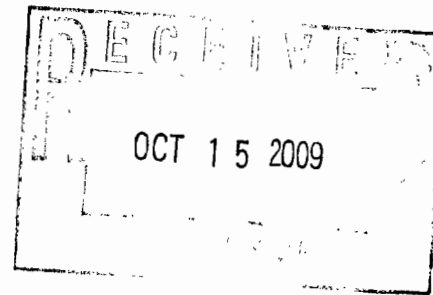


DOCKET NO.
RM 2009-3
REPLY
COMMENT NO 2

Before the United States Copyright Office
Library of Congress



Notice of Proposed Rulemaking

Mandatory Deposit of Published
Electronic Works Available Only
Online

37 C.F.R. Part 202
Docket No. RM 2009-3

October 12, 2009

West, a Thomson Reuters business offers these comments in response to those received by the Copyright Office pursuant to the Notice of Proposed Rulemaking (74 F.R.34286) concerning modification of the rules related to mandatory deposit. Our comments relate particularly to those submitted by the American Association of Publishers (“AAP”), and the Software & Information Industry Association (“SIIA”). We support the comments of these organizations and are pleased to have the opportunity to provide additional comments.

West is a major publisher of print and electronic works for the legal industry. West has been a provider of information to the legal profession since 1874 and has provided electronic information to lawyers since 1975. Today, its products and services are considered the global standard for supporting the business and practice of law.

West was acquired by The Thomson Corporation in 1996, and is now part of Thomson Reuters. With headquarters in Eagan, Minn., West has more than 8,000 employees in locations across the U.S.

By these comments we hope to identify issues of concern that should be addressed as the Copyright Office moves through this process of updating the mandatory deposit requirements, particularly with respect to collective works that update on continual basis, such as databases.

A. Electronic Serial Publications

The “Library plans to phase-in the collection of online-only works on a category-by-category basis”, with the initial category being “electronic serials”, defined in the Proposed Regulations as “...an electronic work published in the United States and available only online, issued or intended to be issued in successive parts bearing numerical or chronological designations, and intended to be continued indefinitely. This class includes periodicals; newspapers; annuals; and the journals, proceedings, transactions, etc. of societies.” This category appears to be analogous to print serials which are printed in separate, successive discrete editions. We agree that it is important to preserve and archive these works. Additionally, this category of works poses fewer practical issues related to the submission of the deposit than many other works published online, therefore is an appropriate place to begin.

There are, however, several points which deserve comment regarding electronic serials and other electronic works to which the Copyright Office may extend electronic deposit in the future.

1) Scope of electronic serials

The definition of “electronic serial” needs to be clarified so that it excludes only works that are analogous to print serials printed in separate, successive, discrete editions; and not more informal online publications such as blogs or websites generally, or database collections of electronic serials.

2) Security

The Notice states that “the Library will also establish policies and practices to insure the security and integrity of its electronic collections, and to provide appropriate, limited access as allowed by law.” It also states “[u]pon receipt of the single copy of a demanded work, the Library may allow simultaneous access by two on-site users.” Due to the ease by which electronic works may be copied, it is important that the Library issue clear security policies and practices before the new rules are adopted, and that it enforce

the limited on-site user restrictions. For instance, the Library should address whether downloading, emailing and similar functionality will be disabled. If not, how will the Library of Congress insure that patrons do not download entire works to a handheld device? We need a better understanding of the types of technological measures and policies that will be in place in order to comment on whether those measures would be adequate.

3) Notification

The Copyright Office specifically requests comment on whether copyright owners should be required to notify the Library of Congress upon the publication of new online-only works. Like SIIA, we believe that the burden should be on the Library to determine what works it is interested in collecting. As stated in the Notice and reiterated in AAP's comments, "[t]he Library believes that sufficient bibliographic information exists on electronic serials (such as indexes, online search tools, and announcement lists) that it will be able to independently determine which titles to demand." 74 F.R. 34286 at 34288 (July 15, 2009). It seems that requiring publishers to also notify the Library creates an unnecessary burden.

