UNITED STATES COPYRIGHT OFFICE • THE LIBRARY OF CONGRESS •

ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF POLICY DECISION

POLICY DECISION REGARDING MANDATORY DEPOSIT OF BOOKS AND OTHER PRINTED WORKS PUBLISHED WITH NOTICE OF COPYRIGHT IN THE UNITED STATES AFTER FIRST PUBLICATION ABROAD

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LIBRARY OF CONGRESS

Copyright Office

[Docket RM 85-8]

Policy Decision Regarding Mandatory Deposit of Books and Other Printed Works Published With Notice of Copyright in the United States After First Publication Abroad

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of policy decision.

SUMMARY: The Copyright Office of the Library of Congress has reviewed its policies regarding the issuance of demands for the mandatory deposit of works published in the United States with notice of copyright following first publication in a foreign country, pursuant to 17 U.S.C. 407. By this Notice of a policy decision, the Office gives notice that it continues to adhere to the policy announced previously (45 FR 49721). The Office has, however, adopted a form to simplify requests for waiver of the regulation. This Notice also explains that the Office does not knowingly demand the deposit of works which are imported into the United States in such small numbers that it is not clear whether publication had been made in this country.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, Telephone: (202) 287-8380.

SUPPLEMENTARY INFORMATION:

1. Background

Under section 407 of the Copyright Act of 1976, title 17 of the United States Code, as amended by Pub. L. 94-553 (90 Stat. 2541) (hereafter, the current Act) the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States must deposit two copies of the work (or, in the case of sound recordings, two phonorecords) in the Copyright Office (hereafter sometimes, the Office) for the use or disposition of the Library of Congress. The regulations of the Copyright Office may exempt certain categories of material from the mandatory deposit requirements or may require the deposit of only one copy or phonorecord with respect to particular categories. 17 U.S.C. 407(c). Regulations implementing the mandatory deposit requirements of 17 U.S.C. 407 were published in the Federal Register on September 29, 1978 (43 FR 41975) and appear as 37 CFR 202.19.

The required deposit must be made within three months after publication with notice in the United States. Failure to deposit does not affect the copyright in the work, but may subject the owner of copyright or the right of publication to fines and other monetary liability if deposit is not made after a written demand for the required deposit has been issued by the Register of Copyrights.

The mandatory deposit requirements applies to works published with notice of copyright in the United States after first publication in a foreign country (hereafter, foreign works). This is clear from the language of section 407 of the current Act, which refers to a "work published with notice of copyright in the United States" without limiting the application of the section to works *first* published in the United States. The relevant congressional reports explicitly confirm this interpretation of the Act:

> Although the basic deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition.
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> S. Rep. No. 94-473, 94th Cong., 1st Sess. 134 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 151 (1976).

Deposit of copies under the authority of the copyright statutes for the enrichment of the collections of the Library of Congress has been a significant method of acquisition for the Library since 1870. Under former statues, the deposit requirement was linked to copyright registration. The current Act separates mandatory deposit for the use of the Library of Congress (17 U.S.C. 407) from copyright registration (17 U.S.C. 408), although it is possible to satisfy the mandatory deposit requirements at the time of registration.

With the passage of the current Act, the Register of Copyrights instituted a policy of comprehensive enforcement of the mandatory deposit requirements under section 407. Written demands were issued for the deposit of certain books and other printed works that appeared to have been published with notice of copyright in the United States. Many copyright owners responded favorably to these demands and complied promptly. Some responded that the work had not been published in the United States. Other stated that they were neither the owner of copyright nor of the right of publication, asserting instead that the owners were foreign corporations or individuals. Sometimes, these assertions were made even though the alleged foreign copyright owner

appeared to be a subsidiary of an American corporation. A few foreign copyright owners protested the application of the mandatory deposit provisions to their works, expecially [1] where periodicals were distributed through subscriptions rather than through publication of an "American edition." Some American publishers voiced concern that enforcement of the deposit requirements against foreign publishers would lead to retaliatory measures by foreign countries.

To assess its policy regarding the deposit of foreign works, the Office, in the latter part of 1978, undertook a review of its mandatory deposit-demand policies and temporarily suspended issuance of demands for foreign works pending this review. The Office did not, however, either explicitly or by implication, exempt foreign works published with notice of copyright in the United States from mandatory deposit except where registration was made under 17 U.S.C. 408. On completion of its review, in July 1980, the Office decided that the mandatory deposit provisions of section 407 were applicable to foreign works and that the enforcement of these provisions against such works would result in considerable benefit to the Library. A policy decision was published on July 25, 1980, resuming the Office's issuance of written demands for the deposit of foreign works. The Office also expressed a willingness to review the results of the Office's policy at some future time, based on its experience under the stated policy. (45 FR 49721).

