since all citizens capable of bearing arms constitute the reserved military force of the United States, the states cannot prohibit people from bearing arms so as to prevent them from assisting in national defense.[16] The framers of the Constitution could not have intended that their recognition of the right to bear arms was to be perverted by wrongdoers into an aid against societal control of crime. In a previous case upon the Act, the Court stated that " * * * The second amendment to the Constitution * * * has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia; to the protective force of government; to the collective body and not individual rights." [17]

A. S. V.

COPYRIGHTS—RIGHT TO MAINTAIN INFRINGEMENT SUIT—SUFFICIENCY OF COMPLIANCE WITH SECTION 12, COPYRIGHT ACT 1909.—Petitioner sought an injunction, damages, etc., because of alleged unauthorized use of a magazine article copyrighted under the Copyright Act. Petitioner published a monthly magazine and claimed copyright by printing thereon the required statutory notice.[1] Subsequently, and before [2] petitioner deposited copies and received a certificate of registration,[3] respondents published and offered for general sale a book containing material substantially identical with an article contained in petitioner's magazine. Respondents deposited copies in the copyright office and received a certificate of registration before petitioner did. Its book contained usual notice of claimed-copyright

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[15] United States v. Cruishank, 92 U. S. 542 (1875); Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580 (1886).

[16] Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580 (1886).

[17] United States v. Adams, 11 F. Supp. 216, 218 (D. C. Fla. 1935).

[1] 35 STAT. 1077 (1909), 17 U. S. C. § 9 (1934) ("Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor. * * *").

[2] Fourteen months elapsed between the publication and the submission of copies for deposit in the Copyright Office and a certificate of registration obtained * * * the respondents published and offered for sale their book six months before the petitioner's deposit of copies and receipt of certificate of registration.

[3] 35 STAT. 1078 (1909), 17 U. S. C. A. § 10 (1934) ("Such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section 55 of this title").

by a printing thereon. Petitioner alleged that, under the statute,[4] "prompt" deposit of copies of the published work is not a condition precedent to an action for infringement and that mere deposit before suit satisfies the Act.[5] Respondents concede that petitioner secured, upon publication, a valid copyright, but allege that although "prompt" deposit of copies is not prerequisite to copyright, no action can be maintained because of infringement prior in date to a tardy deposit. The trial court sustained petitioner's demands. The Court of Appeals reversed and remanded the cause as copies of the magazine had not been "promptly" deposited in the copyright office under Section 12 and, therefore, petitioner could not be heard. On appeal to the United States Supreme Court, *held,* three judges dissenting, reversed. While no action or proceeding can be maintained for infringement of copyright until copies of the copyrighted material are actually deposited in accordance with the provisions of the statute,[6] mere delay in depositing will not destroy the right to sue. A deposit prior to the institution of an infringement suit is sufficient compliance with Section 12. *The Washington Publishing Co., Inc.* v. *Drew Pearson, Robert S. Allen and Van Rees Press, Inc.,* — U. S. —, — Sup. Ct. — (1939).

The interpretation and construction to be given the wording of a statute is the extent of the problem. The word "promptly" [7] as contained in Section 12 is essentially the subject of analysis. What did the draftsmen of the Act intend? The Court itself was divided.[8]

It was argued by the respondents that the provision in Section 12 covering actions should be interpreted as though it contained the word "promptly", and "unless" instead of "until", so that it would read: No action shall be maintained for infringement of copyright "unless" the provisions of this Act with respect to the deposit of copies "promptly" and registration of such work shall have been complied with. The majority opinion found disfavor with this as reading in something the letter of the Act gave no reason to imply, and said: "Petitioner's claim of copyright came to fruition immediately upon publication. Without further notice it was good against the world. Its value depended upon the possibility of enforcement. * * * The

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[4] 35 STAT. 1075, 1088 (1909), 17 U. S. C. § 1 (1934).

[5] 38 STAT. 311 (1914), 17 U. S. C. § 12 (1934) ("After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published. * * * No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with").

[6] *Ibid.*

[7] 38 STAT. 311 (1914), 17 U. S. C. § 12 (1934) ("After copyright has been secured by publication of the work with the notice of copyright as provided in § 9 * * * there shall be promptly deposited in the copyright office * * *").

