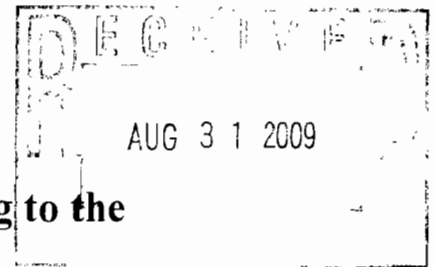


DOCKET NO.
RM 2009-3
COMMENT NO. <u>5</u>



Comments on
The Notice of Proposed Rulemaking Relating to the

**MANDATORY DEPOSIT OF PUBLISHED ELECTRONIC
WORKS AVAILABLE ONLY ONLINE**

Submitted By
THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

to
THE UNITED STATES COPYRIGHT OFFICE

Docket No. RM 2009-3
August 31, 2009

The Software & Information Industry Association (“SIIA”) appreciates the opportunity to respond to the Notice of Proposed Rulemaking relating to the *Mandatory Deposit of Published Electronic Works Available Only Online* that was published in the Federal Register on July 15, 2009. SIIA files the following comments on behalf of itself and its members.

SIIA is the principal trade association of the software and information industry and represents approximately 500 companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA members represent a wide range of business and consumer interests. They are also publishers and owners of copyrighted

works that may be subject to the new deposit requirements proposed in the aforementioned rulemaking.

The way in which SIIA members and others make available and publish their copyrighted content and software has changed significantly since the laws and regulations relating to deposit of copyrighted works were last amended. SIIA certainly understands and appreciates the need to examine whether a change in the deposit regulations is warranted to account for these changes. In particular, we recognize the need for the Copyright Office to potentially amend the mandatory deposit requirements specified in 37 C.F.R. sections 202.19 and Appendix B, Section I and add a new section 202.24 (implementing the requirements of Title 17 U.S.C. 407) to ensure that online-only works that have been both published in the United States and demanded by the Register of Copyrights are deposited with the Copyright Office.

While we understand the need to examine and potentially amend these regulations, we have many questions and concerns with the manner in which the amended rules would apply in practice, which are outlined below. Because the Federal Register Notice identifies serials as the first category of works that will be subject to the amended deposit requirements, in most instances we have limited our comments to serials. Deposit of other types of works, such as databases and software as a service will no doubt raise additional, and likely more complex, issues. We look forward to working with the Copyright Office and other interested stakeholders going forward to craft deposit rules that make sense for all the parties involved and to ensure that any new deposit requirements do not unduly burden publishers or adversely affect the market for their works.

A. The Deposit Process

An area of significant concern involves the manner by which a publisher would comply with a demand for deposit. There are numerous issues in the proposed rulemaking that primarily relate

to: (1) what method a publisher would use to make deposits; (2) what version is deposited; and (3) how frequently the Copyright Office would want the deposits.¹

First, the proposed rule does not provide sufficient detail regarding the methods a publisher would use to deposit copies with the Copyright Office. For instance, could the publisher choose to provide a continuous direct “feed” to the Library? If so, what would be the technical specification for the type of feed the Copyright Office could accept? Alternatively, would the Copyright Office provide the option for publishers to bundle the works in a package and send them to the Office at an established time? Or could the deposit obligation be met by the publisher merely providing a link where the Copyright Office can go to download a copy of the serial (for example, on a publicly accessible website) whenever it chooses?

Second, it is not clear what version of a serial the Copyright Office would require. In today’s world of continuous publishing and constant updating it is not always possible to freeze a work in time in order to establish a “final” or “official” version of a particular work. Moreover, even if there is one definitive version of a particular work, it is not clear whether the version the Copyright Office considers to be the definitive version subject to deposit will coincide with what the publisher considers to be the definitive version.²

Third, it is not clear under the proposed rule how frequently the Copyright Office would want the publisher to send the deposit copies – every week? every month? every three months? Also, how soon after publication would deposits have to be made? It would be helpful for publishers to have the option of bundling issues for deposit. In some cases, such as for databases that are updated frequently in real time, filing after every change or update could be especially burdensome. Would it be possible for a publisher, if they desired, to deposit their serials in the normal course of publishing the serial, as part of their routine, and not have to make any special delivery

¹ These issues are intertwined such that how the Copyright Office responds to one may affect the others.

² The answer to this question depends in part upon the answer to the question of what method a publisher would use to deposit copies with the Copyright Office. For instance, if the Copyright Office allows the publisher to provide a continuous feed or a link to the serial then the issue of what version to provide the Office becomes less important since the Office will likely have access to all versions.

accommodations for the Copyright Office? For instance, would the publisher be allowed to provide a direct continuous feed (as noted above)?

On the other hand some publishers might not want to deposit their works immediately. For instance, it is possible that publications like *Congressional Quarterly* or other journals that are used by Congress and their staff might not want to provide a copy of the serial at the time of publication if the Library were to provide immediate access to the serial to Congress and the their staff for fear that it could lead to a reduction in subscriptions.

