



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 2016-03]

Mandatory Deposit of Electronic-Only Books

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 407 of the Copyright Act requires the mandatory deposit with the Copyright Office (“Office”) of all works published in the United States, within three months of publication, for use by the Library of Congress (“Library”). The Office is allowed to exclude certain classes of works from this requirement. In a 2010 interim rule, the Office codified its longstanding practice of excluding from the mandatory deposit requirements all electronic works that are not otherwise available in a physical format (*i.e.*, “electronic works published in the United States and available only online.”). The 2010 interim rule created one exception to this general rule for electronic-only serials, which are subject to mandatory deposit, if they are published in the United States and if they are affirmatively demanded by the Office. On May 17, 2016, the Office published a Notice of Inquiry seeking public comment on potential regulatory changes that would make the interim rule final and would make electronic-only books and sound recordings subject to mandatory deposit requirements by way of the same demand process. Based on the responses to the NOI and input from the Library, the Office proposes revising its regulations to make the interim rule final, and to make electronic-only books published in the United States subject to the mandatory deposit requirements if they are affirmatively

demanded by the Office. The proposed rule does not address mandatory deposit of electronic-only sound recordings.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <https://www.copyright.gov/rulemaking/ebookdeposit>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Cindy P. Abramson, Assistant General Counsel, by email at ciab@loc.gov or John R. Riley at jril@loc.gov. Both can be reached by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

A. Mandatory Deposit under the Copyright Act Generally

The Copyright Act's "mandatory deposit" requirement, section 407 of title 17, provides that the owner of copyright or the exclusive right of publication in a work published in the United States must, within three months of publication, deposit two complete copies of the "best edition" of the work with the Copyright Office, or, in the case of sound recordings, two complete phonorecords of the best edition, together with

any printed or other visually perceptible material published with the phonorecords.¹ The Register may issue a written demand for works at any time after they have been published in the United States.² Failure to make the required deposit after a written demand is made by the Register may subject such person on whom the demand was made to monetary liability.³ Compliance with this section is not a condition of copyright protection, but the Copyright Act provides that deposits made under section 407 may be used to satisfy the registration deposit provisions under section 408, if all other registration conditions are met.⁴

Deposits made to satisfy section 407 are for the “use or disposition of the Library of Congress” and must satisfy the “best edition” requirement. That is, such deposits must be of the edition, published in the United States at any time before the date of deposit, that the “Library of Congress determines to be most suitable for its purposes.”⁵ These requirements are governed by section 202.19 and Appendix B of part 202 of the Office’s regulations, which set forth rules and criteria, respectively, for the different types of works subject to the mandatory deposit requirement.

Certain categories of works are not subject to mandatory deposit. By definition, mandatory deposit requirements do not apply to unpublished works and foreign works that have not been published in any form in the United States. In addition, under section 407(c) of the Copyright Act, the Register of Copyrights can, by regulation, exempt any

¹ 17 U.S.C. 407(a); *see generally* 37 CFR 202.19.

² 17 U.S.C. 407(d).

³ *See id.*

⁴ *Id.* at 408(b). Although section 408 states that copies deposited pursuant to the mandatory deposit provision in section 407 may be used to satisfy the registration deposit requirement in section 408, in practice the Office treats copies of works submitted for registration as satisfying the mandatory deposit requirement (assuming the deposit requirements are the same), and not vice versa. 37 CFR 202.19(f)(1), 202.20(e); *see* 43 FR 763, 768 (Jan. 4, 1978).

⁵ 17 U.S.C. 101; *see also* 17 U.S.C. 407(b).

categories of material from section 407's mandatory deposit requirements or demand only one copy or phonorecord to provide a "satisfactory archival record of a work." With section 407, Congress balanced different, important interests, including the "value of the copies or phonorecords to the collections of the Library of Congress" and "the burdens and costs to the copyright owner of providing [copies of the works]."⁶ Under this authority, the Register has adopted a series of exemptions from the mandatory deposit requirement.⁷

