



ANNOUNCEMENT

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

FINAL REGULATIONS

MASK WORK PROTECTION; IMPLEMENTATION OF THE SEMICONDUCTOR CHIP PROTECTION ACT OF 1984

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 211

[Docket RM 84-6A]

Mask Work Protection; Implementation of the Semiconductor Chip Protection Act of 1984

AGENCY: Copyright Office, Library of Congress.

ACTION: Final regulations.

SUMMARY: The Copyright Office of the¹ Congress is issuing final regulations establishing a new Part 211 to 37 CFR Ch. II. These regulations implement certain provisions of the Semiconductor Chip Protection Act of 1984, Pub. L. 98-620 (Nov. 8, 1984). The Act establishes a registration system for mask works to be administered by the Copyright Office and authorizes the Office to establish regulations in several cases, including the registration of claims of protection in mask works, the recordation in the Copyright Office of documents pertaining to mask works and the mask work notice. Part 211 of 37 CFR Chapter II sets forth specific requirements for filing applications for registration of mask work claims and for the recordation of documents. The regulations also provide examples of methods of affixation and placement of the mask work notice. Portions of interim rules published January 3, 1985 at 50 FR 283 are herein modified.

EFFECTIVE DATE: June 28, 1985.

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

SUPPLEMENTARY INFORMATION: On November 8, 1984, the President signed into law the Semiconductor Chip Protection Act of 1984, Pub. L. 98-620. The Act creates a new form of intellectual property law separate and apart from any earlier law. The legislation consists of an amalgam of patent and copyright principles, but also contains new features. The law is codified as chapter 9 of title 17 of the U.S. Code and is primarily administered by the Copyright Office. Noteworthy is the requirement in section 908(a) of the Act that registration in the Copyright Office of a claim of protection in a mask work must be made within two years of first commercial exploitation of the work anywhere in the world or protection under the Act terminates. The Act also provides for a notice of mask work protection; however, unlike the copyright notice, this notice is not a condition of protection.

On October 4, 1984, the Copyright Office issued a Notice of Inquiry and of Public Hearing in the Federal Register to advise the public that the Office would institute a rulemaking proceeding to implement certain provisions of the Semiconductor Chip Protection Act of 1984, and to invite public comment, views and information to assist it in the preparation of regulations (49 FR 39171). The Copyright Office was particularly interested in receiving public comment

on a registration form, filing fee for registration and fees for other services, application for registration, deposit of identifying material, mask work notice and publication of registrations made by the Copyright Office.

At the public hearing on implementation of the Semi-conductor Chip Protection Act of 1984, held at the Copyright Office on October 18, 1984, representatives of the Semiconductor Industry Association [hereinafter SIA] testified on the issues raised in the Notice of Inquiry and submitted a written statement for the record. During the course of the hearings, the Copyright Office circulated for information and comment a preliminary draft form, Form MW, to be used for registration of a claim of protection in a mask work. Following the hearing, supplemental comments were received from SIA and from other interested parties. The comment period was held open until October 31, 1984.

On January 3, 1985, the Copyright Office issued interim regulations implementing the Semiconductor Chip Protection Act of 1984. (50 FR 283). The regulations were made immediately effective since owners of mask works were entitled to file applications for registration on January 7, 1985. A lengthy comment period was provided in order to encourage public participation in the rulemaking process.

Approximately simultaneously with publication in the Federal Register of the interim regulations, the Copyright Office issued Form MW and an information circular. A mask work examining unit

¹Error; line should read:
"SUMMARY: The Copyright Office of the Library of Congress"

reasons for this addition have been discussed in the preceding section, no further elaboration on that provision will be made here.

Issues relating to deposit of identifying material include the following:

(a) *Trade Secret protection under § 211.5(c)*. Most of the comments about the deposit provision were concerned about accommodation for trade secret material. A number of proposals have been adopted. For example, the proposal of SIA for allowing two layers to be withheld for each five layers of commercially exploited mask works has been adopted. In addition, the opportunity to deposit visually perceptible representations with blocked out portions has been introduced.

One proposal which was not adopted is the suggestion of SIA to substitute the phrase "made available to the public" in place of "commercially exploited," throughout § 211.5. SIA argues that the phrase "made available to the public" is more consistent with trade secret principles. This consideration, however, is not a sufficient reason to depart from statutory language. The concept of "commercially exploited" is firmly grounded in the Act itself. Applicants can refer to a statutory definition and legislative history to ascertain its meaning. Adoption of the SIA proposal would inject into federal law a concept which is not grounded in the statute. Presumably the meaning of "made available to the public" could only be derived by referring to an amorphous body of trade secret law. In addition, since trade secret law is based upon state law, what is "made available to the public" in one state may not be "made available to the public" in another state. For these reasons, the proposal of SIA was not adopted.

(b) *Permissive deposit of chips for mask works not commercially exploited*. The Copyright Office believes that chips deposited with the Copyright Office may become significant evidentiary material in litigation concerning mask works. For this reason the Copyright Office has added an express provision which allows owners of mask works not commercially exploited to deposit chips in addition to visually perceptible representations. We had allowed such deposit by practice even under the interim regulations.

(c) *Defective chips*. The Copyright Office has added a provision clarifying that "defective" chips are acceptable if the mask work contribution would be revealed in a reverse dissection process. Chips which do not reveal the mask work contribution are not acceptable

since they would have little or no evidentiary value should litigation concerning the chips arise.

