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Divisible Copyright Under the Copyright Act of 1976: The Effect on Registration, Recordation, Notice, and Standing to Sue†

I. INTRODUCTION

The Copyright Act of 1976 explicitly recognizes that ownership of the numerous exclusive rights comprising the copyright is divisible. In so doing, Congress at long last laid to rest the remnants of the doctrine of indivisible copyright which had been the source of unnecessary complexity in the transfers of rights granted under copyright law.

When the value of a copyright was centered on the right to publish, a doctrine which required unity of ownership was consistent with commercial practices and needs. Since usually only one person dealt with a copyrighted work, it was logical to transfer the copyright as a whole. But with the advance of technology and particularly the development of the motion picture and broadcasting industries, the various rights comprising the copyright attained independent importance. The notion of unity of ownership contradicted the nature of copyright, which encompasses an aggregate

† This essay was awarded first prize in the 1978 Nathan Burkan Memorial Competition at the University of Nebraska College of Law, and is entered in the National Competition, which is sponsored by the American Society of Composers, Authors, and Publishers.

2. Id. § 201(d).
3. CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION 107 (1973) [hereinafter cited as OMNIBUS COPYRIGHT REVISION].
4. The exclusive rights in copyrighted works enumerated in the Copyright Act of 1909, included the rights to reprint, copy, publish, translate, dramatize, arrange, adapt, and perform publicly for profit. Copyright Act, ch. 320, 35 Stat. 1075 (1909).

The Copyright Act of 1976 provides that the copyright owner has the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies of the copyrighted work, and to perform and display the copyrighted work publicly. 17 U.S.C. § 106 (1976).
of rights, and caused a great deal of confusion in the marketing of an author's product. Thus, the doctrine of indivisibility was greatly criticized and most commentators agreed that "[t]he doctrine of indivisibility of copyright is an anachronism and outmoded fiction; it ignores the business and commercial practices in the copyright field." Nevertheless, at least theoretically, it survived until the recent statutory revision.

This comment will discuss the recognition of divisible copyright in the Copyright Act of 1976. It will focus primarily on the effects of the statutory recognition of divisibility on those provisions of the Copyright Act of 1976 which deal with the problems of registration, recordation, notice and standing to sue for infringement.

II. THE "SO-CALLED" DOCTRINE OF INDIVISIBLE COPYRIGHT

Initially, it is necessary to discuss briefly the doctrine of indivisible copyright. Theoretically, the doctrine of indivisibility required a "unity of ownership of legal title to the entire bundle" of rights labeled as copyright. Consistent with this theory, the legal rights incident to ownership of the copyright could only be transferred by assigning all of the rights in a particular work. A transfer of anything less than all of the exclusive rights comprising the copyright constituted a license, which permitted the transferee to use the work but did not entitle him to any of the rights of ownership. Thus in its extreme form, the doctrine of indivisibility operated to categorize transfers of rights comprising copyright as either assignments or licenses, the distinction turning on whether the transfer included the totality of rights.

6. Schulman, Author's Rights, in COPYRIGHT PROBLEMS ANALYZED 19, 22 (1966). In summarizing the theory of indivisible copyright, it has been stated:

With respect to a particular work embodied in concrete form, or separable part of such work, there is, at any one time, in any particular jurisdiction, only a single incorporeal legal title or property known as the copyright, which encompasses all of the authorial rights recognized by the law of the particular jurisdiction with respect thereto.

Henn, "Magazine Rights"—A Division of Indivisible Copyright, 40 CORNELL L.Q. 411, 417-18 (1955).
8. B. KAPLAN & R. BROWN, CASES ON COPYRIGHT 307 (1978). This interpretation
The concept of an indivisible copyright is a judicial creation\(^9\) which developed rather obscurely in case law.\(^10\) Although the Copyright Act of 1909\(^11\) did not expressly state that ownership of copyright is indivisible, it has been stated that this concept was implied in the Act since the constant statutory references to "the copyright proprietor"\(^12\) logically implied singular ownership.\(^13\) Whether this analysis is accurate as a matter of statutory construc-

of the doctrine of indivisibility precluded assignments limited as to duration, geographic area, or parts of the total collection of exclusive rights comprising the copyright. \textit{See} A. Weil, \textit{American Copyright Law} \S 151, at 545 (1917); Kaminstein, \textit{Divisibility of Copyrights, Study No. II}, in \textit{1 Studies on Copyright} 623, 635 (A. Fisher mem. ed. 1963).

9. Kaminstein, \textit{supra} note 8, at 635.

10. The development of the doctrine of indivisible copyright has been traced by various commentators from two different origins. It has been said that the doctrine is derived from patent law, \textit{see} H. Warner, \textit{supra} note 5, \S 53, at 130, and, perhaps more accurately, that it developed through a misapplication of two early patent cases decided by the Supreme Court on procedural grounds. Commissioner v. Wodehouse, 337 U.S. 309, 419 (1948) (Frankfurter, J., dissenting).

In Gayler v. Wilder, 51 U.S. (10 How.) 477 (1850), the Supreme Court held that an assignment for a specified territory which does not convey the entire and unqualified monopoly held by the patentee is a mere license, which is legally binding between the parties, but which does not vest legal title in the licensee and does not give the licensee standing to sue a third party for infringement. As an explanation for its holding, the Court stated that to allow the creation of several monopolies would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place. \textit{Id.} at 494-95.

A later case, Waterman v. Mackenzie, 138 U.S. 252 (1890), utilized the rationale of \textit{Gayler}, and held that an agreement, by which the patentee granted the exclusive right to manufacture and sell but not to use the patented article throughout the United States was a license and the licensee could not maintain a suit against a third party for infringement of the patent.

The origin of the doctrine of indivisibility has also been traced by commentators to an English case, Jefferys v. Boosey, 10 Eng. Rep. 681 (H.L. 1854), which dealt with a transfer of copyright. The transfer involved the exclusive right to publish the work in the United Kingdom. At least one of the opinions expressed was that copyright cannot be partially assigned and therefore the transfer was a mere license. \textit{Id.} at 730. \textit{See} Kaminstein, \textit{supra} note 8, at 626-27; Note, \textit{Copyright—The Doctrine of Indivisibility: The Final Chapter, 7 Memphis St. L. Rev.} 637, 639-41 (1977). \textit{But see} H. Warner, \textit{supra} note 5, \S 53, at 132 n.11 (cases collected therein do not follow the notion of indivisibility articulated in Jefferys v. Boosey, 10 Eng. Rep. 681 (H.L. 1854)).


12. \textit{See id.} \S\S 1-3, 7-12, 14, 19, 21-22, 24-26, 28, 42, 62.

13. \textit{OmniBUS Copyright ReVISION, supra} note 3, at 107; Henn, \textit{supra} note 6, at 416. The Copyright Act of 1909 equated the label of the copyright proprietor
tion may be questioned; however, it is clear that the statute distin-
guished between an assignee, who is the copyright proprietor, and
a mere licensee. The superimposing of the judicially created
doctrine of indivisible copyright onto the statutory scheme led to
the conclusion that only an assignee who is granted the entire bun-
dle of rights comprising the copyright could be the owner or “the
copyright proprietor.”

It was the author or “the copyright proprietor” who secured
copyright by publication of the work with notice, who could ob-
tain registration of his or her claim, whose name was required to
appear in the notice, whose signature was required on an instru-
ment granting, assigning, or mortgaging the copyright, and who
was entitled to damages, profits, or statutory damages due to in-
fringement, etc. Thus, the distinction between a transfer of all
the exclusive rights incident to copyright and a lesser transfer had
a significant legal effect, at least theoretically.