B. Regulations Regarding Mandatory Deposit of Electronic-Only Materials

In 2010, the Office codified its longstanding practice of excluding from mandatory deposit requirements all "[e]lectronic works published in the United States and available only online."⁸ (The Office is now referring to this category of works as "electronic-only" works, to better distinguish it from works that are published in both electronic and physical formats. The Office is also proposing changes to the regulations to adopt this clearer nomenclature.) The Office, however, also adopted an exception to this exemption, putting in place a demand-based mandatory deposit provision for electronic-only serials.⁹ An electronic-only serial is "an electronic work published in the United States and available only online, issued or intended to be issued on an established schedule in successive parts bearing numerical or chronological designations, without subsequent alterations, and intended to be continued indefinitely." This category includes "periodicals, newspapers, annuals, and the journals, proceedings, transactions, and other

⁶ H.R. REP. NO. 94-1476, at 151 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5767.

⁷ *See* 37 CFR 202.19(c).

⁸ 75 FR 3863, 3869 (Jan. 25, 2010) ("2010 Interim Rule"); 37 CFR 202.19(c)(5).

⁹ 75 FR at 3865-66.

publications of societies.”¹⁰ The 2010 Interim Rule also stated that, any additional categories of electronic-only works would first be “identified as being subject to demand” through a rulemaking with notice and comment before the Office issues any actual demands for such works.¹¹

C. 2016 Notice of Inquiry Regarding Expansion of Demand-Based Deposit

As described in-depth in this rulemaking’s 2016 NOI,¹² the Office is interested in finalizing the 2010 Interim Rule, as well as adding a new category of online works—electronic-only books—to the demand-based mandatory deposit scheme. Although the NOI included online sound recordings as a potential additional category of works that could be subject to the mandatory deposit requirement, the Office has not included electronic-only sound recordings within the rule proposed in this current rulemaking. The Copyright Office is postponing further consideration of this issue until after the conclusion of the present rulemaking.

In the Office’s NOI, it sought comments on four topics. First, the public was invited to opine on the efficacy of the 2010 Interim Rule, including whether it adequately serves the needs of the Library and other affected parties and whether it could serve as a good framework for adding additional categories of electronic works to the mandatory deposit system. Second, the NOI solicited comments on the Library’s access policy as applied to both electronic-only serials and, potentially, to electronic-only books. The third topic asked about “information technology, security, and/or other requirements” that

¹⁰ 37 CFR 202.19(b)(4). “Electronic works” are themselves defined as “works fixed and published solely in an electronic format.” 37 CFR 202.24(c)(3).

¹¹ 75 FR at 3866.

¹² 81 FR 30505, 30506–08 (May 17, 2016).

should apply to the receipt and storage of, and access to, electronic-only books. Fourth, the NOI requested comments on how the “best edition” requirements should be applied to the mandatory deposit of electronic-only books. The Copyright Office received fifteen comments on the proposed changes. While some of the comments praised the efforts to collect more works in the identified categories, others expressed reservations.

D. 2018 Rule Regarding Public Access To Deposited Works

In January 2018, the Office also issued a final rule updating its regulations governing the group registration and mandatory deposit of newspapers.¹³ Under that rule, newspaper publishers can submit groups of newspapers issues, in electronic format, pursuant to the group registration option.¹⁴ Copies of those newspaper issues are then delivered to the Library for its collections, and the rule specifies that those copies satisfy the mandatory deposit regulations.¹⁵ As part of that rule, the Office codified public access restrictions in a new section 202.18, specifying that access will be provided only to authorized users at Library of Congress premises and off-site to Library staff as part of their assigned duties via a secure connection.¹⁶ These access restrictions reflected informal restrictions that had been in place for electronic-only serials since 2010.¹⁷ In issuing the notice of proposed rulemaking, the Office emphasized that “over time the Library would like to expand [section 202.18] to address public access to digital registration deposits for other types of digital works” but that “[b]efore expanding such

¹³ 83 FR 4144 (Jan. 30, 2018).

¹⁴ 37 CFR 202.4(e).

¹⁵ *Id.* at 202.19(d)(2)(ix).

¹⁶ *Id.* at 202.18.