(d) *Deposit of chips containing classified material*. One comment expressed concerns about depositing mask works which are classified for national security reasons.

The Copyright Office believes that the principle of 17 U.S.C. 705(b) must be applied to mask work deposits; consequently, the Office will make available for public inspection the visually perceptible representations of registered mask works. In addition, the Copyright Office is not equipped to provide the kind of security necessary for classified mask works. For these reasons, owners of classified mask works should not deposit any material which might jeopardize national security. Should an owner wish to register a classified mask work, he or she should first write a letter of inquiry under the special relief provision of § 211.5(d).

3. *Eligibility under a transfer of all rights under the Act*. Section 902(a)(1) of the Act establishes as one of the tests of eligibility that "the owner of the mask work is a national or domiciliary of the United States * * *." Section 901(a)(6) of the Act defines owner as the person to whom "all the rights under this chapter" are transferred.

Copyright Office interim regulation § 211.4(b)(2)(ii) implements these provisions by basing eligibility on a transfer of the totality of rights. Therefore, a U.S. subsidiary of a foreign corporation receiving a transfer limited to U.S. rights was prohibited from registering on the basis of ownership.

The commentary accompanying the interim regulation noted that:

If the ownership criterion of section 902(a)(1)(A) includes licensees of United States rights, it would be fairly simple for a foreign owner to retain all rights outside the United States, and license a subsidiary, parent, or third party to claim rights in the United States before first commercial exploitation. In some cases, the conveyance might constitute a license of United States rights without further qualifications; in other cases, the conveyance might purport to require a license-back to the original foreign owner.

Congress established a unique transitional procedure in section 914 apparently because it believed the general eligibility criteria would foreclose registration of most foreign-owned chips. An overbroad interpretation of the general eligibility criteria will largely, if not completely, eliminate the incentive to seek section 914 Orders or bilateral agreements. The United States would in effect offer unilateral protection for mask works with no assurance of protection for United States mask works in foreign countries. (50 FR 268).

The interpretation of the Copyright Office was criticized in three comment letters. The major thrust of the comments was that the term "all rights under this chapter" plainly meant U.S. rights. It was further argued that the interpretation did not follow traditional intellectual property practices.

The Copyright Office has concluded that there is doubt about the correct interpretation of the Act on this point, and we should therefore not refuse registration. The concerns of the Copyright Office regarding the disincentive such a construction may have on the advancement of mask work protection for U.S. nationals abroad remain. The Copyright Office has decided, however, to change § 211.4(b)(2) to reflect the statutory language under the Act. If the United States public becomes dissatisfied with the protection afforded U.S. works abroad, the Congress may wish to narrow the eligibility criteria of this law.

4. *Registration under a section 914 Order*. Certain issues concerning registration under a section 914 Order involve a classic case of conflicting statutory policies. Sections 906 and 913(d)(1) apply clear statutory deadlines for the securing of protection under the Act. Under section 906(a) registration must be sought within two years of first commercial exploitation. Under section 913(d)(1) mask works first commercially exploited between July 1, 1983 and November 8, 1984, must be registered before July 1, 1985. How these deadlines apply to section 914 Orders which are backdated in accordance with Section 914(c) is not specified under the Act.

Under interim regulation § 211.4(f)(4) it was required that an Order be issued before the statutory deadline in order for a mask work to be eligible for protection. Under this interpretation, claims from foreign owners received in the Office before the statutory deadline which were waiting for a 914 Order could not be registered after expiration of the statutory deadline on the basis of an Order issued after the expiration of the statutory deadline. Backdating was to be permitted if the Order was timely. The reason for this policy was the belief that Congress did not intend the discretion under section 914 to be applied in a way which would waive the explicit statutory deadlines.

The Copyright Office received two comments on this issue criticizing this position. It was argued that the time constraints placed on foreign governments to secure issuance of a 914 Order posed a hardship in light of the complexities of the issue. In addition, it was argued the authorization to issue

backdated Orders under section 914 was the most pertinent indication of Congressional intent.

Under a proposal of the Electronic Industries Association of Japan (hereafter EIAJ) foreign applications made during the pendency of a possible section 914 Order would not be permanently denied registration upon expiration of the statutory deadlines. Instead, they would be held in abeyance. If the pending Order were later issued and backdated to before the expiration date, the registration would be made. Applications received in the Copyright Office after the expiration date, however, would be denied registration.

This issue presents a dilemma for the Copyright Office. Under the interim regulation, some claims in chips associated with a foreign country whose mask works the Secretary of Commerce arguably deems worthy of protection may be denied registration. Such a policy might generate ill will in the foreign country to which the provision was applied because issuance of the Order would presumably be based on the availability of protection for U.S. works in that country.

The policy of holding in abeyance foreign claims awaiting a section 914 Order even after expiration of the statutory deadlines has serious drawbacks, however. Under such a policy, the certainty stemming from registration within the statutory deadlines is eliminated. In addition, a de facto form of protection would probably be extended for chips held in abeyance since there would exist a *possibility* of protection under the Act. In circumstances where an Order is never issued this de facto protection will be achieved without securing eligibility under the Act. As a result, foreign claims which are found underserving of a section 914 Order by the Secretary of Commerce may be given a de facto form of protection for a period of the authority of the Secretary.

