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

PROPOSED RULEMAKING

REGISTRATION OF CLAIMS TO COPYRIGHT; DEPOSIT REQUIREMENTS FOR COMPUTER PROGRAMS CONTAINING TRADE SECRETS

The following excerpt is taken from Volume 51, Number 189 of the Federal Register for Tuesday, September 30, 1986 (pp. 34667-34669)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 83-4A]

Registration of Claims to Copyright; Deposit Requirements for Computer Programs Containing Trade Secrets

AGENCY: Library of Congress, Copyright Office.

ACTION: Proposed rulemaking.

SUMMARY: This notice of proposed rulemaking is issued to inform the public that the Copyright Office of the Library of Congress is considering adoption of new regulations amending the deposit requirements for Copyright registration of computer programs containing trade secrets. The amendments address concerns about the revelation of trade secrets through registration and public inspection of deposit copies of computer programs.

DATES: Comments should be received on or before December 1, 1986.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Library of Congress, Department D.S., Washington, DC 20540. If delivered by hand, copies should be brought to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559, (202) 287-8380.

SUPPLEMENTARY INFORMATION: Under section 408 of Title 17 of the United States Code, the Copyright Act, copyright registration of both published and unpublished works requires a deposit of a copy, phonorecord, or other material to identify the work for which registration is sought and to permit examination of the claim by the Copyright Office, in accordance with section 410 of the Act. Except as provided by subsection (c) of section 408, subsection (b) generally requires the deposit of one complete copy or phonorecord in the case of an unpublished work, or two complete copies or phonorecords of the best edition in the case of a published work. For works first published outside the United States, the Act requires deposit of one complete copy or phonorecord as so published. Subsection (c) of section 408 authorizes the Register to specify administrative classes of works for purposes of deposit and registration, to determine the nature of the copies to be deposited, and to permit or require the deposit of identifying materials in lieu of actual copies.

In reliance on this authorization, the Copyright Office established regulations governing deposit for registration of claims to copyright at 37 CFR Ch. II §§ 202.20 and 202.21. Section 202.20 provides a number of modifications to the deposit requirement in the case of certain works. Among the works having special provisions are machine-readable works (§ 202.20(c)(2)(vii)), and secure tests (§ 202.20(c)(2)(vi)). In addition, section 202.20(d) established a procedure for special relief in cases where the normally applicable deposit requirements pose an undue hardship.

Section 705(b) of the copyright law requires all deposits retained under the control of the Copyright Office to be available for public inspection. As a result of the public inspection requirement, some copyright claimants have asserted that the deposit of material containing trade secrets jeopardizes trade secret protection under state law. No court, however, has specifically ruled on this issue.

On May 23, 1983, the Copyright Office published a Notice of Inquiry in the **Federal Register** requesting public comments on the deposit of material containing trade secrets. (48 FR 22951) The notice summarized the statutory framework of the deposit requirement and discussed the special deposit provisions for secure tests and the nature of trade secret protection. The notice closed by posing twelve questions of particular interest to the Copyright Office.

The Copyright Office received a total of 41 responses from the notice of inquiry. The vast majority of the responses were from members of the computer industry and the overwhelming sentiment was in favor of establishing special deposit procedures to mitigate the alleged uncertainties associated with depositing in a public office, material containing trade secrets.

A number of the comments addressed public policy issues concerning the establishment of special deposit provisions. Several of the comments expressed the view that trade secret protection and copyright advance similar societal goals, and therefore it is completely consistent to modify the deposit requirement in a way that would preserve trade secret protection fully.

The Association of American Publishers argued that the deposit requirement was not intended to delineate the scope of a copyright claim through public disclosure, citing the Register's authority to determine the nature of deposited material under section 408(c)(1) and *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), concerning deposit of secure tests. Only two comments argued in favor of a deposit that fully discloses and copyrightable content of registered material. One asserted that public disclosure through deposit was intended as a trade-off for receiving copyright protection, and the other argued owners of intellectual property should elect either copyright protection or trade secret protection.

On the basis of the comments received, the Copyright Office has concluded that a case has not been made for establishment of a broad deposit exemption covering all material which could conceivably contain trade secrets. Of the submitted comments, only one came from outside of the computer industry. That comment came from a manufacturer of spare parts who argued that public inspection should be restricted on deposits of technical drawings and specifications.

On narrower grounds, however, the Copyright Office finds that particular problems of the computer industry do merit special attention. Many in the computer industry are concerned that the availability of registered computer programs for public inspection in the Copyright Office gravely jeopardizes trade secret protection. While no court has directly addressed the issue, it is clear that computer programs are valuable intellectual property whose owners are rightfully concerned about adequate protection for their works.

Another factor is the extensive use by the computer industry of the special relief provisions of the deposit regulations in order to avoid making a deposit that reveals trade secrets. The Examining Division of the Copyright Office has found the frequent requests for special relief administratively burdensome. In order to speed handling of such requests, the Examining Division often suggested depositing under special relief in accordance with one of three alternatives: (1) The first and last 25 pages of source code with some portions blocked out, provided that the blocked-out portions are proportionately less than the material still remaining; (2) At least the first and last ten pages of source code alone with no blocked-out portions; or (3) The first and last 25 pages of object code plus any ten or more consecutive pages of source code with no blocked-out portions. When Compendium II of Copyright Office Practices was published in 1985, these three alternatives were listed at § 324.05(a).

