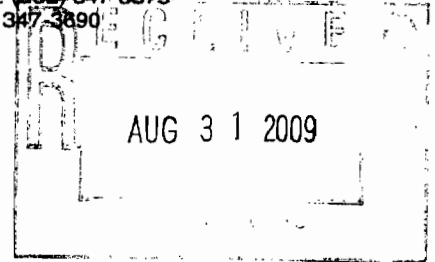


DOCKET NO.
RM 2009-3
COMMENT NO. 3

Association of American Publishers, Inc.
www.publishers.org



50 F Street, N.W., 4th Floor
Washington, D.C. 20001
Telephone: (202) 347-3375
Fax: (202) 347-3890



August 27, 2009

Office of the General Counsel
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Washington, D.C. 20024

Signed Original Plus 5 Copies

RE: Mandatory Deposit of Published Electronic Works Available Only Online

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) published by the Copyright Office in the Federal Register of July 15, 2009 (p. 34286-34290), the Association of American Publishers (hereinafter “AAP”) submits these Comments on behalf of its members regarding the Copyright Office’s proposed amendments to its regulations governing mandatory deposit of electronic works published in the United States and available only online.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, many AAP members are active in the commercial markets for ebooks and audiobooks, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

AAP commends the Copyright Office for initiating this proposed rulemaking to update its regulations implementing the mandatory deposit requirements of Section 407 of the Copyright Act of 1976, as amended. Over the years, AAP members have been strong supporters of Copyright Office deposit practices, submitting “best edition” copies of their publications to help the Library of Congress fulfill its mandate of sustaining and preserving a universal collection of knowledge and creativity. While many publishers are continuing to develop business models that offer their literary works in digital versions as well as in traditional print versions, some AAP members – particularly those in the various fields of journal publication – are contemplating or already taking their next steps beyond such alternative or paired offerings toward “online only” models of access and distribution for their publications. For this reason, they view the NPRM as timely in

raising a number of key issues regarding how the mandatory deposit requirements of the Copyright Act will apply to “electronic works published in the United States and available only online.”

From the perspective of interested AAP members, the proposed amendments to the Copyright Office’s regulations regarding mandatory deposit for “electronic works published in the United States and available only online” appear to be sensible and non-controversial. The concept of a “qualified exemption” for such works, requiring deposit only upon receipt of a demand from the Copyright Office, appears to be a practical and efficient approach for serials and other electronic works, recognizing that a demand for a copy of an online-only periodical or other serial would cover not only the issue or issues specified in the demand, but also all subsequent issues of the serial title. Of course, this preliminary assessment is subject to the receipt of further clarification regarding a few of the issues addressed in the NPRM, both to resolve possible concerns for AAP members and to confirm their understanding of the intended implementation of the amended regulations. Examples of such issues:

Deposit Copies – Security and User Access

The NPRM states that, as part of its process in “developing technological systems that will allow it to electronically ingest online-only works and maintain them in formats suitable for long-term preservation,” the Library of Congress “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 the law.” (p.34287). The NPRM goes on to explain that, in proposing to require only a single copy of a demanded work (instead of the two copies that the statute ordinarily requires), “the Library may allow simultaneous access by two on-site users,” which “achieves the statute’s goal” of providing two copies of a published work. (p.34288)

Clearly, these specific “policies and practices” will be important for AAP members, who have concerns regarding the potential market harm that could result to submitting copyright owners from unauthorized or expansive access to and distribution of online-only works deposited with the Library of Congress. But Section 407 of the Copyright Act is silent on the issue of access to deposit copies by “users,” whether such individuals might be members of the general public or otherwise. With respect to the purpose of requiring such deposits, Section 407(b) only refers broadly to the mandatory deposits being made “for the use or disposition of the Library of Congress.” Similarly, the current Copyright Office regulations on the deposit of published copies for the Library of Congress, 37 CFR Part 202.19, say nothing about access to such deposit copies by “users” of any kind, and the amended regulations proposed in the NPRM (p.34289) are also silent on the matter.

To the extent that public access to and use of deposit copies of online-only works as part of the Library of Congress collection is to be permitted, the proposed amended regulations should explicitly address the issues of what kind of access and use is to be

afforded, and what terms and conditions will apply to such access and use. Any public interest underlying such access and use should be carefully balanced with consideration of the copyright owner's interests, and recognition of the fact that the copyright owner is required by law to deposit such copies with the Library of Congress. Thus, for example, at minimum, any access to and use of deposit copies of online-only works should be on-site at the Library of Congress, rather than remote, and any user permitted to access and use such copies should be prohibited from downloading, forwarding or otherwise distributing them.

Notice of Publication

To the extent that the Library of Congress currently "believes that sufficient bibliographic information exists on electronic serials... that it will be able to independently determine which titles to demand," there appears to be no justification for requiring the owner of copyright or of the exclusive right of publication in an online-only work to notify the Library upon publication of a new online-only work in the United States. The reasonableness of the burden imposed by such a requirement would largely depend upon specific details such as the requisite content and medium required for such notices, but the Library's confidence in its ability to independently learn about the publication of a new online-only work argues in favor of not imposing any burden of notice on the rights owner. As the NPRM indicates, the issue can be revisited if experience with the demand-deposit process demonstrates that a number of important electronic serial titles are escaping the Library's notice.

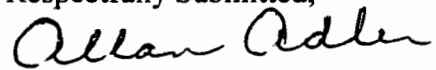
Definition of "Complete Copy"

As the nature of online-only products continues to evolve, it appears that some models may involve multiple servers that must communicate with each other to enable a complete "interactive" work to be utilized online for a limited time that is governed by digital rights management (DRM) technology. It is unclear how a "complete copy" of such works could be provided to the Library of Congress in compliance with the proposed deposit requirement.

Conclusion

As indicated, these Comments reflect only the preliminary views of AAP members on some issues raised by the NPRM. AAP will carefully review other Comments submitted in response to the Copyright Office NPRM, and will consider submitting Reply Comments to address the views and proposals put forward by other Commenters, while further discussing and refining the views submitted in these Comments. We look forward to working with the Copyright Office to develop final regulations that will meet statutory deposit requirements and advance the collection missions of the Library of Congress.

Respectfully Submitted,



Allan Adler

Vice President for Legal & Government Affairs

Association of American Publishers

50 F Street, NW

4th Floor

Washington, D.C. 20001-1530

Phone: 202/220-4544

Fax: 202/347-3690

Email: adler@publishers.org