The notion of indivisibility is diametrically opposed to commer-
cial practices. The exclusive rights in a copyright are generally
useful in many different fields and a single owner frequently can-
not develop the rights in all potential areas. Thus, it is often less
profitable for an author to transfer all of the rights to one grante.
Necessity encouraged commercial practitioners to contractually
avoid some of the problems caused by the concept of indivisibil-

with the word owner. Copyright Act, ch. 320, §§ 1, 8, 9, 35 Stat. 1075 (1909).
See also Henn, supra note 6, at 416 n.18.
15. Id. §§ 8-9.
16. Id. § 10.
17. Id. § 18.
18. Id. § 42.
19. Id. § 25.
20. The copyright proprietor also renewed the copyright, id. § 23; granted author-
ization for the first edition of the work, id. § 62; consented to production of a
copyrightable new version, id. § 6; paid a fine, if required, for failure to de-
posit copies, id. § 13; reimbursed an innocent infringer, as required under
some circumstances, id. § 20; and had several obligations under some com-
pulsory licensing provisions, id. § 1(e). See Henn, supra note 6, at 417.
21. At one time the doctrine of indivisible copyright also had important tax con-
sequences. The characterization of a transfer as an assignment or a license
played an important role in determining whether the income should be taxed
as capital gain or ordinary income. If a transfer was an assignment, it could
be considered a sale of a capital asset which was obviously an advantage to
the copyright owner. See 2 M. NIMMER, supra note 7, § 119.2, at 516 n.33; Mar-
golis, Divisibility in Relation to Income Tax, Supplement No. 1, Study No. 11,
22. See note 5 & accompanying text supra.
23. Henn, supra note 6, at 432; Kaminstein, supra note 8, at 636.
24. A Wasserstrom, Magazine Newspaper and Syndicated Problems, in COPY-
Judicial application of the doctrine of indivisibility could result in harsh consequences, such as forfeiture of the copyright, thus causing the work to fall into the public domain, or the inability of a party to bring a suit for infringement. The reluctance of courts to render such decisions encouraged the articulation of other less extreme tests to distinguish between an assignee and a licensee. Some courts concluded that copyright was divisible as to duration or geographic area, apparently reasoning that the indivisibility concept was aimed primarily at preventing the severance of certain rights from the rest of the bundle of rights. Equitable doctrines were applied in other cases to reach the desired results. Some courts simply rejected the application of the doc-

RIGHT PROBLEMS ANALYZED 159, 168 (1966); Note, supra note 10, at 648. See generally Henn, supra note 6. For example, if the transferor of the copyright wished to retain certain limited rights but also wanted to ensure that the transferee obtained "proprietor" status, it was suggested that they enter into a two-step agreement. The transferor assigned the totality of rights in the copyright to the transferee, who then transferred the limited rights back to the transferor. 2 M. NIMMER, supra note 7, § 119.31, at 516.

Other commentators have suggested that persons dealing with literary and artistic works simply ignored the doctrine of indivisibility and hoped "fervently that the other fellow was honest." Appleman, Compromise in Copyright, 19 B.U. L. Rev. 619, 624 (1939).

25. This result could occur when the work was published and the notice attached thereto was in the name of a licensee rather than the copyright proprietor. See notes 150-55 & accompanying text infra.

26. A licensee could not sue a third party for infringement unless he joined the copyright proprietor as a party. See notes 182-84 & accompanying text infra.

27. It has been asserted that commentators extended the doctrine of indivisibility much further than did the courts. 24 S.W.L.J. 711 (1970).

28. Some courts and writers suggested that if the transfer included all the rights designated in one of the five statutory categories of exclusive rights it was an assignment. Another standard permitted a transfer to be categorized as an assignment if it comprised all of the rights necessary to produce a new version which was itself copyrightable. A third test turned on the intent of the parties to determine whether the transfer was an assignment or license. See generally 2 M. NIMMER, supra note 7, § 119.2, at 514 (and cases cited therein); Henn, supra note 6, at 431-34 (and cases cited therein); Kaminstein, supra note 8, at 636-39 (and cases cited therein); Neu, The Rights of a Copyright Owner, 17 Notre Dame Law. 373, 389-91 (1942).

As is not infrequent in this characterization approach, the judicial analysis of a particular conveyance had a "question begging" quality. Often the result was determined and then the transfer characterized accordingly. B. KAPLAN & R. BROWN, supra note 8, at 397.

29. 2 M. NIMMER, supra note 7, § 119.2, at 512-13, (and cases cited therein); Kaminstein, supra note 8, at 635-38 (and cases cited therein); Neu, supra note 28, at 388-89 (and cases cited therein).

30. To avoid holding that a work had fallen into the public domain in situations in which a licensee had attempted to secure the copyright, some courts inferred that the copyright was secured in trust for the copyright proprietor. See R. NORDHAUS, PATENT TRADEMARK AND COPYRIGHT INFRINGEMENT § 63, at 127 (1971) (and cases cited therein). The trust relationship was found to exist
trine of indivisibility. Thus to say that the legal effect of the doctrine was unclear is an understatement.

While the judiciary was involved in rewriting or ignoring the doctrine of indivisibility, its demise was also being sought in the legislative branch. In fact, soon after the passage of the 1909 Act, attempts to secure divisibility by legislation became the most important goal of authors and motion picture producers in the copyright area. These legislative attempts at revision were largely unsuccessful until 1976.

when the proprietor requested the licensee to secure the copyright or even when it could be implied from the circumstances. See 24 S.W.L.J. 711, 714 (1970) (and cases cited therein). The apparent rationale utilized to avoid rejecting the concept of indivisibility was based on the strained interpretation or fiction that the licensee had been transferred the totality of rights for the purpose of securing the copyright which was held in trust for the benefit of the author or the copyright proprietor. 2 M. Nimmer, supra note 7, § 119.2, at 519 (and cases cited therein).

Procedural problems arising from the licensee’s inability to bring a suit for infringement were limited by compelling the copyright proprietor, as trustee, to join the suit. L.C. Page & Co. v. Fox Film Corp., 83 F.2d 196 (2d Cir. 1936). “Equity will not permit a wrong to remain unrighted if there is any possible way to remedy the situation.” Ilyin v. Avon Publications, 144 F. Supp. 368, 374 (S.D.N.Y. 1956).

31. Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970) (rejecting the application of the doctrine of indivisibility to avoid forfeiture of the copyright for failure to secure notice in the name of the copyright proprietor). See also 2 M. Nimmer, supra note 7, § 119.31, at 515 (and cases cited therein).


33. Kaminstein, supra note 8, at 633-34, app. at 655-61.

34. In 1910, the decision rendered in Dam v. Kirke La Shelie Co., 166 F. 589 (C.C.S.D.N.Y. 1908), aff’d, 175 F. 902 (2d Cir. 1910), caused a great deal of concern, particularly among authors. The plaintiff sold his story to a magazine. The transaction was evidenced only by a receipt accompanying the check which indicated that it was “in full payment for story.” The story was published without a separate copyright notice. There was, however, a notice for the entire magazine in the name of the publisher. The magazine purportedly conveyed back to the plaintiff all of its interest in the copyrighted story. The defendant, who used the story as the basis for a play, contended that the magazine was a mere licensee because the initial transfer involved only the first publication rights and that since the notice was, therefore, in the name of a licensee rather than the copyright proprietor, it was of no effect and the work had fallen into the public domain. The court construed the facts to hold that the initial transfer involved the totality of rights in the work so that the magazine was an assignee and thus copyright protection had been secured by the notice. In dictum, the court indicated that if the author has reserved certain rights in the work, a separate notice in the author’s name would be necessary to secure copyright protection. The case indicated the hazards awaiting the unwary due at least in part to the doctrine of indivisibility.

