



ANNOUNCEMENT

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

NOTICE OF PROPOSED RULEMAKING

REGISTRATION OF CLAIMS TO COPYRIGHT MANDATORY DEPOSIT OF MACHINE-READABLE COPIES; PROPOSED RULEMAKING

The following excerpt is taken from Volume 53, Number 153 of the Federal Register for Tuesday, August 9, 1988 (pp. 29923 - 29925)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 88-6]

Registration of Claims to Copyright Mandatory Deposit of Machine-Readable Copies; Proposed Rulemaking

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of 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 for deposit of certain machine-readable copies. The amendments would revoke the exemption from mandatory deposit, pursuant to section 407 of the Copyright Act of 1976, of machine-readable copies and require deposit of works published in IBM or Macintosh formats for use in the collections of the Library.

DATES: Comments should be received on or before October 11, 1988.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Library of Congress, Department 100, 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. Telephone: (202) 287-8380.

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, the owner of copyright, or of the exclusive right of publication, in a work published with notice of copyright in the United States is required to deposit two copies (or, in the case of sound recordings, two phonorecords) of the work in the Copyright Office for the use or disposition of the Library of Congress. The deposit is to be made within three months after such publication. Failure to make the required deposit does not affect copyright in the work, but may subject the copyright owner to fines and other monetary liability if the failure is continued after a demand for deposit is made by the Register of Copyrights. As a qualification of these general provisions, section 407 also provides that the Register of Copyrights "may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories."

In reliance on this authorization, the Copyright Office, with the approval of the Librarian of Congress, established regulations governing deposit at 37 CFR Chap. II § 202.19, § 202.20, and § 202.21. Section 202.19 establishes the standards governing mandatory deposit of published copies and phonorecords for the Library of Congress. Section 202.20 concerns the required deposit when application is made for registration of a

copyright claim with the Copyright Office under section 408 of title 17, U.S.C. Section 202.21 allows deposit of identifying material in lieu of copies or phonorecords in certain cases. In addition, the Library of Congress published its Best Edition Statement specifying the required deposit in instances where two or more different editions were published with notice of copyright.

At the time these policies were first implemented in 1978, machine-readable copies were not widely marketed to the public at large. For this reason, the Library of Congress decided to exempt all works published solely in machine-readable formats from mandatory deposit. The deposit of machine-readable works for purposes of copyright registration was generally established as identifying material comprising the equivalent of the first and last 25 pages of the work.

Since the time these policies were announced, great changes have occurred. As a result of the great popularity of the personal computer, computer software and data bases are in wide public demand. In response to these public needs, the Library has established a Machine-Readable Collections Reading Room. The Reading Room will provide access to two categories of important machine-readable copies.

The first category is standard data that traditionally has only been available in print form (encyclopedias, census figures, standard reference publications, etc.). With the development of computer technology, many standard reference materials have become available in whole or in part in

machine-readable form. The Library desires to provide patrons access to these machine-readable reference sources.

Second, the Library desires to provide patrons access to computer software in IBM or Macintosh formats for the purposes of study and evaluation and to obtain information. One of the primary purposes of this software collection is to allow scholars in the future to study the computer revolution going on today.

The Library is well aware of the significant value of the machine-readable copies that will be available in the reading room. For this reason, use of the terminals will be monitored in order to prevent copying. Library staff rather than library patrons will maintain physical control of the disks and other machine-readable copies. No lending of copies to patrons or other institutions is contemplated.

2. Proposed Regulation

In order to build the collections of the Machine-Readable Collections Reading Room, the Library proposes to eliminate the existing broad exemption with respect to machine-readable copies. In order to avoid imposing hardship on software publishers, however, the Library proposes generally to limit the required deposit to one copy of the best edition, rather than the traditional two copies. Additionally, the Library will not demand published data bases that are available *only online*.

Section 202.19 governing mandatory deposit would be changed in two places. Section 202.19(c)(5) would limit the exemption for machine-readable copies to automated databases available only online. Section 202.19(d) would be modified by adding a new subparagraph (vii) allowing for deposit of only one machine-readable copy, except where a copy-guard system is used. In the latter case, two copies are required.

