



ANNOUNCEMENT

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

INTERIM REGULATIONS

GENERAL PROVISIONS—REGISTRY OF DOCUMENTS PERTAINING TO COMPUTER SHAREWARE AND THE DONATION OF PUBLIC DOMAIN SOFTWARE

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 91-11]

General Provisions—Registry of Documents Pertaining to Computer Shareware and the Donation of Public Domain Software

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulations.

SUMMARY: The Copyright Office of the Library of Congress is issuing an interim regulation establishing a registry for documents pertaining to computer shareware and procedures for donating copies of public domain software. The Judicial Improvements Act of 1990, Public Law 101-650, 104 Stat. 5089 (1990) authorized the creation of these new systems of public records. The interim regulation governs the procedures for recording computer shareware documents and informs the public about donation of public domain software.

DATES: Interim rule effective October 8, 1991. Comments must be received on or before December 9, 1991.

ADDRESSES: Ten copies of written comments should be addressed. If sent by mail, to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Department 17, Washington, DC 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 Ave., SE, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559 (202) 707-8390.

SUPPLEMENTARY INFORMATION:

1. Background

On December 1, 1990, the President signed into law the Judicial Improvements Act of 1990, Public Law 101-650, 104 Stat. 5089 (1990) containing several provisions affecting the copyright law. Section 805 of that Act authorized the creation of a registry of documents "designated as pertaining to computer shareware." In addition, the act authorized the establishment of a voluntary system of deposit of public domain computer software for the benefit of the Machine-Readable Collections Reading Room of the Library of Congress. Section 805 of the Judicial Improvements Act was not codified in the copyright law, and therefore the provisions creating these new systems of records will not be codified in title 17.

The provision authorizing creating of the shareware registry accompanies several significant copyright amendments affecting computer software. Most important among these changes was the creation of a rental right for computer programs.

In considering these substantive changes in the copyright law with respect to computer programs, a concern was raised that changes in the law might have an unintended adverse impact on the shareware industry. Creation of the Computer Shareware Registry addresses this concern.

Shareware is a descriptive term applying to a unique way of marketing copyrighted computer programs. Under

a shareware system of marketing, the copyright owner of the computer program permits wide distribution of disks embodying the program in order to allow potential users the opportunity for testing and review. The licensing terms extended to distributors of the disks vary. If a person who has received a disk embodying the program decides to use the software, then that person is required to register the use with the author and pay a registration fee. Authors obtain their income through these registration fees, and, in general, the registration fees are lower than the purchase price for a similar program through commercial channels.

The shareware system of marketing software is an increasingly popular way for authors of computer software to enter the software market. The Computer Shareware Registry is intended as a means for notifying the public of the licensing terms applicable to individual programs marketed on a shareware basis.

2. Nature of the Computer Shareware Registry

With certain minor modifications, the Computer Shareware Registry is patterned after the Copyright Act's section 205 recordation system, title 17 U.S.C. Only documents clearly designated as "Documents Pertaining to Computer Shareware" will be recorded in the Computer Shareware Registry. Documents not so designated will be treated as section 205 recordations, even if they involve computer programs marketed on a shareware basis. The legal effect of recording a document in the Computer Shareware Registry is at the discretion of the courts.

The Copyright Office intends to process Computer Shareware Registry documents in a system separate from ordinary section 205 copyright documents. The catalog records of shareware documents will not be found by searching the Copyright Office History Documents (COHD) files.

The creation of the Computer Shareware Registry does not change fundamental copyright principles applying to copyrighted computer programs generally. The Copyright Office strongly urges shareware authors to register their copyright claims in their programs through the usual procedures. Only through prompt registration can authors be assured of statutory damages and attorney's fees under section 412 of title 17. Participation in the Computer Shareware Registry is not a substitute for registration of the claim to copyright.

Additionally, documents transferring ownership of the rights under copyright of programs marketed on a shareware basis should be recorded under section 205 rather than solely in the Computer Shareware Registry. For example, if a commercial publisher purchases the rights under copyright to shareware¹ program from the author, the document transferring ownership of rights should be recorded under the section 205 recordation system. In addition, security interests, wills, and bequests regarding programs marketed as shareware should be recorded under section 205. Timely recordation pursuant to 17 U.S.C. 205 is necessary to be assured of constructive notice effect against a subsequent bona fide purchaser of the same rights.

An author or copyright owner of computer shareware may, of course, record both under 17 U.S.C. 205 and in² the Computer Shareware Registry by fulfilling the different requirements of each recordation system and by paying the recording fees of each.

In order to simplify procedures for the public and the Copyright Office, the Office is specifying in the regulation that photocopies of documents or other facsimile reproductions should be submitted rather than original documents. Photocopies or facsimile reproductions will not be returned. If an original document is submitted by mistake, it will not be returned unless specifically requested by the sender.

The Office also encourages the submission of a machine-readable copy of the document in ASCII text format on an IBM-PC compatible disk, in addition to the photocopy or facsimile reproduction.