[8] Mr. Justices Hughes, McReynolds, Butler, Stone and Frankfurter for petitioner. Mr. Justices Roberts, Reed and Black dissented.

use of the word 'until' in Section twelve rather than 'unless' indicates the mere delay in making deposit of copies was not enough to cause forfeiture of the right theretofore distinctly granted." [9]

The penalty for delay clearly enunciated in Section 13 [10] adequately handles delinquents. If Section 12 were endowed with a more sweepingly drastic application, it might inundate the obviously intended benefits of the Act. The report of the Congressional Committee [11] calls attention to the fact that forfeiture after notice and three months' further delay was considered by some to be too severe. A reading of Sections 12 and 13 together,[12] facilitates an understanding of the Congress' intention that while no action can be maintained before copies are actually deposited, mere delay will not destroy the right to bring an action. "Such forfeitures are never to be inferred from doubtful language." [13]

It is offered that the Act of 1909 treads a new path in the trend of copyright law, being revisionary in wordage and design. Its innovations indicate new and distinct advantages to publishers and writers while stripping them of burdensome requirements; thereby lending an

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[9] For statement of the views of the Copyright Office concerning Act of 1909 and practice thereunder, see Letter from the Register of Copyrights to the Librarian of Congress, Sept. 17, 1938. The following appears therein at p. 20:

"The failure to make deposit within the proper time does not in itself invalidate the copyright which has already been secured by publication with notice; this can now result only after failure to make deposit upon actual notice as provided in Section 13.

"It is true that Section 12 provides that no action or proceeding shall be maintained for infringement until the 'deposit of copies and registration' have taken place, which presumably was added as a special inducement to make prompt deposit; but this does not answer the question.

"Heretofore, the practice of the office has been to accept copies at any time subsequent to publication with notice; thus, in effect, attaching no significance to the word 'promptly'; and certain decisions of the courts seem to sanction the practice. * * *

"It seems very desirable to remove this doubt and uncertainty by eliminating the word 'promptly' from Section 12, leaving Section 13 as heretofore to take care of any delinquent. * * *"

[10] 35 STAT. 1078 (1909), 17 U. S. C. § 13 (1934) ("Should the copies called for by section twelve of this title not be promptly deposited as herein provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100.00 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void").

[11] See note 14, *infra.*

[12] The report of the House Committee on Patents suggests such a reading. See notes 9, 12, *supra.*

[13] Mr. Justice McReynolds writing the majority opinion. This view is in accord with the interpretation of somewhat similar provisions of the English Copyright Act. See Lumiere v. Pathé Exchange, 275 Fed. 428 (C. C. A. 2d, 1921).

encouraging hand to create endeavor.[14] Associate Justice Black has said [15] that "the judgment here rests upon the conclusions: (1) that the statute grants a copyright from the date of first publication with notice; (2) that after deposits are made the statute permits a retroactive recovery for public use of an article of which copies were never promptly deposited as required by the statute; (3) that Section 13 provides an exclusive penalty for failure to make the deposit; and (4) that according to administrative interpretation of the Act deposits are not essential." It is difficult to fit these conclusions into the historic pattern of the Copyright Act.

There is no novelty to the requirement of the Act of 1909 that deposit of copies shall be made after the copyright has been secured.[16] Every Copyright Act, including the original Act of 1790, provided for a copyright interest which (as in the 1909 Act) vested prior to the time by which the last deposit is required.[17] All copyright laws before 1891 had required deposit within some designated period after publi-

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[14] See Act of March 3, 1891, c. 565. 26 STAT. 1106 (1891); Goubaud v. Wallace (1877), 36 L. T. R. (N. S.) 704, 705; Cate v. Devon and Exeter Constitutional Newspaper Co. (1889), L. R., 40 Ch. D. 500; Lumiere v. Pathé Exchange, 275 Fed. 428 (C. C. A. 2d, 1921); Mittenthal v. Berlin, 291 Fed. 714 (S. D. N. Y. 1923).