¹⁷ 82 FR 51369, 51377 (Nov. 6, 2017).

access, . . . the Office will issue separate rulemakings to notify the public.”¹⁸

II. Discussion

This Notice of Proposed Rulemaking addresses issues raised in response to the NOI as well as additional issues raised by commenting parties. This rule aims to respond to the increase in publication and marketing of works in electronic-only digital forms.¹⁹ The Library’s collections comprise the world’s most comprehensive record of human creativity and knowledge and support the Library’s role as the research arm of Congress. To help the Library continue to fulfill these responsibilities, the Copyright Office is proposing to amend the mandatory deposit rules and criteria to include electronic-only books.

Under this proposed rule, electronic-only books would be subject to mandatory deposit if a written demand is issued by the Copyright Office. The Office anticipates that, in some cases, rather than sending individual demands for each work, it will instead demand all of the published electronic-only works from particular publishers. Additionally, this proposal would make the 2010 Interim Rule concerning electronic-only works final, and amend the rule governing public access to electronic-only works to encompass electronic-only serials and electronic-only books received via mandatory deposit. Finally, with this rule the Office proposes specific “best edition” criteria for electronic-only books, and proposes amendments to the best edition criteria for electronic-only serials, modeled on the Library’s Recommended Formats Statement.²⁰

¹⁸ *Id.*

¹⁹ Libr. Copyright All. (“LCA”) Comments at 3; Nat’l Writers Union et al. Comments at 11; Univ. of Mich. Libr. Comments at 2; Univ. of Va. Libr. Comments at 2.

²⁰ See *Recommended Formats Statement*, LIBR. OF CONG., <https://www.loc.gov/preservation/resources/rfs/textmus.html> (last visited Mar. 29, 2018).

A. Electronic Deposit and the 2010 Interim Rule

In its NOI, the Office asked for opinions on “the efficacy of the 2010 Interim Rule, including whether it adequately addresses the digital collection and preservation needs of the Library of Congress, whether it has adequately addressed the concerns of affected parties, and whether it is a good framework for further developing section 407.”²¹ This question was aimed, in part, at eliciting concerns that should be addressed before the 2010 Interim Rule is made final. Comments responding to this question raised two main concerns: the perceived overbreadth of the 2010 Interim Rule and the need for a comprehensive Library of Congress digital collections strategy.

Those who voiced concerns over the broad scope of authority granted to demand electronic works suggested that expanding the Interim Rule to include electronic-only books has a potential “to impose widespread and burdensome deposit requirements,” especially on independent or self-publishers.²² The Office appreciates these concerns, but believes that the approach of selective demand-based deposit requirements, as a way to fulfill the Library’s digital collections, will not be as burdensome as some assume. While the Library’s collection authority is relatively broad, it does not have the desire or the means to collect all electronic-only books. In the context of electronic-only serials, the Library has responsibly exercised its authority to demand such works, without significant issue.

Commenters also suggested that mandatory deposit for electronic-only books would be premature as the Library has not publicly communicated a cohesive strategy for

²¹ 81 FR at 30509.

²² Nat’l Writers Union et al. Comments at 15; *see also* Authors Guild Comments at 4.

electronic deposits, and therefore, any such strategy could not be evaluated.²³ These commenters cited reports such as those by the United States Government Accountability Office and the Library’s Office of the Inspector General which made recommendations regarding the Library’s digital collections and information technology. Some also pointed out the Inspector General’s criticism that the Library lacked quantifiable performance measures for its electronic deposit and collections projects.²⁴

In early 2017, the Library of Congress addressed some of these concerns. In February, the Library adopted strategic steps related to future acquisition of digital content, including confirming the Library’s desire to expand the electronic deposit program to include electronic-only books.²⁵ In March 2017, the Library issued an updated information technology strategic plan, outlining its goals and objectives to be accomplished over the next five years. The Library has also added performance measures to strengthen its plans and to help ensure it meets its collections and information technology development goals. Further, the Library formed a new “eCollections Steering Group” to coordinate the development of its digital collection strategies. While the Inspector General still believes the Library needs a comprehensive digital strategic plan, it has acknowledged these early efforts.²⁶

While some of the Library’s collection strategies will need to be further refined as time goes on, it is clear that the Library will rely on mandatory deposit of digital works as

²³ Copyright All. Comments at 2; Recording Indus. Ass’n of Am. (“RIAA”) Comments at 8; Software & Info. Indus. Ass’n (“SIIA”) Comments at 2.