35. Kaminstein, supra note 8, at 629.

36. Id. at 633-34, app. at 655-61. It has been stated rather graphically that copyright revision in general is difficult because of the sharp conflict of interests between highly organized groups. “[Copyright revision]... arouses as
III. DIVISIBLE COPYRIGHT

Although commercial practice and judicial modification had surmounted most of the difficulties caused by the notion of indivisible copyright, so that in actuality an exclusive licensee stood in a position which was similar to that of an assignee, most commentators considered it desirable to statutorily abolish the doctrine of indivisibility.\textsuperscript{37} However, there was disagreement as to the extent to which copyright should be divisible.\textsuperscript{38}

One opinion was that copyright should be completely divisible, so that the transfer of any exclusive right, regardless of limitations as to the duration, the geographic area, or the scope of the exclusive right, conveyed incidents of ownership to the transferee.\textsuperscript{39} For example, an author of a particular story could transfer separately the exclusive right to publish it in a magazine, in hard bound form, in paperback form or to use the work as the basis for a movie, television movie, series, musical, opera, play, pantomime, etc., and each transferee of an exclusive right would be a copyright owner.

In contrast, the opinion existed that total divisibility could result in over-fragmentization of the rights to any one work.\textsuperscript{40} This viewpoint stemmed from a fear that total divisibility would render it too difficult to trace the title to a particular right or too expensive to obtain permission from numerous owners and thus potential users would be discouraged from using a particular work. It was also feared that the usage of copyrighted works would decrease if there were numerous copyright owners since any one such owner could prohibit a prospective use.\textsuperscript{41} These concerns led to the sug-

\textsuperscript{37} Kaminstein, \textit{supra} note 8, at 649. Judicial modification of the doctrine undoubtedly decreased the impetus for statutory revision.

\textsuperscript{38} DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, Pp. 2, 162-69 (Comm. Print 1963) [hereinafter cited as REPORT OF REGISTER, Pt. 2]; Kaminstein, \textit{supra} note 8, at 651.

\textsuperscript{39} REPORT OF REGISTER, Pt. 2, \textit{supra} note 38, at 162-69; PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION, Pt. 3, 402 (Comm. Print 1964) [hereinafter cited as PRELIMINARY DRAFT].

\textsuperscript{40} REPORT OF REGISTER, Pt. 2, \textit{supra} note 38, at 164.

\textsuperscript{41} \textit{Id.} at 166.
estion that the statute enumerate specific exclusive rights which are capable of being assigned. Another suggestion was that a transfer, in order to be considered an assignment with all of the incidents of copyright ownership, should convey all exclusive rights within any separately recognized medium of exploitation.

Both suggestions offered as a method of limiting divisibility were rejected. The Copyright Act of 1976 adopted the countervailing argument that such limitations were artificial and would continue to unduly restrict exploitation of a work. Statutory enumeration of rights which could be separately assigned was criticized because in an era of developing technology such specificity could render the revised statute obsolete in a short period of time. The proposal to categorize assignments based on the standard of a recognized medium of exploitation was criticized as being too vague to allow transferees to be certain of their status and the nature of the rights they purchased.

The Copyright Act of 1976 does not limit the extent to which ownership of any exclusive rights may be sub-divided and transferred. Section 201(d)(2) provides:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1)[48] and owned separately. The owner of any particular exclusive right is entitled to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

By specifically mentioning subdivisions of the exclusive rights enumerated in section 106, section 201(d)(2) clarifies the definitions of "copyright owner" and a "transfer of copyright ownership" found in section 101, which provides in pertinent part:

"Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

42. Id. See also Comment, Indivisibility of Copyright—An Obsolete Doctrine, 37 U. COLO. L. REV. 95, 103-04 (1964). This is the approach taken by the English copyright statute. Kaminstein, supra note 8, at 651 (citing Copyright Act, 1956, 4 & 5 Eliz. 2 c.74 § 2).
43. REPORT OF REGISTER, Pt. 2, supra note 38, at 167-69.
45. OMNIBUS COPYRIGHT REVISION, supra note 3, at 109.
46. Id.; REPORT OF REGISTER, Pt. 2, supra note 38, at 168.
47. REPORT OF REGISTER, Pt. 2, supra note 38, at 167.
48. 17 U.S.C. § 201(d)(1) (1976) provides: "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." To be valid, a transfer of copyright ownership, unless it is by operation of law, must be in writing and signed by the owner of the rights conveyed or by such owner's authorized agent. Id. § 204(a).
49. Id. § 201(d)(2).
A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in the copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license.\(^{50}\)

The Copyright Act of 1976 abolishes the need to characterize a transfer as an assignment or a license for the purpose of determining ownership of the copyright. However, the Act provides for a classification that rests on distinctions between exclusive and non-exclusive rights. A person with a non-exclusive right to use a particular work, i.e., a non-exclusive licensee, does not have any rights of ownership. The importance of this distinction will be further discussed in regard to specific statutory provisions.

In recognizing the divisibility of the bundle of exclusive rights comprising the copyright, the Copyright Act of 1976 clarifies the confusion which resulted because of the divorce of legal doctrines from commercial reality. But discarding the doctrine of indivisibility does not resolve the problems which initially brought about the need for the rule.\(^{51}\) The need to determine who owns the copyright in a work and the desire to prevent multiplicity of suits and recoveries for infringement are considerations which are equally important today. It is obviously much easier to trace title and prevent multiplicity of suits when the copyright is controlled by a single proprietor.\(^{52}\) Thus legal recognition of divisibility required adjustments in the statutory framework. The remainder of this comment will explore some of the changes made by the Copyright Act of 1976 in order to accommodate the statutory recognition of divisibility. Specifically, the following discussion will focus on the provisions dealing with registration, recordation of transfers, notice of copyright and the right to sue for infringement.

A. Registration

The system of registration serves several important functions which are of value both to copyright owners and potential users.\(^{53}\)

\(^{50}\) Id. § 101.
\(^{51}\) Kaminstein, supra note 8, at 650.
\(^{52}\) Id.
\(^{53}\) A public registration system provides an administrative review of copyright claims which weeds out those claims which are totally unfounded and thereby avoids needless litigation and promotes the use of material which prospective users may otherwise presume to be protected. Administrative review of applications for registrations also informs authors and other claimants of the requirements for copyright protection.

Registration provides potential users information concerning ownership of the copyright. It also provides copyright owners a permanent record of their claims. The certificate of registration may be considered as prima facie
The role of the registration process is to add to the information available to the public concerning works claiming copyright protection. Registration, combined with the deposit of copies and, more importantly, the recordation of transfers, comprises the public body of information which enables prospective users to trace the title of the copyright.

Because of the intangible nature of copyright, the public record system in the copyright office may be of even greater importance to prospective users than systems of tracing title to other forms of property. And to the extent that the registration system instills confidence in the title and validity of rights in the copyright which are transferred, it is also of value to owners as it promotes marketability. The information on a few classes of works may also be of value to prospective users looking for suitable material as a method of discovering what is not protected by copyright.

Of course, the value of the registration system depends on its reliability in revealing the ownership and the interest at any given time. The system of registration has been criticized on several grounds as being unreliable. During the revision process, most interested groups favored a public registration system which would provide the most complete and reliable record possible, without imposing forfeiture of copyright as the penalty for failure.

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54. Subject to administrative regulations as to certain types of works, two copies of the best edition of a published work or one complete copy of an unpublished work are required to accompany the application for registration. However, the deposit of copies need not accompany registration if copies are deposited with the Library of Congress according to the provisions of section 407. 17 U.S.C. § 408(b), (c) (1976). The purpose of the deposit requirement is to identify the work being registered and to increase the collections in the Library of Congress. REPORT OF THE REGISTER OF COPYRIGHTS, supra note 53, at 77.