Frequently mentioned among the submitted comments was the proposal that the Copyright Office merely restrict public access to deposits of computer programs and other material containing trade secrets. The Copyright Office has concluded that such an approach would clearly violate section 705(b) mandating public inspection of deposits retained by the Copyright Office. As a result, this proposal has not been adopted.

Some comments contended that the deposit requirements inhibited the registration of computer programs. The authors of these comments, however, may have been unaware of the extensive use of special relief in the computer software area. Although registrations for computer programs are not separately tabulated, the Copyright Office estimates over 10,000 registrations are made for computer programs anually. The Copyright Office therefore concludes that the present deposit requirements, as set forth in the regulations and Compendium II, do not necessarily inhibit the registration of computer programs.

A controversial matter addressed by commentators was the subject of depositing object code. As explained in the Notice of Inquiry, the Copyright Office has taken the position that the source code format of a copyright program constitutes the best representation of the authorship in the program for examining purposes. Registration on the basis of an object code deposit is only considered under the "rule of doubt" because authorship can not ordinarily be determined. A number of commentators criticized this policy, arguing that computer programs are frequently exploited in object code format.

Despite the criticism of Copyright Office practice in this area, no clear consensus arose. Commentators generally agreed that object code could not be examined for copyrightable authorship. Some thought such a determination was not necessary under the copyright law, but could not adequately support that view in the face of the examination requirement of 17 U.S.C. 410. Opinions were mixed as to whether an object code deposit had any public record value in representing the authorship contained in the program.

Section 410(a) requires the Register to examine claims to copyright and ascertain that material deposited "constitutes copyrightable subject matter." In light of this clear statutory responsibility, and the lack of any consensus regarding alternative policies, the Copyright Office has decided to continue its present policy of requesting source code deposit as the best representation of the authorship in a computer program.

In its comment, a law firm suggested that the identifying material include an indication of the number of lines contained in the program. The Copyrigh Office believes it is useful to know the size of the program which is registered. In some cases the number of lines in the program will be apparent from the identifying portions which are deposited. In other cases the size of the program will be unclear. The Copyright Office wants to encourage applicants to provide information as to the size of the program being registered, and has proposed a modification in the regulation requiring this disclosure.

The Copyright Office also proposes modifying present regulation 202.20(c)(2)(vii) to include alternative deposits in the case of computer programs containing trade secrets. It is hoped that knowledge of these alternatives will lessen the demand for administratively burdensome special relief. The three alternatives suggested in Compendium II of the Copyright Office Practices have been tested by experience, and they adequately balance public record concerns with the desires of applicants to withhold certain information. The Copyright Office additionally proposes a fourth alternative specifically addressing small computer programs of 25 pages or less.

Finally, while the Copyright Office is not now proposing any amendment of the existing "secure test" regulation (37 CFR 202.20(c)(2)(vi)), the Office hereby gives notice that as part of the policy review of deposit requirements for computer programs containing trade secrets, it is considering changes in the procedures for processing secure tests and and in the nature of the "sufficient portions, description, or the like . . . to constitute a sufficient archival record of the deposit" which must be deposited for retention by the Office.

This document issued under 17 U.S.C. 407, 408, and 702.

List of Subjects in 37 CFR Part 202

Claims, Claims to Copyright, Copyright, Registration requirements.

Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend Part 202 of 37 CFR, Chapter II.

PART 202—[AMENDED]

1. The authority citation for Part 202 would continue to read as follows:

Authority: Copright Act, Pub. L. 94–553, 90 Stat. 2541 (17 U.S.C. 702).

§ 202.20 [Amended]

2. Section 202.20(c)(2)(vii) introductory text and (A) would be revised to read as follows:

* * * *

(vii) *Computer programs and databases embodied in machinereadable copies.* In cases where a computer program, database, compilation, statistical compendium or the like, if unpublished is fixed, or if published is published only in the form of machine-readable copies (such as magnetic tape or disks, punched cards, semiconductor chip products, or the like) from which the work cannot ordinarily be perceived except with the aid of a machine or device, the deposit shall consist of:

(A) for published or unpublished computer programs, one copy of identifying portions of the program, reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform. For these purposes, "identifying portions" shall mean one of the following:

(*1*) The first and last 25 pages or equivalent units of the program if reproduced on paper, or at least the first and last 25 pages or equivalent units of the program if reproduced in microform, together with the page or equivalent unit containing the copyright notice, if any, except that if the program is 50 pages or less, the required deposit will be the entire work. In addition, the deposit should include a special statement as to the total number of lines in the program unless the size of the program is apparent from the identifying portions. In the case of revised versions of computer programs, if the revisions occur throughout the entire program, the deposit of the first and last 25 pages will suffice; if the revisions are not contained in the first and last 25 pages, the deposit should consist of any 50 pages representative of the revised material; or

(*2*) Where the program contains trade secret material, the page or equivalent unit containing the copyright notice, if any, plus *one* of the following: the first and last 25 pages or equivalent units of source code with some portions blocked-out, provided that the blocked-out portions are proportionately less than the material remaining; or the first and last 10 pages or equivalent units of source code alone with no blocked-out portions; the first and last 25 pages of object code, together with any 10 or more consecutive pages of source code with no blood-out portions; or for programs consisting of or less than 25 pages or equivalent units, no more than 50% of the program is blocked-out or withheld, provided the remaining portion shows sufficient copyrightable authorship. In all cases, the deposit should include a special statement as to the total number of lines in the program if this information is not apparent from the submitted identifying portions.

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Dated: September 15, 1986.

Ralph Oman,

Register of Copyrights.

Approved by:

Donald C. Curran,

The Librarian of Congress (Acting).

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