Ultimately, only a court can resolve this statutory conflict. The Copyright Office is inclined to believe that the better interpretation of the Act is one which applies the statutory deadlines, while recognizing discretion to backdate Orders, as long as the statutory deadlines are observed. This was the interpretation adopted in the interim regulations. The Copyright Office continues to hope that it will be possible for the Secretary of Commerce to act upon section 914 petitions within the statutory deadlines. Nevertheless, in light of the Act's favorable stance towards establishment of international mask work protection, the Copyright

Office has decided to allow registration for whatever it may be worth, should the Secretary of Commerce backdate an Order issued after a statutory deadline expires, pending court guidance. The Copyright Office notes that the authority of the Secretary of Commerce to issue section 914 Orders will expire on November 8, 1987. If Congress considers extending this authority, it is hoped the policy regarding the statutory deadlines will be clarified.

5. *Comments on Space 8 of Form MW.* Two comments were received criticizing the descriptive language contained at Space 8 of Form MW regarding Nature of Contribution.

The statement at Space 8 is intended to secure information about the original material on which the owner bases its claim. The statement should exclude significant preexisting material and mask work contributions owned by others.

The Copyright Office is open to suggestions as to how the descriptive language at Space 8 can be improved. When revision of Form MW is undertaken, these suggestions will be taken into account.

6. *The mask work notice.* The Boston Patent Law Association (hereafter BPLA) advanced two suggestions on the mask work notice. One suggestion was that the Copyright Office establish a registry for abbreviations of names of mask work owners. Another suggestion concerned expanding the methods of affixation to include placement within the semiconductor chip product.

The Copyright Office has decided not to adopt these proposals. The test for validity of an abbreviation under the statute is whether the abbreviation is generally recognizable. The proposed registry in the Copyright Office could not make an unknown abbreviation "generally recognizable." For this reason it could have little legal effect, and would likely prove misleading because owners would rely on it to validate their choice of an abbreviation.

Under section 909, the validity of the notice is determined by whether it gives "reasonable notice" of protection. The examples in the regulation are only illustrative and not exhaustive. Under the proposal of BPLA, only engineers conducting a reverse engineering of the chips would be aware of the notice. It may be that a court will find a notice contained in the semiconductor chip product meets the statutory test under section 909. The Copyright Office, however, has not adopted the proposal because it feels members of the general public may have an interest in knowing that a chip is protected under the Act.

7. *The effect of the deadline date of July 1, 1985 on claims requiring correspondence.* The law firm of Skjerven, Morrill, MacPherson, Franklin & Friel urged that mask works commercially exploited between July 1, 1983 and November 8, 1984 which are in correspondence on July 1, 1985, be considered for an effective date as of the original date of receipt under certain conditions. These conditions included a certification from the applicant's attorney that the applicant believed in good faith that the application and deposit was complete.

Ultimately, it is the responsibility of the applicant to deliver the materials necessary for registration to the Copyright Office before expiration of the statutory deadlines. The effective date of registration is established by the receipt of an acceptable deposit, application and fee. Where a valid claim is established by the original filing, correspondence relating to errors or inconsistencies in the application or minor problems with the deposit material will not normally affect the effective date of registration. In cases where the original submission does not establish that a valid claim exists, the effective date of registration will be the date on which corrective material is received.

8. *Special handling.* Under a policy statement published in the *Federal Register* special handling may be requested "in cases involving pending or prospective litigation, customs matters, or contract or publishing deadlines that necessitate the expedited issuance of a certificate." (49 FR 39742). The Electronic Industries Association of Japan urged these criteria be enlarged to include cases involving section 914 Orders. Under regulation § 211.4(f)(2) foreign claims waiting for a section 914 Order are processed by the Copyright Office. As a result, there should normally not be a significant delay in the issuance of a certificate once the Order has been issued. For this reason, the Copyright Office has decided not to enlarge the present criteria for special handling.

9. *Regulatory Flexibility Act Statement.* With respect to the Regulatory Flexibility Act, the Copyright Office takes the position this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, Chapter 5 of the U.S.

Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.³

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyright has determined that this final regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 211

Mask works, Semiconductor chip products.

Final Regulations

In consideration of the foregoing, Chapter II of 37 CFR is amended in the manner set forth below.

PARTS 205-210—(RESERVED)

1. Parts 205-210 are added and reserved.

2. A new Part 211 is revised to 37 CFR Ch. II as follows:

PART 211—MASK WORK PROTECTION

Sec.

211.1 General provisions.

211.2 Recordation of documents pertaining to mask works.

211.3 Mask work fees.

211.4 Registration of claims of protection in mask works.

211.5 Deposit of identifying material.

211.6 Methods of affixation and placement of mask work notice.

Authority: 17 U.S.C.—701; 908.

§ 211.1 General provisions.

(a) Mail and other communications with the Copyright Office concerning the Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, chapter 9 of Title 17 U.S.C., shall be addressed to: Library of Congress, Department MW, Washington, D.C. 20540.

(b) Section 201.2 of this chapter relating to the information given by the Copyright Office, and Parts 203 and 204 of this chapter pertaining to the Freedom of Information Act and Privacy Act, shall apply, where appropriate, to the

³ The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d), of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17]," except with respect to the making of copies of copyright deposits). [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

administration by the Copyright Office of the Semiconductor Chip Protection Act of 1984, Pub. L. 98-620.

(c) For purposes of this part, the terms "semiconductor chip product," "mask work," "fixed," "commercially exploited," and "owner," shall have the meanings set forth in section 901 of Title 17 U.S.C.

§ 211.2 Recordation of documents pertaining to mask works.