In implementing mandatory deposit for machine-readable copies, the Library intends to demand only copies of works appearing in the formats designated in the Best Edition Statement. As additional assistance to software publishers, the Library does not intend to demand software that requires the utilization of a password or other special authorization.

Demands for deposit pursuant to section 407 will be made, of course, only with respect to works or versions of works that are themselves original works of authorship, eligible for protection under Title 17 of the United States Code.

When final regulations are promulgated, they will be applied prospectively against works published with notice of copyright in the United States for the first time on or after the effective date of the regulations.

If the proposed changes in the mandatory deposit regulation are adopted, the copies demanded by the Library will differ from the identifying material required for copyright registration. The variance occurs because of the lack of standardization of hardware. The Examining Division is required to examine for copyrightable authorship. Machine-readable copies are generally unsuitable for this task because they require utilization of expensive, and often different, hardware. For the present, the Copyright Office continues to require human-readable deposits for examination. The Machine-Readable Collections Reading Room, on the other hand, can only utilize works in those machine-readable formats for which it has acquired hardware. The Copyright Office and the Library have noted the problem and will monitor technological developments and confer with the industry to find a solution as soon as standardization of equipment and budgets permit.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that 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.¹

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 as set forth following the Appendix below.

PART 202—[AMENDED]

Appendix to Part 202 [Amended]

Appendix—"Best Edition" of
Published Copyright Works For The
Collection of the Library of Congress is

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-FOIA requirements.

amended by adding a new section VIII governing machine-readable copies. Present section VIII (Works existing in more than one medium) is renumbered to IX. New section VIII is proposed to read as follows:

VIII. Machine-Readable Copies

A. Computer Programs

1. With documentation and other accompanying material rather than without.
2. Not copy-protected rather than copy-protected (if copy-protected then with a backup copy of the disk(s)).
3. Format:
 - a. PC-DOS or MS-DOS (or other IBM compatible formats, such as XENIX):
 - i. 5¼" Diskette(s).
 - ii. 3¼" Diskette(s).
 - iii. Optical media, such as CD-ROM—best edition should adhere to prevailing NISO standards.
 - b. Apple Macintosh:
 - i. 3¼" Diskette(s).
 - ii. Optical media, such as CD-ROM—best edition should adhere to prevailing NISO standards.

B. Computerized Information Works, Including Statistical Compendia, Serials, or Reference Works

1. With documentation and other accompanying material rather than without.
2. With best edition of accompanying program rather than without.
3. Not copy-protected rather than copy-protected (if copy-protected then with a backup copy of the disk(s)).
4. Format:
 - a. PC-DOS or MS-DOS (or other IBM compatible formats, such as XENIX):
 - i. Optical media, such as CD-ROM—best edition should adhere to prevailing NISO standards.
 - ii. 5¼" Diskette(s).
 - iii. 3¼" Diskette(s).
 - b. Apple Macintosh:
 - i. Optical media, such as CD-ROM—best edition should adhere to prevailing NISO standards.
 - ii. 3¼" Diskette(s).

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

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

2. Section 202.19(c)(5) would be revised and § 202.19 would be amended by adding a new paragraph (d)(2)(vii) to read as follows:

§ 202.19 Deposit of published copies or phonorecords for the Library of Congress.

(c) * * *

(5) Automated databases available only online in the United States but not including automated databases distributed only in the form of machine-readable copies (such as magnetic tape or disks, punch cards, or the like) from which the work cannot ordinarily be visually perceived except with the aid of a machine or device, and computerized

information works in the nature of statistical compendia, serials, and reference works. Also works published in a form requiring the use of a machine or device for purposes of optical enlargement (such as film, filmstrips, slide films and works published in any variety or microform), and works published in visually perceptible form but used in connection with optical scanning devices, are not within this category and are subject to the applicable deposit requirements.

(d) * * *
(2) * * *

(vii) In the case of published computer programs and published computerized information works, such as statistical compendia, serials, and reference works that are not copy-protected, the deposit of one complete copy of the best edition as specified in the current Library of Congress Best Edition Statement will suffice in lieu of the two copies required by paragraph (d)(1) of this section. If the

works are copy-protected, two copies of the best edition are required.

Dated: July 25, 1988.

Ralph Oman,

Register of Copyrights.

Approved by

James H. Billington,

The Librarian of Congress.

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