57. Id. at 368.

58. Id. at 369.

59. Administrative review of claims presented for application is incomplete. Claims which are erroneously registered possess an unwarranted presumption of validity and may prevent legitimate use of the work by others. Errors in the initial registration may cause the entire record of that work to be faulty. It is also said that registration may not clearly identify that portion of the work which is copyrighted or the work from which the copyrighted work was derived. Id. at 367-70.
The statutorily recognized divisibility of copyright raises several issues involving the system of registration. Section 408(a) provides that the owner of any exclusive right in the work may obtain registration of the copyright claim. It is unclear from the language of the statute itself what effect registration of a work by an owner has on the rights of other owners in the same work.

The Copyright Office has adopted the position that it will generally not accept more than one basic registration for the same work. The only circumstance in which failure to register may result in invalidating the copyright occurs when the copyright notice has been omitted from a publicly distributed work. The Copyright Office has adopted the position that it will generally not accept more than one basic registration for the same work.

At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of 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 section 405(a), such registration is not a condition of copyright protection.
work.\textsuperscript{70} The legislative history of the Copyright Act of 1976 indicates that there is a "general rule against allowing more than one registration for the same work."\textsuperscript{71} This is supported by section 408(e) which specifically allows an additional registration for the first published work even though an unpublished edition of the same work was previously registered.\textsuperscript{72} In reaching its conclusion, the Copyright Office also argued that multiple basic registrations would complicate and confuse the public record,\textsuperscript{73} thus imposing upon the public greater costs and obligations in attempting to trace ownership of a work.

Thus the Copyright Office concluded that a basic registration made by any one owner is sufficient to obtain the benefits of registration for all owners of rights in the work.\textsuperscript{74} Specifically, a basic registration by the author or a copyright owner is sufficient to permit any other copyright owner to instigate an action for infringement regardless of whether or not that owner's name appears in the registration.\textsuperscript{75} Similarly, a timely registration within three months after the first publication of the work by the author or an owner suffices to allow recovery of statutory damages and attorney's fees by any other owner who sues for infringement.\textsuperscript{76} In addition, registration by the author or any owner will satisfy the requirement for all other owners that a work be registered in order for a recorded document of transfer to constitute constructive notice.\textsuperscript{77}

\textsuperscript{70} 43 Fed. Reg. 965, 967 (1978) (interim regulation, to be codified in 37 C.F.R. § 202.3(b)(6)). A "basic registration" in this context is defined as "a registration made on application under section 408(a)." 42 Fed. Reg. 48,944 (1977).


\textsuperscript{74} 42 Fed. Reg. 48,944, 48,945-46 (1977). While any owner may file an initial basic registration, it must include the name of the copyright "claimant," as defined by regulation. \textit{See} notes 92-93 & accompanying text \textit{infra}.

\textsuperscript{75} \textit{Id.}, 17 U.S.C. § 411(a) (1976). Under \textit{id.} § 205(d), a person who has acquired his ownership of the copyright, or one of the exclusive rights thereof by a transfer may not bring an infringement suit until the document evidencing the transfer has been recorded.

\textsuperscript{76} 42 Fed. Reg. 48,944, 48,946 (1977); 17 U.S.C. § 412 (1976). To require registration in the name of each owner of an exclusive right, in order for such an owner to be entitled to statutory damages and attorney's fees, would render the three month grace period meaningless. Further, it would preclude awarding such a recovery in some instances to a particular owner who first uses the work after the three month grace period. 42 Fed. Reg. 48,944, 48,946 (1977).

\textsuperscript{77} 42 Fed. Reg. 48,944, 48,946 (1977); 17 U.S.C. § 205(c)(2) (1976). Since the documents of transfer which are recorded reveal the parties to the transaction,
The Copyright Office has recognized several exceptions to the rule that multiple basic registrations will not be allowed. If an applicant for a basic registration contends that an earlier basic registration was unauthorized and invalid, the additional registration will be accepted by the Copyright Office. This exception is based on the notion that the Copyright Office should not resolve the merits of such conflicts. Moreover, acceptance of the additional basic registration may put prospective users on notice of the conflicting claims.

Another exception to the general prohibition against multiple registrations allows an author in certain circumstances to file a second basic registration. This exception applies when the author has transferred all rights to the copyrighted work or has transferred the contractual right to claim legal title to the copyright in an application for registration and the transferee has registered the work. The reason given for this exception involves the problem of tracing an author's retained interest through documents of transfer. If the author is not identified as the copyright claimant in the registration his or her interest may be difficult to ascertain. Therefore, the author may register, but will not lose any of

there is no reason for requiring that the registration be in either of their names. 42 Fed. Reg. 48,944, 48,946 (1977).

An exception is statutorily recognized in 17 U.S.C. § 408(e) (1976), which allows registration for the first published edition of a work, even if the work in an unpublished form was previously registered. 43 Fed. Reg. 964, 967 (1978) (interim regulation, to be codified in 37 C.F.R. § 202.3(b) (6) (i)).

Failure to file a second registration would not affect an owner's right to the statutory benefits flowing from registration. 42 Fed. Reg. 48,944, 48,946 (1977).

Although this purpose could also be achieved by the use of a supplementary registration, the supplementary registration is maintained as an independent record which is separate from the earlier basic registration. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 155, reprinted in [1976] U. S. CODE CONG. & AD. NEWS 5771.

These conditions are set forth in the definition of a copyright "claimant." 43 Fed Reg. 965, 966 (1978) (interim regulation, to be codified in 37 C.F.R. § 202.3(a) (3)). See notes 92-98 & accompanying text infra.

"Recordation of transfers of copyright ownership are essentially directed at the transferee, not at the author from whom all rights derive ... [T] hey are a cumbersome, impractical and inappropriate way of making a public record of an author's retained rights in a work." 42 Fed. Reg. 48,944, 48,945-46 (1977).

The author may retain a royalty interest, an interest by virtue of an express limitation in a transfer, or an interest by virtue of statutory termination of transfers as provided in 17 U.S.C. § 203 (1976). Supplementary registration may be inadequate to inform the public of the author's interest. See note 81 supra.
the statutory benefits by failing to file a second registration. 86

Section 408(d) provides for the filing of applications for supplementary registration "to correct an error in copyright registration or to amplify the information given in a registration." 87 A supplementary registration may be filed by the author or owner of an exclusive right, but it has no effect on securing the statutory benefits of registration. In particular, the supplementary registration does not replace the necessity for recording the document evidencing a transfer. 88

The supplementary registration is an independent record which is maintained separately from the basic registration. 89 It is, however, required to identify the basic registration which it corrects or amplifies. 90 "The information contained in the supplementary registration augments but does not supercede that contained in the earlier registration." 91

Statutory recognition of divisibility also necessitates an adjustment in the information required in the application. Section 409 sets out certain information which the application for registration must include. 92 Section 409(1) requires that the application contain the name and address of the "copyright claimant." 93 Section 409(5) requires that if the "copyright claimant" is not the author, the application should include information concerning how the claimant obtained ownership of the copyright. 94 The term "copyright claimant" is not statutorily defined. Some concern was expressed that if the claimant was equated with the owner who applied for registration, it could misleadingly imply ownership of the entire copyright. 95 The Copyright Office agreed with this rationale and reached the conclusion that allowing an applicant, whose ownership could be limited to one exclusive right, to indicate that he or she was the copyright claimant would result in an inaccurate public record and thus "subvert the purpose of the registration system." 96 Under interim regulation section 202.3(a)(3)