The conditions prescribed in section 201.4 of this chapter for recordation of transfers of copyright ownership and other documents pertaining to copyright are applicable to the recordation of documents pertaining to mask works under section 903 of Title 17 U.S.C.

§ 211.3 Mask work fees.

(a) The following fees or charges are established by the Register of Copyrights for services relating to mask works:

- (1) For filing an application for registration of a mask work claim....\$20.00
- (2) For recordation of a document consisting of six pages or less covering no more than one title.....\$10.00
- (3) For recordation of each page over six and each title over one.....\$5.00
- (4) For a certified copy of a certificate of registration.....\$4.00
- (5) For certifications of photocopies of other Copyright Office records.....\$4.00
- (6) For the issuance of a receipt of a deposit.....\$2.00
- (7) For each hour or fraction of an hour consumed in the making and reporting of a routine search, and for any related services.....\$10.00
- (8) For special handling of an application for registration of a claim.....\$200.00
- (9) For any special services not listed above requiring a substantial amount of time or expense, the fees will be fixed on the basis of the cost of providing the service.....

(b) Section 201.6 of this chapter on the payment and refund of Copyright Office fees shall apply to mask work fees.

§ 211.4 Registration of claims of protection in mask works.

(a) *General.* This section prescribes conditions for the registration of claims of protection in mask works pursuant to section 908 of Title 17 U.S.C.

(b) *Application for registration.* (1) For purposes of registration of mask work claims, the Register of Copyrights has designated "Form MW" to be used for all applications submitted on and after January 7, 1985. Copies of the form are available free upon request to the Public Information Office, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559. Applications submitted

before January 7, 1985 will be dated January 7, 1985.

(2) An application for registration of a mask work claim may be submitted by the owner of the mask work, or the duly authorized agent of any such owner.

(i) The owner of a mask work includes a party that has obtained the transfer of all of the exclusive rights in the work, but does not include the transferee of less than all of the exclusive rights, or the licensee of all or less than all of these rights.

(ii) For purposes of eligibility to claim mask work protection pursuant to section 902(a)(1)(A) of 17 U.S.C., the owner of the mask work must be either the initial owner or a person who has obtained by transfer the totality of rights in the mask work under the Act.

(3) An application for registration shall be submitted on Form MW prescribed by the Register under paragraph (b)(1) of this section, and shall be accompanied by the registration fee and deposit required under 17 U.S.C. 908 and §§ 211.3 and 211.5 of these regulations. The application shall contain the information required by the form and its accompanying instructions, and shall include a certification. The certification shall consist of: (i) A declaration that the applicant is authorized to submit the application and that the statements made are correct to the best of that person's knowledge; and (ii) the handwritten signature of the applicant, accompanied by the typed or printed name of that person.

(c) *One registration per mask work.* As a general rule only one registration can be made for the same version of a mask work fixed in an intermediate or final form of any semiconductor chip product. However, where an applicant for registration alleges that an earlier registration for the same version of the work is unauthorized and legally invalid and submits for recordation a signed affidavit, a registration may be made in the applicant's name.

(d) *Registration as a single work.* For purposes of registration: on a single application and upon payment of a single fee, the following shall be considered a single mask work:

(1) In the case of a mask work that has not been commercially exploited: All original mask work elements fixed in a particular form of a semiconductor chip product at the time an application for registration is filed and in which the owner or owners of the mask work is or are the same; and

(2) In the case of a mask work that has been commercially exploited: All original mask work elements fixed in a semiconductor chip product at the time

that product was first commercially exploited and in which the owner or owners of the mask work is or are the same.

(e) *Registration in most complete form.* Owners seeking registration of a mask work contribution must submit the entire original mask work contribution in its most complete form as fixed in a semiconductor chip product. The most complete form means the stage of the manufacturing process which is closest to completion. In cases where the owner is unable to register on the basis of the most complete form because he or she lacks control over the most complete form, an averment of this fact must be made at Space 2 of Form MW. Where such an averment is made, the owner may register on the basis of the most complete form in his or her possession.

(f) *Section 914 Orders.* (1) For purposes of this section, the terms "Commissioner" and "Order" shall have the meaning given them in the *Guidelines for the Submission of Applications for Interim Protection of Mask Works Under 17 U.S.C. 914* (49 FR 44517; Nov. 7, 1984) as follows:

(i) "Commissioner" means the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

(ii) "Order" means an action by the Commissioner issuing or terminating an Order extending to foreign nationals, domiciliaries and sovereign authorities the privilege of making interim registrations for mask works pursuant to Chapter 9 of title 17, U.S.C.

(2) In the case of a mask work which is eligible for registration only after issuance of an Order of the Commissioner pursuant to section 914, 17 U.S.C., applications for registration under section 908 may be submitted, along with the proper identifying material and fee, if a request for issuance of an Order has been made in accordance with the *Guidelines*. The Copyright Office will process and examine the claims, but will not issue a certificate of registration unless and until an Order is issued pursuant to 17 U.S.C. 914.

(3) The effective date of any registration premised on a section 914, 17 U.S.C. Order shall not be earlier than the effective date of the Order.

(4) Registration premised on a section 914, 17 U.S.C. Order will be refused unless the Order is given an effective date before, and the proper application, deposit of identifying material, and fee are received in the Copyright Office before:

(i) July 1, 1985, in the case of mask works first commercially exploited

between July 1, 1983, and November 8, 1984; or

(ii) the expiration of two years following first commercial exploitation, in the case of a mask work commercially exploited on or after November 8, 1984.