The policy adopted in 1980 has engendered some criticism from a number of foreign publishers, particularly with respect to works that are published multinationally where the publisher is generally viewed as not being a United States publisher. Concern continued to be expressed by the Association of American Publishers (hereafter AAP) over the impact of the Library's demands for the deposit of foreign works on the United States publishers. In May 1985 representatives of the Copyright Office and the Library of Congress met with the AAP to discuss the matter and to explore possible solutions. The AAP proposed three alternatives to the Library's current policy: (i) Changing the deposit requirements of section 407(a) by regulation to exclude foreign publishers; or (ii) Limiting demands to works that are imported in bulk—10,000 copies or more; or (iii) Dropping the option of submitting non-compliance cases to the Department of Justice for prosecution.

2. Policy Decision

After thorough consideration and for the following reasons, the Copyright Office has decided not to adopt any of the above proposals. The Office will continue its policy of enforcing the deposit requirements against foreign books and other printed works published in the United States with notice of copyright. This Notice also explains more fully the circumstances under which demands for foreign works will be issued, and the Office has prepared a special form to simplify requests for "special relief," i.e., waiver of the deposit requirements.

(i) *Excluding works by foreign publishers from the deposit requirement by regulation.* The Office declines to exclude works by foreign publishers from the deposit regulations because Congress clearly intended for these works to be subject to demand under section 407, and the Library of Congress has a strong interest in acquiring publications in this category. S. Rep. 94-473, 94th Cong., 1st Sess. (1975), H.R. Rep. 94-1476, 94th Cong., 2d Sess. (1976). Indeed, the idea of including foreign works within the demand process may be traced to the Vestal and Perkins copyright law revision bills of 1925 and 1930. H.R. 11258, 68th Cong., 2d Sess. (1925) and H.R. 12549, 71st Cong., 2d Sess. (1930). In other countries as well, *e.g.* the United Kingdom and Sweden, legal deposit laws require the deposit of imported works. J. Lunn, *Study On A Model Law For Legal Deposit* (1980). If the U.S. copyright law were to differentiate between foreign and domestic works and treat foreign publishers as a special class, U.S. publishers could, and some might, claim discrimination. The deposit requirement, moreover, is consistent with the Universal Copyright Convention, and has also been held to be a reasonable fee for the exclusive rights granted by the copyright law to the owner of copyright. *Ladd* v. *Law and Technology Press*, 762 F.2d 809 (9th Cir. 1985).

Moreover, special accommodations are already made in the present regulations for the deposit of foreign works. They are exempted from deposit under section 407(a), if registration is made before a demand is issued; special relief is available in cases of hardship; and the Library generally acquires only one copy of a work instead of two. In most cases, publishers have responded favorably to the Library's deposit demands and many have established a regular procedure for automatically depositing their works with the Copyright Office. The benefits to the Library of Congress and the U.S. public have proved significant.

(ii) *Limiting demands to works imported in bulk.* The AAP also suggested that the Library might limit its demands to foreign works imported in bulk of 10,000 copies or more. It is not feasible, however, for the Copyright Office to ascertain in the case of each foreign work the number of copies published in the United States. Additionally, many works, particularly scholarly publications which are of great significance to the Library's collections, are intended for a limited market and have small press runs.

(iii) *Dropping the option of referring foreign cases to the Department of Justice.* The Copyright Office has concluded, after careful review, that the current sanctions, particularly the option of referring cases where there has been failure to deposit following the issuance of a demand to the Department of Justice, are necessary to assure compliance with the Copyright Act.

We reiterate, however, our commitment to a sensible and flexible application of section 407. The deposit requirement is intended to be "as flexible as possible so that there will be no obligation to make deposits where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases." H.R. Rep. 94-1476, 94th Cong., 2d Sess. 151 (1976). Special relief is available to publishers of foreign works in cases of hardship, and the Office is simplifying the request procedure. The Deposits and Acquisitions Division has prepared a form for use in requesting special relief for works published in the United States *after first publication abroad.* In appropriate cases, special relief may be arranged on an ongoing basis, eliminating the need for frequent written requests.

Demands, moreover, will only be issued where publication is clear: copies which enter the United States only at random or in a very limited way will not knowingly be requested. Demands for foreign works will also be limited to books and other "printed works," including microfiche. Finally, no foreign case has yet been referred to the Department of Justice, and before the first foreign noncompliance case is referred for enforcement of the demand, the case will be reviewed by the General Counsel's Office in consultation with the Register of Copyrights.

(17 U.S.C. 407, 702)

List of Subjects

Copyright, Copyright Office.

Dated: December 13, 1985.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

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[1] Error; line should read:
"provisions to their works, especially"