91. Id.
92. Id., § 409. Section 409(11) authorizes the Register of Copyrights to require other information "bearing upon the preparation or identification of the work or the existence, ownership or duration of the copyright." See 43 Fed. Reg. 965, 967 (1978) (interim regulation, to be codified in 37 C.F.R. § 202.3(c)(2)).
94. Id., § 409(5).
96. Id. "We do not believe that the concept of 'divisibility of copyright' was in-
DIVISIBLE COPYRIGHT

“copyright claimant” is defined as either

i. The author of a work; [or]

ii. A person or organization that has obtained ownership of all rights under the copyright initially belonging to the author.97

Category (ii) includes “a person or organization that has obtained, from the author or from an entity that has obtained ownership of all rights under the copyright initially belonging to the author, the contractual right to claim legal title to the copyright in an application for copyright registration.”98

Statutory recognition of divisible copyright has necessitated adjustments in the technicalities of the registration scheme, including who may register the work, the effect of basic registration on other owners, the nature and effect of the supplementary registration, and the content of the application for basic registration. Divisibility, which emphasizes the necessity of providing an accurate public record of copyright ownership, also increases the importance of registration. This increased importance is reflected in the statutory inducements to register. However, the registration process focuses primarily on initial ownership and thus is only a part of the scheme to provide the public with accurate and dependable information to determine who owns the rights in the copyright of a work. The recordation of transfers is an equally important method of obtaining this goal.

B. Recordation of Transfers

Statutory recognition of divisibility in the Copyright Act of 1976 facilitates fragmented transfers of rights.99 In addition, technological advances have increased, and probably will continue to increase, the variety of ways in which a copyrighted work may be used. As a result of these factors, commercial transactions involving transfers to copyright are increasingly complex.100 Such complexity, combined with the consideration that copyright is by nature an intangible right which is incapable of physical possession, indicates the importance of an accurate and dependable body of public information concerning copyrighted works.101

97. Id. at 966 (interim regulation, to be codified in 37 C.F.R. § 202.3(a)(3)).
98. Id.
100. Latman, supra note 99, at 763.
101. Id.
The role of registration in the system of providing public information has already been discussed. However, registration usually indicates only initial ownership of exclusive rights in a copyrighted work. Because a copyrighted work can be exploited in such a great variety of ways, the availability of information concerning initial ownership may be of less importance than information revealing the exclusive rights which have subsequently been transferred to various owners.\textsuperscript{102} The latter information is provided through the statutory scheme of recording documents which evidence a transfer of rights in a copyright.

Of course, a complete system of information requires a combination of registration and recordation of transfers. This interrelationship is recognized in the Copyright Act of 1976, which provides in section 205(c) that in order for a recorded document to give constructive notice of its contents, the work involved must have been registered.\textsuperscript{103} The language of this provision raises some question as to whether registration of a work must occur before recordation of the document in order for the recorded document to ever constitute constructive notice.\textsuperscript{104} It has been suggested that the more sensible interpretation of this provision is that a document gives constructive notice when it is recorded and the work is registered, regardless of which occurs first.\textsuperscript{105} On the other hand, it could be argued that an earlier recorded document may never be linked to a subsequent registration since the document will not reveal the registration number. Thus the recorded document may be easily missed by persons searching the records.\textsuperscript{106} Moreover, since regis-

\begin{itemize}
\item \textsuperscript{102} Kaplan, \textit{supra} note 53, at 369 n.85, 383 (citing 86 CONG. REC. 77 (1940)).
\item \textsuperscript{103} 17 U.S.C. \textsection 205(c) (1976).
\item \textsuperscript{104} \textit{Id.} \textsection 205(c), provides in pertinent part:
\begin{quote}
Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—
\begin{enumerate}
\item the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and
\item registration has been made for the work.
\end{enumerate}
\end{quote}
(emphasis added).
\item \textsuperscript{106} A document which fails to meet the requirements of section 205(c) and, therefore, does not give constructive notice may still be recorded. Section 205(a) articulates the requirement for recordation, which is simply that the document bear the actual signature of the person who executed it, or that it be accompanied by a sworn certification that it is a true copy of the original, signed document. 17 U.S.C. \textsection 205 (a) (1976). Thus it is possible, albeit unlikely, for a recorded document to give actual notice, even though it is incapable of operating as constructive notice.
\end{itemize}
tation may be obtained by any owner of an exclusive right, it does not seem to place too great a burden on an owner to register the work before or at the same time that he or she records a document of transfer.\textsuperscript{107}

The increased importance of recordation of transfers in the Copyright Act of 1976 is evidenced by the requirement that in order to institute a suit for infringement, a plaintiff who claims ownership of any exclusive right in a copyrighted work on the basis of a transfer of ownership must record the document which is the instrument of transfer.\textsuperscript{108} Although this provision makes recordation a condition of copyright enforcement, it is less stringent than that dealing with registration.\textsuperscript{109} Recordation must occur prior to the commencement of the suit, however, and in contrast to an unregistered work, there is no limitation as to the type of recovery if recordation is delayed.\textsuperscript{110} The infringement suit may also involve a cause of action that arose before recordation.\textsuperscript{111}

The principal inducement to promptly record a document evidencing a transfer of ownership is found in the provision for constructive notice. By establishing priorities among conflicting transfers on the basis of recordation of documents, this aspect of the statutory scheme offers substantial protection to owners. Although the Copyright Act of 1909 established a similar recordation system,\textsuperscript{112} confusion existed as to the scope and effects of recordation. The provisions of section 205 of the Copyright Act of 1976 are intended to clear up a number of uncertainties arising from the prior act.\textsuperscript{113}

The Copyright Act of 1909 provided that an assignment must be recorded within three months after its execution\textsuperscript{114} or it was void as against a subsequent purchaser for valuable consideration without notice who duly recorded the assignment.\textsuperscript{115} The confusion caused by this provision was due to the notion of indivisibility of

\textsuperscript{107} Because of the other statutory inducements incident to registration, the owner may want to be certain that the work has been promptly registered. \textit{See} notes 64-68 & accompanying text \textit{supra}.


\textsuperscript{110} \textit{Id.} § 205(d).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} Copyright Act, ch. 320, §§ 44-45, 35 Stat. 1075 (1909).


\textsuperscript{114} Copyright Act, ch. 320, §§ 44-45, 35 Stat. 1075 (1909) (or within six months after its execution outside of the United States).

\textsuperscript{115} \textit{Id.}
copyright with its distinction between assignments and licenses.\(^\text{116}\) Since this section spoke only of assignments,\(^\text{117}\) the effect of recording or failing to record licenses was unclear.

Many commentators reasoned that since recording of a license was not statutorily required, such recording could have no legal effect. Recordation of a license could not give constructive notice, nor could failure to record a license affect its validity. This analysis led to the conclusion that subsequent assignees and licensees took subject to the prior license whether recorded or not.\(^\text{118}\)

The opposite result was reached by other commentators and the few courts who considered the issue. They concluded that an unrecorded license was void as against a subsequent transferee for value, without notice, whose license or assignment was recorded.\(^\text{119}\) Besides common-sense notions,\(^\text{120}\) it appears that the rationale for this result was based, at least in part, on the fact that the Copyright Office would accept licenses for recordation.\(^\text{121}\)

With the statutory recognition of divisibility, the distinction between assignments and licenses disappeared in the recordation context.\(^\text{122}\) Section 205(e) established the priorities between all conflicting transfers of ownership.\(^\text{123}\) The transfer which is first executed\(^\text{124}\) prevails if it is properly\(^\text{125}\) recorded within one month.