(5) Subject to paragraph (e)(4) of this section, registration of a claim premised on a section 914, 17 U.S.C. Order will be made even after the termination or expiration of an Order, provided that a proper application, deposit of identifying material, and fee are received in the Copyright Office while the Order is in effect, and the claim is otherwise entitled to registration under chapter 9 of Title 17 U.S.C.

(g) *Corrections and amplifications of prior registration.* Except for errors or omissions made by the Copyright Office, no corrections or amplifications can be made to the information contained in the record of a completed registration after the effective date of the registration. A document purporting to correct or amplify the information in a completed registration may be recorded in the Copyright Office for whatever effect a court of competent jurisdiction may later give to it, if the document is signed by the owner of the mask work, as identified in the registration record, or by a duly authorized agent of the owner.

§ 211.5 Deposit of identifying material.

(a) *General.* This section prescribes rules pertaining to the deposit of identifying material for registration of a claim of protection in a mask work under section 908 of Title 17 U.S.C.

(b) *Nature of required deposit.* Subject to the provisions of paragraph (c) of this section, the deposit of identifying material to accompany an application for registration of a mask work claim under § 211.4 of these regulations shall consist of:

(1) In the case of a commercially exploited mask work, four reproductions of the mask work fixed in the form of the semiconductor chip product in which it was first commercially exploited. Defective chips may be deposited under this section provided that the mask work contribution would be revealed in reverse dissection of the chips. The four reproductions shall be accompanied by a visually perceptible representation of each layer of the mask work consisting of:

(i) Sets of plastic color overlay sheets;

(ii) drawings or plots in composite form on a single sheet or on separate sheets; or

(iii) a photograph of each layer of the work fixed in a semiconductor chip product.

The visually perceptible representation of a mask work deposited under this section shall be reproduced on material which can be readily stored in an 8½ x 11 inch format, and shall be reproduced at a magnification sufficient to reveal the basic circuitry design of the mask work and which shall in all cases be at least 20 times magnification.

(2) In the case of a mask work that has not been commercially exploited, one of the following:

(i) Where the mask work contribution in which registration is sought represents twenty percent or more of the area of the intended final form, a visually perceptible representation of the work in accordance with paragraph (b)(1)(i) or (ii) of this section. In addition to the deposit of visually perceptible representations of the work, an applicant may, at his or her option, deposit four reproductions in the most complete form of the mask work as fixed in a semiconductor product.

(ii) Where the mask work contribution in which registration is sought represents less than twenty percent of the area of the intended final form, a visually perceptible representation of the work which reveals the totality of the mask work contribution to a person trained in the state of the art. The visually perceptible representations may consist of any combination of plastic color overlay sheets, drawing or plots in composite form, or a photograph or photographs of the entire mask set. If the visually perceptible representation fails to identify all of the elements of the mask work contribution, they may be accompanied by additional explanatory material. The visually perceptible representation of a mask work deposited under this section shall be reproduced on material which can be readily stored in an 8½ x 11 inch format and shall be of sufficient magnification and completeness to reveal all elements of the mask work contribution. In addition to the deposit of visually perceptible representations of the work, an applicant may, at his or her option, deposit four reproductions in the most complete form of the mask work as fixed in a semiconductor chip product.

(c) *Trade secret protection.* Where specific layers of a mask work fixed in a semiconductor chip product contain information in which trade secret protection is asserted, certain material may be withheld as follows:

(1) *Mask works commercially exploited.* For commercially exploited mask works no more than two layers of each five or more layers in the work. In lieu of the visually perceptible representations required under

paragraph (b)(1) of this section, identifying portions of the withheld material must be submitted. For these purposes, "identifying portions" shall mean (i) a printout of the mask work design data pertaining to each withheld layer, reproduced in microform, or (ii) visually perceptible representations in accordance with paragraph (b)(1) (i), (ii), or (iii) of this section with those portions containing sensitive information maintained under a claim of trade secrecy blocked out, provided that the portions remaining are greater than those which are blocked out.

(2) *Mask work not commercially exploited.* For mask works not commercially exploited falling under paragraph (b)(2)(i) of this section, any layer may be withheld. In lieu of the visually perceptible representations required under paragraph (b)(2) of this section, "identifying portions" shall mean (i) a printout of the mask work design data pertaining to each withheld layer, reproduced in microform, in which sensitive information maintained under a claim of trade secrecy has been blocked out or stripped, or (ii) visually perceptible representations in accordance with paragraph (b)(2)(i) with those portions containing sensitive information maintained under a claim of trade secrecy blocked out, provided that the portions remaining are greater than those which are blocked out. The identifying portions shall be accompanied by a single photograph of the top or other visible layers of the mask work fixed in a semiconductor chip product in which the sensitive information maintained under a claim of trade secrecy has been blocked out, provided that the blocked out portions do not exceed the remaining portions.

(d) *Special relief.* The Register of

Copyrights may decide to grant special relief from the deposit requirements of this section, and shall determine the conditions under which special relief is to be granted. Requests for special relief under this paragraph shall be made in writing to the Chief, Examining Division of the Copyright Office, Washington, D.C. 20559, shall be signed by the person signing the application for registration, shall set forth specific reasons why the request should be granted and shall propose an alternative form of deposit.

(e) *Retention and disposition of deposits.* (1) Any identifying material deposited under this section, including material deposited in connection with claims that have been refused registration, are the property of the United States Government.