See Report of House Committee on Patents, Feb. 22, 1909 (No. 2222). Among other things this says: "Sections 12 and 13 deal with the deposit of copies, and should be considered together. They materially alter the existing law, which provides that in order to make the copyright valid there must be deposited two complete copies of the book or other article not later than the date of first publication. The failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with. The committee felt that some modification of this drastic provision, under which the delay of a single day might destroy a copyright, might well be made. * * *"

[15] Mr. Justice Black wrote the dissenting opinion.

[16] 38 STAT. 311 (1914), 17 U. S. C. § 12 (1934) ("* * * That after copyright has been secured * * * there shall be * * * deposited * * * two complete copies.").

[17] It is true that the 1909 Act grants a copyright upon first publication; that is, before the date on which deposit is required. But all the previous Acts granted a copyright interest from the time of recording the title of an article and recording always took place before the date by which the last deposits were required.

Section 4 of the first Act of 1790, 1 STAT. 124, 125 (1790), required the last deposit of one copy of the copyrighted article "within six months after the publishing thereof. * * *" Section 4 of the Act of 1831, 4 STAT. 436, 437, required the last deposit to be made "within three months from the publication. * * *" Section 2 of the Act of 1865, 13 STAT. 540, required the last deposit to be made "within one month of the date of publication * * *", the Act of 1867, 14 STAT. 395, required deposit "within one month after publication. * * *" Section 93 of the Act of 1870, 16 STAT. 213, required the last deposits "within ten days after * * * publication. * * *" Revised Statutes of 1878, No. 4956, required the last deposits "within ten days from the publication. * * *" Section 3 of the Act of 1891, 26 STAT. 1106, required deposit not later than the day of publication. * * *" Section 12 of the Act of 1909, 35 STAT. 1078, provides that "after Copyright, * * * there shall be promptly deposited * * *."

cation. The Act of 1891, however, required deposit "not later than the date of first publication." The Bill Committee of the 1909 Act thought this requirement too hard for the reason that "the delay of a single day" after publication in making the deposit "might destroy a copyright" and so the committee recommended an extension of time for deposit.[18] Thus the question: what did Congress have in mind when it continued in the 1909 revision of the copyright laws the requirement for the deposit of copies arises. A glance at the source of the expression and the judicial construction of it prior to the 1909 Act will give perspective [19] to the instant Act. Prior to the 1909 Act the United States Supreme Court construed provisions for deposit as essential requirements to the perfection of copyright, whether considered as conditions precedent or subsequent. The committee reporting the 1909 Act pointed out that "under existing law (the 1891 Act being then in force) the filing of title and deposit of copies on or before the date of first publication are 'conditions precedent' and any failure to comply with them works a forfeiture of the copyright. It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice and the other formalities become 'conditions subsequent'." [20]

Petitioners asserted monopoly rights rest solely on the letter and intent of the statute.[21] The Act requires "prompt deposit." Admittedly, petitioner delayed fourteen months after publication before making deposit.

Did Congress intend that the requirement as to deposits must be literally complied with in order to perfect the copyright interest under the 1909 Act? The majority opinion, in effect, does not make such a compliance necessary but history, apparently, is on the side of the dissenters.[22]

A. J. S.

CRIMINAL LAW—DISORDERLY PERSON—SECTION 899(5) CONSTRUED.—The defendant was accused under Section 899(5) of the New York Code of Criminal Procedure which provides: "Persons

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[18] Instead of requiring deposit within a fixed number of days, or by the date of publication, the bill as reported, and the 1909 Act as passed, permitted a copyright to be perfected by a "prompt deposit" after publication. The committee did not recommend, nor did Congress provide, that Copyright could be perfected without deposit; the committee did recommend an extension of the time for deposit.

[19] Kepnor v. United States, 195 U. S. 100, 24 Sup. Ct. 797 (1904).

[20] H. R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

[21] Banks v. Manchester, 128 U. S. 244, 24 Sup. Ct. 797 (1888); Caliga v. Inter Ocean Newspaper, 215 U. S. 182, 30 Sup. Ct. 38 (1909); Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346, 28 Sup. Ct. 722 (1908); Globe Newspaper Co. v. Walker, 210 U. S. 356, 367, 28 Sup. Ct. 726 (1909).

[22] See dissenting opinion of Justice Black in instant case.