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118. H. Ball, Law of Copyright and Literary Property 550 (1944); A. Weill, supra note 8, at 562-64; Kaminstein, supra note 8, at 639; Latman, supra note 99, at 765.
119. Brady v. Reliance Motion Picture Corp., 229 F. 137, 139 (2d Cir. 1916); Photo Drama Motion Picture Co. v. Social Uplift Film Corp., 213 F. 374, 377 (S.D.N.Y. 1913), aff'd, 220 F. 448, 450 (2d Cir. 1915). See also Kaplan, Literary and Artistic Property as Security, 19 LAW & CONTEMP. PROB. 254, 266 (1954).
120. Judge Learned Hand concluded that "it would be absurd to protect a subsequent purchaser against a prior unrecorded assignee and leave him open to prior unrecorded licenses which should defeat him." Photo Drama Motion Picture Co. v. Social Uplift Film Corp., 213 F. 374, 377 (S.D.N.Y. 1913), aff'd, 220 F. 448 (2d Cir. 1915).
121. The administrative practices of the Copyright Office have been relied on to support judicial opinions. Latman, supra note 99, at 766 (citing Witwer v. Harold Lloyd Corp., 46 F.2d 792, 795 (S.D. Cal. 1930), rev'd on other grounds, 65 F.2d 1 (9th Cir. 1933), cert. denied, 296 U.S. 669 (1933) and Commissioner v. Wodehouse, 337 U.S. 369, 401 (1949) (Frankfurter, J., dissenting)).
122. 17 U.S.C. § 205 (1976), speaks in terms of "transfers of ownership" or "transfers." "Transfer of ownership" includes assignments and licenses, but specifically excludes nonexclusive licenses. Id. § 101.
123. Id. § 205(e).
124. Section 204 articulates standards for execution of transfers of copyright ownership. In order to be valid, a transfer of ownership must be in writing, or otherwise noted in writing, and it must be signed by the owner of the rights conveyed or an agent of such owner. The only exception provided occurs if the transfer is by operation of law. Id. § 204.
after its execution in the United States,126 or if it is properly re-
corded before the second transfer is recorded.127 If the first trans-
fer fails to meet these conditions the later transfer prevails, if it
was recorded properly and was taken for valuable consideration, in
good faith, and without notice of the earlier transfer.128

Another unanswered question in the Copyright Act of 1909 was
whether a nonexclusive license, i.e., a permit to use the work,
which was obtained in good faith from the copyright owner of rec-
ord, was valid as against an earlier unrecorded transfer. The sta-
tus of nonexclusive licenses is resolved in section 205(f) of the
Copyright Act of 1976,129 but not without causing disagreement. A
nonexclusive license,130 whether or not it is recorded, prevails over
a conflicting transfer of ownership which is subsequently exe-
cuted. In addition, a nonexclusive license, whether recorded or
not, prevails over a conflicting transfer of ownership which is exe-
cuted, but not recorded prior to the granting of the nonexclusive
license, provided the latter was taken in good faith and without

125. To be properly recorded a document must comply with both the conditions
for recordation in section 205(a) and the conditions for recordation as con-
structive notice in section 205(c). Id. § 205(a),(c).
126. If the transfer is executed outside of the United States, the statute extends
the grace period of two months. Id. § 205(e).

The notion of a grace period during which an owner is protected, without
recordation, from subsequent transfers was part of the Copyright Act of 1909.
That Act provided for a three month grace period if the assignment was exe-
cuted in the United States and a six month period if executed elsewhere.
Copyright Act, ch. 320, § 44, 35 Stat. 1075 (1909).

The one and three month grace periods in the Copyright Act of 1976 were
considered to be a compromise between those who felt owners needed time
to record during which they should be protected and those who believed that
a bona fide transferee needs to be able to completely rely on the record at
any given time. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 129, reprinted in
Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835
Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st
Sess. 1034 (1965) (statement of the Copyright Committee of the Motion Pic-
ture Association of America, Inc.) [hereinafter cited as Hearings on Copy-
right Law Revision].

128. Id. The terms, "good faith," "valuable consideration" and "without notice"
have a similar judicial gloss in the copyright context, as in the context of con-
tracts, negotiable instruments and other areas of law. See Latman, supra
note 99, at 774-75.
130. In order to prevail, a nonexclusive license must be evidenced by a written
instrument signed by the owner of the right licensed or his or her agent. Id.
§ 205(f). This requirement excludes a great many nonexclusive licenses
which in practice are given orally. REPORT OF THE REGISTER OF COPYRIGHTS,
supra note 53, at 95.
notice of the transfer.\textsuperscript{131} Section 205(f) does not provide for a grace period for recordation of the transfer of ownership as against a nonexclusive license. An owner has no statutory protection against prior nonexclusive licenses and he or she must record the transfer document immediately to acquire protection against nonexclusive licenses which are executed after the transfer.

The statutory treatment of nonexclusive licenses reflects the opinion that persons who seek permission to use a work should be entitled to rely on the record.\textsuperscript{132} The provision also reflects the majority opinion that requiring the recordation of the great number and variety of nonexclusive licenses would be too burdensome and impractical.\textsuperscript{133} It was the latter opinion which sparked debate by those concerned with allowing unrecorded nonexclusive licenses to prevail over subsequent transfers. The persons representing this viewpoint, particularly motion picture producers, indicated that in some instances outstanding nonexclusive licenses could have a significant effect on a transfer and that transferees should also be entitled to rely on the recording system.\textsuperscript{134} It was also suggested that most nonexclusive licenses would not be recorded, particularly if they were of little value or for a short duration, and thus the practicalities of the situation would prevent the possible overburdening of the system.\textsuperscript{135} The conclusion reached, however, was that the limited advantages of requiring recordation of nonexclusive licenses in order for them to prevail over subsequent conflicting transfers were outweighed by the impracticalities and burdens of such a requirement.\textsuperscript{136}

Although the effect of the priority systems, articulated in sections 205(e)-(f) is to require only recordation of documents evidencing a transfer of ownership, any other document pertaining to a copyright may be recorded if it meets certain standards.\textsuperscript{137} Further, any document so recorded will give constructive notice of its contents, provided it specifically identifies the particular work.\textsuperscript{138} Recording documents which reflect an interest in the copyrighted work may be beneficial if an infringement suit is instituted.\textsuperscript{139}

\begin{footnotes}
\textsuperscript{131} 17 U.S.C. § 205(f) (1976).
\textsuperscript{132} Report of the Register of Copyrights, supra note 53, at 97.
\textsuperscript{134} Id.; Preliminary Draft, supra note 39, at 306-11; Hearings on Copyright Law Revision, supra note 126, at 1035.
\textsuperscript{135} Preliminary Draft, supra note 39, at 307.
\textsuperscript{138} The work must also be registered. 17 U.S.C. § 205(c) (1976).
\textsuperscript{139} If an infringement suit is instigated, the court may require that notice be sent
\end{footnotes}
The Copyright Act of 1976 places an increased emphasis on recordation of transfers and registration as the method for promoting the availability of information concerning copyright ownership. Directly related to such an emphasis is the decreased importance of the notice requirement.140

C. Notice

The Copyright Act of 1909 required that a notice in the name of the copyright proprietor be affixed to each copy of a work upon publication in order to secure copyright protection.141 Although the act provided for an exception in situations in which the notice was accidentally omitted from a copy or copies,142 total failure to comply with the notice provision or the affixation of an erroneous notice resulted in a forfeiture of the copyright.143

As has been discussed, the copyright proprietor was the author or an assignee, i.e., a transferee of all of the rights comprising the copyright.144 If the copyright notice affixed to the work upon publication contained the name of a licensee, the copyright would be forfeited.145 This problem was particularly vexing in the context of magazines or other types of compilations, since the copyright notice was frequently in the name of the publisher who was often a licensee.146

Those involved in the revision process generally agreed that forfeiture of the copyright because of an error or an inadvertent omission in the notice imposed an injustice on the unwary author.147 However, two schools of thought existed as to whether the

to all persons who claim an interest in the copyright as shown by the records of the Copyright Office. Id. § 501(b).