(2) Where a claim of protection in a mask work is registered in the Copyright Office, the identifying material deposited in connection with the claim shall be retained under the control of the Copyright Office, including retention in Government storage facilities, during the period of protection. After that period, it is within the joint discretion of the Register of Copyrights and the Librarian of Congress to order its destruction or other disposition.

§211.6 Methods of affixation and placement of mask work notice

(a) *General.* (1) This section specifies methods of affixation and placement of the mask work notice that will satisfy the notice requirement in section 909 of title 17 U.S.C. A notice deemed "acceptable" under this regulation shall be considered to satisfy the requirement of that section that it be affixed "in such manner and location as to give reasonable notice" of protection. As provided in that section, the examples

specified in this regulation shall not be considered exhaustive of the methods of affixation and positions giving reasonable notice of the claim of protection in a mask work.

(2) The acceptability of a mask work notice under these regulations shall depend upon its being legible under normal conditions of use, and affixed in such manner and position that, when affixed, it may be viewed upon reasonable examination.

(b) *Elements of mask work notice.* The elements of a mask work notice shall consist of:

(1) the words "mask work", the symbol "M", or the symbol "M" (the letter M in a circle); and

(2) the name of the owner or owners of the mask work or an abbreviation by which the name is recognized or is generally known.

(c) *Methods of affixation and placement of the notice.* In the case of a mask work fixed in a semiconductor chip product, the following locations are acceptable:

(1) A gummed or other label securely affixed or imprinted upon the package or other container used as a permanent receptacle for the product; or

(2) A notice imprinted or otherwise affixed in or on the top or other visible layer of the product.

Dated: June 21, 1985.

Donald C. Curran,
Acting Register of Copyrights.

Approved by:
Daniel J. Boorstin,
The Librarian of Congress.
[FR Doc. 85-15514 Filed 6-27-85; 8:45 am]
BILLING CODE 1410-03-M

ANNOUNCEMENT

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

INTERIM REGULATION

37 CFR Part 202

REGISTRATION OF CLAIMS TO COPYRIGHT; FULL TERM RETENTION OF COPYRIGHT DEPOSITS

The following excerpt is taken from Volume 48, Number 139 of the Federal Register for Tuesday, July 19, 1983 (pp. 32775-32778).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket RM 83-5]

Registration of Claims to Copyright;
Full Term Retention of Copyright
Deposits

AGENCY: Copyright Office, Library of
Congress.

ACTION: Interim regulation.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting a new regulation on an interim basis to implement section 704(e) of the Copyright Act. Section 704(e) directs the Register of Copyrights to issue regulations prescribing the conditions under which requests for full term retention of copyright deposits are to be made and granted, including the fees for this service.

The effect of the interim regulation is to provide a mechanism for requesting retention of copyright deposits, to establish the conditions under which such requests are granted or denied, and to fix the fee to be charged pursuant to section 708(a)(11), if the request is granted.

DATES: Effective July 19, 1983. Written comments should be received before

August 30, 1983.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Dorothy Schrader, Library of Congress, Department D.S., Washington, D.C. 20540.

If delivered by hand, copies should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room 407, First and Independence Avenue, S.E., Washington, D.C.

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

SUPPLEMENTARY INFORMATION: Copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. In order to register a work, an appropriate application, fee, and copyright deposit must be submitted to the Copyright Office. The Copyright Act [title 17 of the United States Code] gives the Register of Copyrights the authority to issue regulations concerning the required copyright deposit. Existing regulations require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, and in some cases material other than complete copies of the best edition. See the deposit regulations, 37 CFR 202.20 and 202.21. The copies, phonorecords, or identifying

material deposited under these deposit regulations and retained by the Copyright Office upon completion of registration of the copyright claim are hereafter referred to as "copyright deposits."

Under subsection (a) of section 704 of the Copyright Act, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States Government."

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchange or transfer to any other library." Where the work is unpublished, the Library is authorized to select any deposit for its own collections or for transfer to the National Archives of the United States or to a Federal records center, but the Copyright Office will first make a facsimile reproduction of the unpublished deposit. See 37 CFR 201.23.

For deposits not selected by the Library, subsection (d) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register of Copyrights and the Librarian of Congress. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and the Librarian have joint discretion to order their "destruction or other

disposition." Because of the unique value and irreplaceable nature of unpublished deposits, the Copyright Act prohibits their intentional destruction or disposition during their copyright term, unless a facsimile reproduction has been made a part of the records of the Copyright Office.

As stated in House Report 94-1476:

A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704 is that copyright deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so. [H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 171 (1976).]

In 48 FR 12862 the Copyright Office announced that the Register of Copyrights and the Librarian of Congress have made a determination pursuant to section 704(d) regarding retention of copyright deposits at government expense. They have determined that it is no longer practicable to retain published copyright deposits for more than five years from the date of deposit, except for works of the visual arts [Class VA], which will be retained for ten or more years, if possible.

Section 704 also recognizes that some copyright owners wish to assure that¹ the deposit for a registered work will be stored for the full term of the copyright, and they are willing to assume the cost of storage. Thus, subsection (e) of section 704 authorizes the Register to issue a regulation under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to prescribe the fees for this service and the "conditions under which such requests are to be made and granted."

Section 708 contains a schedule of fees for specific services performed by the Copyright Office, and in subsection (a)(11) authorizes the Register to fix additional fees "for any other special services requiring a substantial amount of time or expense . . . on the basis of the cost of providing the service."