4) Method of Deposit

The technological means of and process for deposit are not described in the Notice. Electronic works often are comprised of numerous files and have complex file structures, and so deposit and ingest by the Copyright office may be far from simple. West would want to ensure that the Copyright Office was able to receive and compile the files correctly, as well as preserve them. Without more information on the technological processes, it is not possible to comment on the burden and cost electronic mandatory deposit might entail. We may wish to submit additional comments once the deposit submission process is established.

B. Databases and Other Collective Works that Update on a Regular Basis

Although the Notice states that as additional categories of works are identified, additional notice and comment periods will be available, we think it critical to understand at this early stage that databases and other large works that are updated on a regular basis are not appropriate for electronic deposit. Indeed, it is our understanding that the Copyright Office understood this in initially adopting the current exemption for deposit of “automated databases available online.” In addition to the comments set forth above applicable to all online works, West makes the following observations specifically with respect to databases and other collective works that update on a regular basis.

1. Collections of Licensed Content

Many database collections include copyrighted content owned by and licensed from others. Pre-existing contractual relationships with those underlying rights holders may limit how West may distribute the licensed content. Because it is unclear, and under what circumstances Library will provide access and what technologies and security it will have in place for electronically deposited material, it is also unclear whether depositing the database would put the database owner at odds contractually with third party content providers.

2. Capacity

Capacity issues will be of great concern for databases, such as Westlaw and other large collective works that are updated on a regular basis, unless adequate solutions are implemented to reduce the frequency of deposit and the requirements for and size of the deposits. If the required deposit includes a copy at each update interval, the amount of storage capacity needed would be extreme as would the amount of duplication. For instance, depositing every update of a collective database such as Westlaw, which updates by the moment, would most certainly create unworkable capacity demands on the Library’s systems, as well as place an unnecessary and tremendous burden on West. Indeed, requiring even daily or weekly updates may make compliance difficult or impossible. Again, because the process and requirements for and frequency of deposits are

unclear, we are not able to assess whether, from a technological or resource perspective, compliance would be feasible.

Moreover, it is not clear to us that the Copyright Office would have the technical capacity to ingest, maintain and/or serve up such databases in any way that would preserve the integrity of the work. It requires enormous computing capacity to do so, which the Copyright Office very unlikely would be able to meet without a significant investment in additional technology and support.

3. Deposit Requirements: Timing

Because West, as the copyright owner, would not be required to provide a copy of a work until a request is made by the Copyright Office, the request would likely come some time after the work had been updated. For works that update on a regular basis it may be impossible to provide a copy of a prior version of the work, even as it existed on a previous day. It will be important therefore to provide clarity about what the deposit requirements will be in these instances. For instance, will the Copyright Office require West to save a copy of every iteration of its database until such time as the Copyright Office made a demand? That would place far too large of a burden on West's technologic infrastructure.

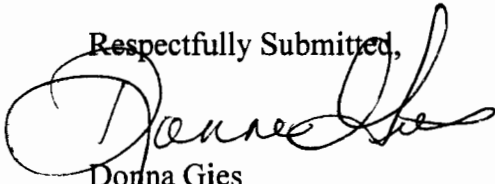
4. Complete Copy Requirements

The Notice proposes to clarify that a complete copy of an electronic work includes metadata and formatting codes. For many works, such as electronic serials that take the form of traditional print serials, this requirement may not be overly burdensome or otherwise objectionable, but may be for other works such as databases, depending on how "metadata" is defined. For instance, for services which rely on internal linking and other proprietary functionality this could be a serious concern as this may include proprietary coding that is protected by trade secret, or other intellectual property protections and would therefore not be appropriate to provide as part of the deposit.

5. Penalty for Non-Compliance

The current penalty for non-compliance is \$250 per work (up to \$2,500 for willful non-compliance). Depending on whether each update constitutes a new work for these purposes, the penalties could become significant and thus not appropriate. We agree with SIIA's suggested alternative to impose fines on a per-serial or title basis, not a per-work or update basis. Moreover, there may well be problems with delivery and ingest of deposited materials. How will the copyright owner know if a work has been received at all or in its entirety? In any event, it should be clear that if a copyright owner has made a good faith attempt to deposit materials, it should receive a receipt of proof thereof and not be penalized for technological failures in the delivery process.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Donna Gies", written over the typed name.

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