140. Latman, supra note 99, at 776.
141. Copyright Act, ch. 320, § 9, 35 Stat. 1075 (1909). The notice required included: (1) the word “Copyright,” or the abbreviation “Copr.,” or the symbol “c”; (2) the name of the copyright proprietor; (3) and in the case of literary, musical or dramatic works, the year in which the copyright was secured by publication. Id. § 18.
142. Id. § 20.
144. See note 8 & accompanying text supra.
146. Kaminstein, supra note 8, at 642.
notice provision should be modified or abrogated. Proponents of a notice scheme argued that it fulfills an important function in informing the public of the existence of a claim to copyright protection. Further, a notice provision gives the prospective user at least an initial lead in discovering from whom permission to use the work must be obtained. It was also suggested by proponents that, without the requirement of an affirmative act, the majority of published works, which fall into the public domain because no one is interested in protecting them, would needlessly be kept in the private domain.

On the other hand, opponents argued that notice is a meaningless technicality. Persons who wish to determine ownership of the copyright cannot rely on the notice provision, but must necessarily look to the records in the Copyright Office. Since the author is the initial owner of the copyright, a search for permission logically begins with him or her, so in most cases notice serves no function as an initial starting point. Opponents also suggested that automatic copyright protection, by including all works in the private domain, would have little significant effect since works of value to prospective users would be copyrighted in any case.

The notice scheme adopted in the Copyright Act of 1976 takes a compromise approach. When a work is published under the authority of the copyright owner, a notice must be affixed "on all publicly distributed copies from which the work can be visually perceived."

The contrasting viewpoints concerning the notice requirement reflect two philosophically different attitudes toward the nature of copyright. Copyright is perceived by some as the inherent or natural right of an author to protect his or her creation. On the other hand, copyright is perceived as a statutory grant to an author which can be conditioned or limited as the legislative body chooses. See Levine & Squires, supra note 63, at 1232-33.

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151. FURTHER DISCUSSION AND COMMENTS ON PRELIMINARY DRAFT, supra note 148, at 90-91; NOTICE OF COPYRIGHT, supra note 143, at 272.


forfeiture of the copyright due to omission or error in the notice in certain circumstances if specified conditions have been met. These provisions have been described as an "annuity for copyright lawyers." Section 405 articulates three alternative circumstances under which the omission of notice will not invalidate the copyright. First, if the notice is omitted from a "relatively small number" of copies distributed publicly, the omission will not result in forfeiture. Second, if the notice is omitted in violation of an expressed contractual requirement pursuant to the copyright owner's authorization of the public distribution of the work, the copyright will not be invalidated. Third, registration of the work within five years after publication will prevent the work from falling into the public domain. Coupled with the registration, a "reasonable effort" must be made to add notice to all copies that are distributed after the omission has been discovered. In effect, a work published without notice will remain subject to statutory protection for at least five years. However, innocent infringers who relied on the omission of notice will not be liable for damages for any infringing acts committed before they received actual knowledge of the notice. The court may, however, award the copyright owner the profits from the use of the work and injunctive relief or a license fee.

Statutory recognition of divisibility of copyright is interwoven with section 406, which concerns errors in the copyright notice. Under section 406, an error in the notice will not invalidate the copyright. Specifically, if the person or entity named in the copyright notice is not the owner of the copyright, the validity of the copyright is not affected. However, statutory protection exists for the innocent infringer.

Divisibility of copyright permits numerous copyright owners in one work, but the notice provisions do not specify which owner

154. See id. §§ 405, 406.
155. Further Discussion and Comments on Preliminary Draft, supra note 148, at 81.
157. Id. § 405(a)(1).
158. Id. § 405(a)(3).
159. Id. § 405(a)(2).
162. Id.
163. Id. § 406.
164. Id. § 406(a).
165. Id.
166. See notes 47-49 & accompanying text supra.
is to be named in the notice. Therefore, it seems clear that any owner of an exclusive right, regardless of the scope or importance of that right, may correctly insert his or her name in the notice.\textsuperscript{167} One could argue, then, that as long as any copyright owner is named in the notice, there is no error and the provisions of section 406(a) do not apply. The problem with this analysis arises from the protection given by section 406(a) to an innocent infringer. A person who infringes a copyright in good faith reliance on a purported transfer or license from the person named in the notice may be shielded from liability in an infringement action.\textsuperscript{168} Such an innocent infringer could exist in a situation in which the owner of an exclusive right whose name appears in the notice purports to transfer or license rights owned by a different copyright owner. Thus the name of a copyright owner contained in the notice may be erroneous under section 406(a) if that owner purports to transfer or license rights in the copyright which he or she does not own.

Copyright owners whose rights have been purportedly transferred without their authorization may protect themselves from innocent infringers. First they may be in a position to insist that the notice also include their name.\textsuperscript{169} However, this is a contractual rather than a statutory solution and, therefore, may only be of limited usefulness. Section 406(a) also offers the true owner two methods of protecting rights in the copyright in those instances in which someone else's name appears in the notice.\textsuperscript{170}

Section 406(a)(1) provides that a person who infringes the copyright in good faith reliance on a license or transfer from the person named in the notice is liable to the true owner if registration for the work has been made in the name of the copyright owner.\textsuperscript{171} It is unclear from the language of the statute whether a basic registration filed by any owner is sufficient to invoke this exception. The basic registration may not necessarily reveal the identity of the owner whose right in the copyright has been purportedly transferred or licensed by the person named in the notice. However, where the registration reveals that one who is not the person named in the notice is the "copyright claimant," as defined by regulation,\textsuperscript{172} it is likely that a prospective user would thereby be put on notice that he or she should not rely on the name in the copyright notice.

\textsuperscript{168} Id. § 406(a).
\textsuperscript{169} Kadden, \textit{supra} note 105, at 28.
\textsuperscript{171} Id. § 406(a)(1).
\textsuperscript{172} 43 Fed. Reg. 965, 966 (1978) (interim regulation, to be codified in 37 C.F.R. § 202.3(a)(3)).
Section 406(a)(2) provides that the innocent infringer is liable if "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded" prior to the infringing act. The scope of this exception is unclear. However, it seems to leave the true owner unprotected in some situations, as when the person named in the notice fails to record the document evidencing his or her ownership. If the owner whose rights were purportedly transferred or licensed was granted those rights from the owner named in the notice, then protection is apparently available by recording the document of transfer. The document must be recorded immediately, or at least before the infringing acts, as there is no statutory grace period in this context. A problem seems to arise, however, if the true owner has acquired ownership of the copyright from one other than the person named in the notice, since in this situation recordation by the true owner will not trigger the exception of section 406(a)(2). Rather the true owner whose rights were purportedly transferred or licensed by the person named in the notice must rely on a recordation by that person.

Presented with such a problem, the owner of the rights purportedly transferred without authority may be unable to recover from the innocent infringer. However, this owner has a cause of action against the owner who wrongfully transferred the right. The person named in the notice must account to the true owner for all receipts from transfers or licenses purportedly granted. However, the true owner may remain less than wholly compensated, either monetarily or in the sense that he or she was forced to part with a property right when not wishing to do so.