This interim regulation is generally self-explanatory but a few provisions deserve special comment:

1. *Copyright Office Storage Limitations and Costs.* This regulation attempts to balance the interest of copyright owners and the public in full term storage of copyright deposits against the limitations on storage space and the handling costs faced by the Copyright Office. Copies retained under the control of the Copyright Office serve to identify the work, and in many cases, establish prima facie the scope of the copyright, both in connection with litigation and commercial transactions. For many years the Copyright Office has recognized this need and supported it by retaining copyright deposits for as long as possible at public expense.

The Copyright Office currently faces a storage crisis. The storage space allotted by the Library of Congress to the Copyright Office is virtually filled, and growth projections estimate that receipts within the next ten years may double the deposit material now being held. There is no possibility of acquiring additional storage space in the foreseeable future. Within the next twelve months, the Copyright Office must eliminate a substantial amount of stored material merely to accommodate deposits now being processed.

Full term retention of deposit material upon request, and at the expense of the requestor, was authorized by Congress as one way of resolving, at least in part, the tension between the recognized need for full term retention on the one hand, and rising storage costs and limited storage space, on the other.

The fee for full term retention was calculated to take account both of inflationary increases in storage costs over a 75 year period and the reduced need of the Government to borrow funds because the fee for future storage has been paid in advance. Thus, the cost of storing an average deposit copy under Copyright Office control is currently \$1.80 per year. In establishing a fee of \$135.00 for full term retention, the Office has assumed an average interest rate of 6% and an average inflation rate between 5% and 7% for storage costs, both calculated over a 75 year period.

The Office expects that it may be necessary to revise the fee for full term retention from time to time. The public will be notified of any change by publication of a revised regulation, and the revised fee will of course apply only to requests for full term retention granted after the effective date of any revised regulation.

2. *Circumstances under which a request for a long-term storage can be denied.*

A request for full term retention will be denied if the unusual size, weight, or fragility of the deposit would place unreasonable costs or administrative

burdens on the Copyright Office, or if the nature of the deposit could cause health or safety problems. However, we have also provided an option in the interim regulation for preparation of identifying reproductions, at the expense of the requestor, and subsequent retention of the identifying reproductions in lieu of oversize or otherwise unacceptable copies.

One of the general purposes of the deposit system is to enrich the collections of the Library of Congress. Therefore the deposit needs of the Library will prevail should they conflict with a request for full term retention under this regulation, unless the requestor deposits an extra copy, as provided in § 202.23(c)(2). If a published work has been exempted from deposit under section 407 or if the Library wants only one of two deposit copies or phonorecords, no conflict exists.

3. *Definition of "full term."*

The copyright term for works by² individual authors created on or after January 1, 1978 is usually life of the author plus 50 years. However, under section 302(e) of the statute, after 75 years from the year of first publication of a work or one hundred years from the year of its creation, whichever expires first, if the Copyright Office records do not show that the author of the work is living or died less than 50 years before, a presumption exists that the author has been dead for at least 50 years.

In the case of works made for hire and anonymous or pseudonymous works, section 302(c) establishes a copyright term of 75 years from publication, or 100 years from creation, whichever is shorter. Requests for full term retention of copyright deposits will be made exclusively with respect to published works, since the Copyright Act already mandates full term retention of unpublished works.

The 75 year period set by the Act was selected on the basis of statistical studies by the Copyright Office which suggested that 75 years was the average equivalent of a life-plus-50 term. [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 135 (1976).]

The legislative history behind section 704(e) shows the intent that the Copyright Office use some rational means by which it can measure the necessary term of storage for deposits. For purposes of section 704(e), the Copyright Office has determined that "full term retention" means a period of 75 years from publication, and that period has been used in calculating the deposit retention fee.

4. *Under the Control of the Copyright Office.*

Section 704(e) specifies that deposit

¹Error; line should read:
"copyright owners wish to assure that"

²Error; line should read:
"The copyright term for works by"

material retained for full term storage in response to a request will be kept "under the control of the Copyright Office."

Accordingly, deposit material retained under the interim regulation pursuant to section 704(e) will be kept within the confines of Copyright Office buildings or under the control of Copyright Office employees, and will not be transferred to the Library of Congress collections.

The Copyright Office will exercise normal due care in processing and maintaining copyright deposits in full term retention status, but the Office will not apply special preservation techniques. Moreover, full term deposits are open to public inspection pursuant to 17 U.S.C. 705(b).

5. Interim effect.

This regulation is being issued on an interim basis to allow eligible persons to request full term retention of copyright deposits immediately. The regulation extends a privilege to the public. The Office does invite public comment before the regulation is made final.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1948, as amended (title 5, Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.¹

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined that this interim regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 202

Claims to copyright, Copyright, Registration requirements.

¹ The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17]," except with respect to the making of copies of copyright deposits). [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOLA requirements.

Interim Regulation

PART 202—(AMENDED)

In consideration of the foregoing, Part 202 of 37 CFR Chapter II is amended on an interim basis by adding a new § 202.23 to read as follows:

§ 202.23 Full term retention of copyright deposits.

