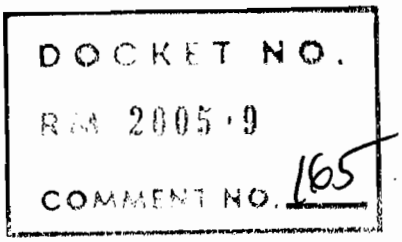
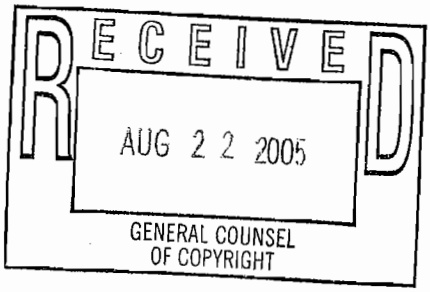
Software & Information
Industry Association
1090 Vermont Ave NW Sixth Floor
Washington, DC 20005-4095



August 22, 2005



Ms. Charlotte Douglass
Principal Legal Advisor
Office of the General Counsel
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
101 Independence Avenue, SE
Washington, DC 20559-6000

RE: Preregistration of Certain Unpublished Copyright Claims:
(1) Notice of Proposed Rulemaking and
(2) Supplemental Notice Of Proposed Rulemaking
– Internet Explorer Brower

Dear Ms. Douglass:

On behalf of the members of the Software & Information Industry Association (SIIA), I am writing in response to both your Notice of Proposed Rulemaking and the Supplemental Notice of Proposed Rulemaking. We appreciate the opportunity to comment on these two proceedings.

As the principal trade association of the software code and information content industry, the more than 700 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies. In the context of this proceeding, our members are both victims of rampant piracy and promoters of effective eGovernment for use by citizens, including implementation of the E-Government Act of 2003.[1]

Notice of Proposed Rulemaking. The proposed regulations limit the classes of eligible works to certain movies and music. Therefore, the regulations, as proposed, would not apply to software, database and other types of content. The Copyright Office notice, however, invites copyright owners of other classes of works that have a history of pre-release infringement to submit comments and justify why they too should be able to avail themselves of the new pre-release registration process. The notice states that these owners should be "be prepared to document more than 'a few instances' of pre-release infringement" and that the burden is on these copyright owners "to demonstrate that there is a substantial history of pre-

[1] Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002).

Tel: +1.202.289.7442
Fax: +1.202.289.7097
www.siia.net

release infringement which is likely to continue, causing harm to copyright owners that can be ameliorated by permitting preregistration of such works."

In accordance with this notice, SIIA has surveyed its members to determine the extent to which their unpublished software products have been victimized by pre-release infringement. Not surprisingly, many of SIIA's software member companies responded that in more than "a few instances" their yet-to-be-published software products have been infringed prior to publication. They indicated that the present registration requirements have adversely affected their ability to take, or have others take on their behalf, action against the infringers, and, depending upon how the new pre-release registration process is implemented, such a process could directly and effectively resolve these problems.

Our survey results also demonstrate that the effected companies have been frequently victimized by pre-release infringement and that, in many cases such infringement have harmed the company, for instance by damaging the market value of the pre-release software product, customer and partnership relationships, or the company's market share. Such infringements are likely to continue and get worse over time.

While our survey indicates that there have been substantial harms caused by pre-release infringements, which would likely be alleviated by a pre-release registration system, we are not, at present, in a position to delineate these infringements in this submission for several reasons. First, many companies were reticent or prohibited (on advise of counsel) from providing details about these infringements because they were subject to either ongoing, or soon-to-be-initiated, litigation or other sensitive matter. In other instances, they were concerns about publicly disclosing potential vulnerabilities. Second, because the Copyright Office notice was published on July 22nd and allowed only 30 days for the submission of comments, several of our members (especially the smaller companies) were not able to compile the requisite information due to the short period of time and the fact that to many people at the companies who have such information were out of the office during the 30 day comment period.

We understand that the Copyright Office has set the burden of proof quite high in this notice and that, without substantiating actual instances of harm that would be rectified by the pre-release registration process, we are unlikely to meet that burden. We would welcome the opportunity to submit additional information to make the case that software should be included in the pre-release registration process, if: (1) either the Copyright Office is willing to afford more time to file a submission or allow us to supplement this filing at a later date; and (2) guarantee that the submissions would be kept confidential and not disclosed to the public, at least for a stated period of time or until such time as release of the information in the submission would no longer threaten an ongoing litigation or other matter. Given the sensitivities of the subject matter of the notice, we think this is a reasonable request, and hope the Copyright Office will take us up on our offer.