After discussing the potential new regulations with our members, it is clear that different publishers will need to be able to satisfy the deposit requirements in different ways. For example, some publishers may prefer to meet the deposit requirements by providing a continuous direct feed to the serial to the Copyright Office, while other publishers may prefer to package and send the deposits to the Office at a specified time. Any new regulations in this area should allow for multiple options, as well as potentially others as technology and the nature of digital publications continue to evolve. The regulations should provide publishers with sufficient flexibility to meet the deposit requirements in a manner that does not disrupt the publishing process and does not overburden publishers with creating new arduous systems or processes for depositing their serials.

B. Notice of Publication

The Federal Register Notice suggests that the new regulations might require a publisher to proactively notify the Library of Congress (“the Library”) when it publishes a new “online-only work,” and that failure to do so could result in the Copyright Office penalizing the publisher in some manner.

We strongly oppose this approach. The burden should be on the Library to determine what works they would like deposited. It would be unfair to burden publishers with this obligation. In particular, it would be unfair to impose this burden on many small publishers or individuals who

may not even know about the regulation. While it is reasonable for the Library to demand deposit by a publisher when the Library proactively takes steps to determine what works it needs for its collections and then contacts the publishers of these works for copies, it is certainly not reasonable to demand deposit whenever any publisher or individual publishes a new “online-only work,” especially given that the Library may only want a very small percentage of online-only works for its collections. This problem is exacerbated by the amorphous definition of serials (discussed below).

The Notice also does not make clear what is meant by an “online-only work” in this context. Normally, in the context of copyright law, each edition of the serial would constitute a new work. Using this strict interpretation of the term “online-only work,” every time a new edition (or copyrightable version) of the serial is published a publisher could have to notify the Library. Accordingly, someone who publishes a daily serial could have to notify the Library each day. This would be extremely onerous for the publisher, and would likely not serve the Library’s objectives. It is more likely what is meant here is that the publisher would need to notify the Library every time a new “online-only *serial*” (as opposed to an edition or version of the serial) is published. That too would be problematic for publishers to comply with (but less so than the other interpretation).

It would be much more efficient for the Library to research what works it requires for deposit, and then reach out to the publishers of those works. Once contacted, the publisher can provide information to the Library about the type of work and how frequently it is published, and the two parties can work out a means for the Library to obtain deposit copies of these publications.

C. Other Areas of Concern

Penalty for Non-Compliance: The existing \$250 fine in section 407(d)(1) of the Copyright Act may prove to be too excessive for online-only serials. Fines of \$250 for each work might be acceptable for a non-serial work or even traditional serials, but because “online-only” serials may be updated and published so frequently these fines may add up very quickly

and are thus, not appropriate. An alternative would be to amend this provision so that any fines imposed are done so on a per-serial basis, not a per-work basis.

Format for Deposit Copies: It is essential that the Copyright Office be flexible in the type of formats that it is willing to accept. In the past, the Copyright Office has been very willing to accept works in a wide range of formats so as not to overburden publishers. Consistent with this approach, the different formats identified in the Federal Register Notice seem to cover most of the different formats used by publishers. Nevertheless, this list must be dynamic so that the Office may add new formats as they become available.

Access and Distribution: The issue of access and distribution of the deposited works was not addressed in any detail in the Federal Register Notice. Our comments are based on the premise that the rules regarding the provision of access to and distribution of deposited works by the Library of Congress are not being altered from current practices. The Federal Register Notice notes that access to these “online-only works” would be consistent with the manner in which access to other works in the Library’s collection are presently provided, which is through simultaneous access by no more than two on-site users. We presume that this means at the main Library of Congress buildings—the Thomas Jefferson building, the James Madison Memorial building and the John Adams building. If access was expanded beyond these buildings or other changes to the manner in which the Library provides access to works were to be considered, we would likely have additional comments, and our overall concerns with the proposed rules for deposit would be significantly heightened. As to distribution, it is important that the user should not be able to electronically download or otherwise forward the electronic version. In addition, while the Library may be currently using deposited paper works for inter library loans (ILL), we would not want any new ILL digital delivery rights just because the source is digital. We would appreciate an explanation of the Library’s intent as to ILL for online-only works on which we could comment.

Definition of “Serials”: The definition of the term serials in the proposed new regulation is problematic because it lacks specificity. The definition presently includes the term “etc” which could be broadly interpreted. The definition needs to be defined in more detail so that it is

clear whether publications like blogs, twitter feeds, databases analogous to loose leafs and directories are included. Such publications would pose additional difficulties not addressed here.

Data Delivery and Proof of Compliance: The Federal Register Notice does not go into great detail regarding how exactly the deposited works would be delivered to the Copyright Office. If works are able to be delivered in the same manner that they are delivered under Section 408, than we have a concern that the files could be so large they could shut down the system. This may not be a problem for serials, but the deposit of databases could certainly have that effect. In addition, it is not clear from the Notice how a publisher will prove it has complied with the deposit requirements. Will some type of electronic receipt be provided?

Other Proposed Changes to the Regulations: We do not take issue with several of the other changes to the deposit regulations that are proposed, including the new definition of “complete copy,” the change from a demand for two copies to a single copy, and the new definition of “best edition” for electronic serials.