¹ Error: line should read:
"rights under copyright to a shareware"

² Error: line should read:
"record both under 17 U.S.C. § 205 and in"

3. Donation of Public Domain Software

Copyright is claimed in most computer shareware programs, and they are subject to mandatory deposit under section 407 of title 17, U.S.C. if the program is published in the United States. The law passed by Congress as Public Law 101-650 contains another provision which has the purpose of encouraging donations of public domain software as a gift to the collections of the Machine-Readable Collections Reading Room of the Library of Congress. Persons who believe that selection of certain public domain software by the Library of Congress would serve important national preservation purposes are encouraged to donate software. Whether or not the software is added to the collections is determined solely by the Library of Congress. In order to assist the staff of the Library in evaluating the appropriateness of the deposit for accession to the collections, we request that as much information as possible about the software be included in the submission. The regulations specify the conditions for acceptance of a donation.

4. Regulatory Flexibility Act

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 a 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

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 and hereby certifies that this regulation will have no significant impact on small businesses.

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. 701(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.

List of Subjects in 37 CFR Part 201

Computer shareware registry;
Computer programs copyright.

Interim Regulations

In consideration of the foregoing, the Copyright Office amends part 201 of 37 CFR, chapter II in the manner set forth below.

PART 201—(AMENDED)

1. The authority citation for part 201 continues to read as follows:

Authority: Section 702, 90 Stat. 2541; 17 U.S.C. 702; § 201.28 is also issued under Public Law 101-650, 104 Stat. 5089, 5136-37.

2. A new § 201.28 is added as follows:

§ 201.28 Recordation of Documents Pertaining to Computer Shareware and Donation of Public Domain Computer Software.

(a) *General.* This section prescribes the procedures for submission of legal documents pertaining to computer shareware and the deposit of public domain computer software under section 805 of Public Law 101-650, 104 Stat. 5089 (1990). Documents recorded in the Copyright Office under this regulation will be included in the Computer Shareware Registry. Recordation in this Registry will establish a public record of licenses or other legal documents governing the relationship between copyright owners of computer shareware and persons associated with the dissemination or other use of computer shareware. Documents transferring the ownership of some or all rights under the copyright law of computer software marketed as shareware and security interests in such software should be recorded under section 205 of title 17, as implemented by § 201.4 of these regulations.

(b) *Definitions.* (1) The term *computer shareware* is accorded its customary meaning within the software industry. In general, shareware is copyrighted software which is distributed with relatively few restrictions for the purpose of testing and review, subject to the condition that payment to the copyright owner is required after a person who has secured a copy decides to use the software.

(2) A document designated as *pertaining to computer shareware* means licenses or other legal documents governing the relationship between copyright owners of computer shareware and persons associated with the dissemination or other use of computer shareware.

(3) *Public domain computer software* means software which has been publicly

distributed with an explicit disclaimer of copyright protection by the copyright owner.

(c) *Forms.* The Copyright Office does not provide forms for the use of persons recording documents designated as pertaining to computer shareware or for the deposit of public domain computer software.

(d) *Recordable Documents.* (1) Any document clearly designated as a "Document Pertaining to Computer Shareware" and which governs the legal relationship between owners of computer shareware and persons associated with the dissemination or other use of computer shareware may be recorded in the Computer Shareware Registry.

(2) Submitted documents must be a legible photocopy or other legible facsimile reproduction of a document containing the signature of the copyright owner of the computer shareware. Original documents should not be submitted.

(3) The photocopies or facsimile reproductions will not be returned. If an original document is submitted by mistake, it will not be returned unless specifically requested by the sender.

(4) The Copyright Office encourages the submission of a machine-readable copy of the document in the form of an IBM-PC compatible disk, in addition to the photocopy or facsimile reproduction.

(e) *Fee.* For a document covering no more than one title, the basic recording fee is \$20. An additional charge of \$10.00 is made for each group of not more than 10 titles. For these purposes the term "title" refers to each computer shareware program covered by the document.

(f) *Date of recordation.* The date of recordation is the date when all of the elements required for recordation, including the prescribed fee have been received in the Copyright Office. After recordation of the statement, the sender will receive a certificate of record from the Copyright Office. The submission will be retained and filed by the Copyright Office, and may be destroyed at a later date after preparing suitable copies, in accordance with usual procedures.

(g) *Donation of public domain computer software.* (1) Any person may donate a copy of public domain computer software for the benefit of the Machine-Readable Collections Reading Room of the Library of Congress. Decision as to whether any public domain computer software is suitable for accession to the collections rests solely with the Library of Congress. Materials not selected will be disposed of in accordance with usual procedures, including transfer to other libraries, sale, or destruction. Donation of public

domain software may be made regardless of whether a document has been recorded pertaining to the software.

(2) In order to donate public domain software, the following conditions must be met:

(i) The copy of the public domain software must contain an explicit disclaimer of copyright protection from the copyright owner.

(ii) The submission should contain documentation regarding the software. If the documentation is in machine-readable form, a print-out of the documentation should be included in the donation.

(iii) If the public domain software is marketed in a box or other packaging, the entire work as distributed, including the packaging, should be deposited.

(iv) If the public domain software is copy protected, two copies of the software must be submitted.

(3) Donations of public domain software with an accompanying letter of explanation must be sent to the following address: Gift Section, Exchange & Gift Division, Library of Congress, Washington, DC 20540.

Dated: September 23, 1991.

Ralph Oman,

Register of Copyrights.

Approved:

James H. Billington,

The Librarian of Congress.

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