Supplemental Notice. The Copyright Office has requested information "that will assist it in determining whether any eligible parties will be prevented from preregistering a claim due to browser requirements of the preregistration system." In particular, the Copyright Office "seeks information whether any potential preregistration filers would have difficulties using Internet Explorer (version 5.1 or higher) to file preregistration claims, and if so, why."

We appreciate the Copyright Office's sensitivity to this issue, and welcome the stated goal of ensuring that no potential user is precluded from benefiting from this system merely because they are required to utilize a particular browser, which is in effect the result of the system design. We understand from both this Supplemental Notice and collateral news references that the Copyright Office will "upgrade" its systems to ensure that other browsers in commercial distribution, such as Netscape 7.2, Firefox 1.0.3, and Mozilla 1.7.7, are not discriminated against, but that these will not be available when preregistration goes into effect on October 24th.

At minimum, we urge the Copyright Office to (1) use all deliberate speed to ensure that use of the preregistration system does not depend on a single browser and, in fact, permits access and use of the system with multiple browsers in commercial distribution, including those not specifically mentioned in the Supplemental Notice and (2) implement supplemental procedures for those parties whose classes of works will eligible for preregistration and who are unable to utilize the system because of the restrictive browser requirement.

Our view is based on the following points. First, we are deeply concerned that a government system which seeks to provide citizens with access (if even to a proscribed group of citizens) would effectively require use of a particular version of a browser to the exclusion of other browsers in commercial distribution. This is an important policy consideration that we believe is essential to the Copyright Office approach.

Second, it is highly unlikely that the Copyright Office will know with any degree of certainty from the responses to this Supplemental Notice that parties eligible for preregistration will not have problems. The final determination of the classes of works is not yet finalized, and without that determination, a complete picture of potential users is incomplete. Moreover, based on industry practice and past experience, the real challenges emerge only after a system is publicly beta tested, which due to the statutory time constraints imposed by the Art Act does not appear to have been done in this case and will not happen until after the system "goes live" October 24th. The evidence of incompatibilities or user "unfriendliness" may gather only after several months, as users learn what is in fact required to utilize the system, which may entail more than reliance on a particular browser. This has, in fact, been the experience of the U.S. Patent and Trademark Office with its electronic filing system. (See story on the planned revamping of their system at http://news.com.com/2102-1028_3-5830864.html.)

Finally, we encourage the Copyright Office to take into account the principles and directives under which agencies in the Executive Branch operate, many of which stem from the

requirements of the E-Government Act of 2002. The policy objective of achieving interoperability is one that is paramount. In his August 1, 2003, memo to all Department and Agency Heads, the Director of the Office of Management and Budget provided implementation guidance for agencies to implement the E-Government Act of 2002. As a general policy matter, agencies, in making their IT investments, are to focus on:

- "delivering services and information to citizens electronically;
- reducing the burden on citizens and businesses;
- determining that the investment is part of the agency's modernization blueprint;
- ***ensuring interoperability of systems***; and
- simplifying business processes and reusing technology where applicable."[2]

As a useful reference point for the Copyright Office, we point to the position of OMB that the Federal government "seeks to improve the exchange and use of data between multiple information technology systems.... Section 212 [of the E-Government Act of 2002] has as its purposes enhancing interoperability; assisting the public in electronically submitting electronic information to agencies; and enabling people to integrate information from different agencies."[3] We urge the Copyright Office to consider its approach in light of these principles and the statutory requirements under which Executive Branch agencies operate.

We appreciate the opportunity to comment on this matter. Please do not hesitate to contact us if you have any questions or if we can be of further assistance.

Sincerely,

/Ken Wasch

Ken Wasch
President

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[2] Memorandum to All Department and Agency Heads, "Implementation Guidance for the E-Government Act of 2002". August 1, 2003 (emphasis added). Found at http://www.regulations.gov/images/eGovinterpretation-m03-18.pdf.

[3] Office of Management and Budget, "FY 2004 Report to Congress on Implementation of The E-Government Act of 2002," March 1, 2005 Found at: http://www.whitehouse.gov/omb/inforeg/2004_egov_report.pdf.