The provisions of section 406 are also applicable in situations involving collective works, such as periodicals. A single notice applicable to the entire collective work is sufficient to fulfill the notice requirements with respect to each individual work collected therein. If the person named in the notice is not the owner of the copyright in the individual work, then an error in notice has occurred and the provisions of section 406 govern. If the person named in the notice has been transferred any exclusive right, such as the exclusive right of first publication in a periodical, then that

174. Id.
175. FURTHER DISCUSSION AND COMMENTS ON PRELIMINARY DRAFT, supra note 148, at 72-79.
177. Id. § 404(a). Advertisements submitted on behalf of one other than the owner of the copyright in the collective work are exempted from this provision. Id.
178. Id. § 404(b).
person is a copyright owner and no error in notice has occurred. However, if he or she purports to transfer or license rights other than those owned under the analysis set forth above, section 406 should control.

It is clear that the notice provisions prevent or greatly reduce the risk of inadvertent forfeiture of a copyright. The harshness attendant upon the combination of notice as an absolute condition of copyright and the doctrine of indivisibility has been reduced by the Copyright Act of 1976. It is unclear, however, whether the notice requirement, in any form, is compatible with divisible copyright. It is also unclear whether the purported benefits of a notice scheme are worth the resulting confusion and problems.

D. Standing to Sue For Infringement

The doctrine of indivisibility was considered by courts most frequently in the context of whether a particular plaintiff has standing to sue for infringement. The general rule had been that only the copyright proprietor had standing, so an exclusive licensee could only institute an infringement suit if the proprietor was joined. Rule 19 of the Federal Rules of Civil Procedure, which allows the compelled joinder of a party, negated most of the problems arising from the notion of indivisibility in this context.

However, commentators pointed to several situations in which the exclusive licensee could still be adversely affected because he or she could not institute an infringement suit without joining the copyright proprietor. An obvious problem occurred if the copyright proprietor had gone out of business or was otherwise unavailable. A second problem mentioned by commentators involved a situation in which the plaintiff-exclusive licensee needed quick injunctive relief which could be hampered by a time-consuming join-


The doctrine of indivisibility was sometimes defined as solely a procedural rule. H. Warner, supra note 5, § 53, at 130; Burton, Business Practices in the Copyright Field, in Copyright Problems Analyzed 87, 88 (1966).

180. 2 M. Nimmer supra note 7, § 119.31, at 517 (and cases cited therein).

181. FED. R. CIV. P. 19; 2 M. Nimmer, supra note 7, § 119.1, at 511; Melgrim, Territoriality of Copyright: An Analysis of Assignability Under the Universal Copyright Convention, 9 BULL. COPYRIGHT SOC'Y 271, 278 (1962).

der procedure. From a different perspective, commentators pointed out that the exclusive licensee could be adversely affected by a suit instituted by the copyright proprietor of which the licensee had no notice.

The primary purpose of the doctrine of indivisible copyright in this context was to prevent multiple suits and multiple recoveries, usually expressed from the viewpoint of protecting the defendant. Section 501(b) of the Copyright Act of 1976 is aimed at achieving this goal while also protecting other parties interested in the suit. With the statutory recognition of divisible copyright, the latter goal has gained increasing importance. Although an owner who is not a party to the suit is obviously not bound by an adverse judgment, notions of *stare decisis* may make recovery difficult in a second suit. A large recovery in a previous suit may also work to the disadvantage of an owner instituting a second suit.

Section 501(b), which articulates the standards regarding the ability to sue and the joinder of parties, must be considered in conjunction with the Federal Rules of Civil Procedure, particularly Rules 19 and 20. Under section 501(b), the legal or beneficial owner of an exclusive right may institute an action for the infringement of that right. The concept of beneficial owner clearly includes an author or assignee who is entitled to royalties from the use of a right in a copyrighted work. It is less clear whether the concept of beneficial owner would be extended to include, for example, the beneficiary of a trust which owns an exclusive right in a

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188. FURTHER DISCUSSION AND COMMENTS ON PRELIMINARY DRAFT, *supra* note 148, at 126-28, 132-35. An infringement can adversely affect numerous different owners of rights in one copyrightable work, as well as the claims of authors or their transferees to royalty payments. The concern was expressed that unless the statutory scheme requires notice and permits intervention as a matter of right, it could be difficult for all persons with interests in the copyright to protect their interests. *Id.* at 127.
189. *Id.* at 134-35.
191. 17 U.S.C. § 501(b) (1976). The right to institute a suit for infringement is conditioned upon the requirements of registration and recordation of transfers. *See id.* §§ 205(d), 411(a), 501(b).
copyrighted work.\textsuperscript{193} The court may require that notice of the suit be served upon any person who has or claims an interest in the copyright, as revealed by the records in the Copyright Office.\textsuperscript{194} The court must require that notice be served on any party whose interest is likely to be affected by the outcome of the case.\textsuperscript{195} The inducements to register and record transfers,\textsuperscript{196} in addition to promoting the reliability of the record for the purpose of determining ownership, also avoid the overlapping of suits by increasing the likelihood of receiving notice of an instituted action.

The court has the discretion to require the joinder of any person "having or claiming an interest in the copyright," but the court must allow the intervention of such a person.\textsuperscript{197} Mandatory intervention reflects the importance perceived in allowing all parties to protect their interest in the copyright if they so desire.\textsuperscript{198}

It has been suggested that allowing any legal or beneficial owner of an exclusive right to institute a suit for infringement, regardless of the insignificance of his or her interest, may work a hardship on the authors or owners of more important exclusive rights in their ability to protect their interests.\textsuperscript{199} However, federal courts have dealt with such procedural problems in the context of other substantive areas of law and there is little reason to believe that the problems cannot be similarly resolved in suits involving copyright infringement.

\textbf{IV. CONCLUSION}

In commercial practice, copyright has been divisible since technological advances increased both the number of ways to exploit a work and the value of the rights incident to such exploitation. Judicial modifications largely rendered copyright legally divisible as well. However, the statutory framework of the Copyright Act of 1909 was inconsistent with the realities of divisible copyright. It seemed logical that those involved in the revision process should strive to make the copyright law conceptually consistent with commercial practice, and reject the paternalistic argument that au-

\textsuperscript{193} Further Discussion and Comments on Preliminary Draft, \textit{supra} note 148, at 128.
\textsuperscript{194} 17 U.S.C. § 501(b) (1976).
\textsuperscript{195} Id.
\textsuperscript{196} See §§ III-A to B of text \textit{supra}.
\textsuperscript{197} 17 U.S.C. § 501(b) (1976).
\textsuperscript{198} Further Discussion and Comments on Preliminary Draft, \textit{supra} note 148, at 126-27.
\textsuperscript{199} The argument posed is that the owner who initiates the infringement suit will have the advantage of determining both where, and against whom, it is brought. \textit{Id.} at 127.
thors and owners will splinter rights in a work to the point that it is beyond usefulness.

Recognition that the copyright in a work may in fact be owned by numerous entities requires an adjustment in the statutory scheme dealing with formalities, tracing title, and standing to sue for infringement. The provisions adopted are a compromise between creators and users, naturalists and positivists.

Statutory recognition of divisibility at the least lessens the emphasis on formalities as a condition of copyright. It can be argued that divisible copyright is inconsistent with such formalities. The notice requirement is no longer of much importance and its value, if any, is limited to permitting some works to fall into the public domain five years after publication.

On the other hand, divisibility requires a recording system which is as accurate and dependable as possible without imposing too great a burden on owners. Thus the provisions concerning registration and recording of documents evidencing transfers are of increased importance.

The compromise between different interest groups is evidenced in the safeguards incident to allowing any one of the multiple legal and beneficial owners to institute a suit for infringement. The practical importance of permitting one who owns a valuable property right to sue if it is damaged is tempered by the need to protect both other owners and defendants.

This compromise legislation has apparently produced a complicated but, at least superficially, effective statutory scheme which recognizes divisibility, yet solves the problems which originally engendered the need for the doctrine of indivisible copyright.

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