(a) *General.* (1) This section prescribes conditions under which a request for full term retention, under the control of the Copyright Office, of copyright deposits (copies, phonorecords, or identifying material) of published works may be made and granted or denied pursuant to section 704(e) of Title 17 of the United States Code. Only copies, phonorecords, or identifying material deposited in connection with registration of a claim to copyright under Title 17 of the United States Code are within the provisions of this section. Only the depositor or the copyright owner of record of the work identified by the copyright deposit, or a duly authorized agent of the depositor or copyright owner, may request full term retention. A fee for this service is fixed by this section pursuant to section 708(a)(11) of Title 17 of the United States Code.

(2) For purposes of this section, "under the control of the Copyright Office" shall mean within the confines of Copyright Office buildings and under the control of Copyright Office employees, including retention in a Federal records center, but does not include transfer to the Library of Congress collections.

(3) For purposes of this section, "full term retention" means retention for a period of 75 years from the date of publication of the work identified by the particular copyright deposit which is retained.

(4) For purposes of this section, "copyright deposit" or its plural means the copy, phonorecord, or identifying material submitted to the Copyright Office in connection with a published work that is subsequently registered and made part of the records of the Office.

(b) *Form and content of request for full term retention.*—(1) *Forms.* The Copyright Office does not provide printed forms for the use of persons requesting full term retention of copyright deposits.

(2) Requests for full term retention must be made in writing, addressed to the Chief, Records Management Division of the Copyright Office, and shall: (i) Be signed by or on behalf of the depositor or the copyright owner of record, and (ii) clearly indicate that full term retention is desired.

(3) The request for full term retention must adequately identify the particular copyright deposit to be retained, preferably by including the title used in the registration application, the name of the depositor or copyright owner of record, the publication date, and, if registration was completed earlier, the registration number.

(c) *Conditions under which requests will be granted or denied.*—(1) *General.* A request that meets the requirements of subsection (b) will generally be granted if the copyright deposit for which full term retention is requested has been continuously in the custody of the Copyright Office and the Library of Congress has not, by the date of the request, selected the copyright deposit for its collections.

(2) *Time of request.* The request for full term retention of a particular copyright deposit may be made at the time of deposit or at any time thereafter; however, the request will be granted only if at least one copy, phonorecord, or set of identifying material is in the custody of the Copyright Office at the time of the request. Where the request is made concurrent with the initial deposit of the work for registration, the requestor must submit one copy or phonorecord more than the number specified in § 202.20 of 37 CFR for the particular work.

(3) *One deposit retained.* The Copyright Office will retain no more than one copy, phonorecord, or set of identifying material for a given registered work.

(4) *Denial of request for full term retention.* The Copyright Office reserves the right to deny the request for full term retention where: (i) The excessive size, fragility, or weight of the deposit would, in the sole discretion of the Register of Copyrights, constitute an unreasonable storage burden. The request may nevertheless be granted if, within 60 calendar days of the original denial of the request, the requestor pays the reasonable administrative costs, as fixed in the particular case by the Register of Copyrights, of preparing acceptable identifying materials for retention in lieu of the actual copyright deposit;

(ii) The Library of Congress has selected for its collections the single copyright deposit, or both, if two copies or phonorecords were deposited; or

(iii) Retention would result in a health or safety hazard, in the sole judgment of the Register of Copyrights. The request may nevertheless be granted if, within 60 calendar days of the original denial of the request, the requestor pays the reasonable administrative costs, as fixed in the particular case by the

Register of Copyrights, of preparing acceptable identifying materials for retention in lieu of the actual copyright deposit.

(d) *Form of copyright deposit.* If full term retention is granted, the Copyright Office will retain under its control the particular copyright deposit used to make registration for the work. Any deposit made on or after September 19, 1978 shall satisfy the requirements of 37 CFR 202.20 and 202.21.

(e) *Fee for full term retention.*—(1) Pursuant to section 708(a)(11) of title 17 of the United States Code, the Register of Copyrights has fixed the fee for full term retention at \$135.00 for each copyright deposit granted full term retention.

(2) A check or money order in the amount of \$135.00 payable to the Register of Copyrights, must be received in the Copyright Office within 60 calendar days from the date of mailing of the Copyright Office's notification to the requestor that full term retention has been granted for a particular copyright deposit.

(3) The Copyright Office will issue a receipt acknowledging payment of the fee and identifying the copyright deposit for which full term retention has been granted.

(f) *Selection by Library of Congress—*

((1) *General.* All published copyright deposits are available for selection by the Library of Congress until the Copyright Office has formally granted a request for full term retention. Unless the requestor has deposited the additional copy or phonorecord specified by paragraph (c)(2) of this section, the Copyright Office will not process a request for full term retention submitted concurrent with a copyright registration application and deposit, until the Library of Congress has had a reasonable amount of time to make its selection determination.

(2) A request for full term retention made at the time of deposit of a published work does not affect the right of the Library to select one or both of the copyright deposits.

(3) If one copyright deposit is selected,

the second deposit, if any, will be used for full term retention.

(4) If both copyright deposits are selected, or, in the case where the single deposit made is selected, full term retention will be granted only if the additional copy or phonorecord specified by paragraph (c)(2) of this section was deposited.³

(g) *Termination of full term storage.* Full term storage will cease 75 years after the date of publication of the work identified by the copyright deposit retained, and the copyright deposit will be disposed of in accordance with section 704, paragraphs (b) through (d), of title 17 of the United States Code.

(17 U.S.C. 408, 702, 704, and 708)

Dated: June 27, 1983.

David Ladd,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 83-19480 Filed 7-18-83; 8:45 am]

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³Error; lines should read:
"specified by subsection (c)(2)
was deposited."