²⁴ Copyright All. Comments at 2–3.

²⁵ *Collecting Digital Content at the Library of Congress*, LIBR. OF CONG., 1–2 (Feb. 2017), <https://www.loc.gov/acq/devpol/CollectingDigitalContent.pdf>.

²⁶ *Office of the Inspector General Semiannual Report to the Congress*, LIBR. OF CONG., 10 (Mar. 2017), <https://www.loc.gov/portals/static/about/office-of-the-inspector-general/annual-reports/documents/March-2017-OIG-Semiannual-Report-to-Congress-5-17-17.pdf>.

a core component of its overall strategy going forward. It is also clear that the existing mandatory deposit program for electronic-only serials has successfully furthered the Library's important goals and could readily serve as a model for electronic-only books. Indeed, the Office has been receiving copies of electronic books on a voluntary basis through special relief agreements for a number of years.²⁷ While implementing mandatory deposit for electronic-only books would require an update to the Copyright Office's information technology systems, the regulatory framework needs to be in place by the time the Library is ready to demand and receive such works.

Some commenters suggested that voluntary agreements should be a preferred method of obtaining digital works.²⁸ The Office notes that mandatory deposit does not preclude voluntary agreements, and the Interim Rule has not precluded the Library from negotiating such arrangements with regard to electronic-only serials. In fact, these voluntary arrangements came about only *after* the 2010 Interim Rule was implemented. Nor does the existence of these voluntary arrangements involving electronic-only serials preclude the Office from expanding mandatory deposit to include other categories of online works.

The University of Virginia asked the Office to reconsider the decision to limit the Office's ability to demand electronic-only serials to those issues published after the

²⁷ Through special relief agreements, the Library has obtained free access to a number of publishers' online portals for use by patrons and received electronic copies of serials and books for archival purposes. These special relief agreements typically involve the deposit of electronic versions of works that are also published in print format, thereby saving publishers the burden and expense of having to send physical copies to satisfy mandatory deposit obligations.

²⁸ Assoc. of Am. Pubs. ("AAP") Comments at 10; SIIA Comments at 3-4.

effective date of the Interim Rule.²⁹ The Office declines this proposal as it would be burdensome for publishers to comply with such a retroactive regulation.³⁰

Finally, one commenter asked whether the Library intends to expand its Surplus Books Program, a program where the Library donates physical books to qualifying educational institutions, to its eCollections strategy.³¹ The Library has no plans to expand that program to electronic works, and will only be demanding electronic-only books that it wishes to keep in its collections. Indeed, section 202.18 would establish the outer limits of public access to electronic-only books and serials received through mandatory deposit.

B. Application of the 2010 Interim Rule to Electronic-Only Books

The Office's NOI also invited comments on whether the 2010 Interim Rule provided a useful framework for mandatory deposit of electronic-only books.³² The Office received several thoughtful responses to this question from interested parties. Those who supported, or did not oppose, expansion of the 2010 Interim Rule noted the rising importance of the Library being able to acquire electronic-only works. The Authors Guild cited reports indicating that nearly a half million self-published electronic books are published each year.³³ The Library Copyright Alliance ("LCA") pointed out that, "[w]ithout mandatory deposit, works created in the digital age could be lost forever."³⁴

²⁹ Univ. of Va. Libr. Comments at 5.

³⁰ Indeed, it is not clear whether section 407 even grants the Office the authority to issue such retroactive rules. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

³¹ AAP Comments at 7–8.

³² 81 FR at 30509.

³³ Authors Guild Comments at 3 (discussing self-published books in the context of "The Growing Online-Only Book Market").

³⁴ LCA Comments at 2.

Commenters with concerns about the Library’s eCollections strategy and expanding the 2010 Interim Rule to electronic-only books expressed skepticism regarding how electronic-only books would be defined and whether the rule would apply to print-on-demand works. Further, these commenters asserted that the Office and the Library have not yet completed some planned actions outlined in the 2010 Interim Rule. These planned actions included, for example, examining the feasibility of allowing rightsholders to provide website links for the Office to download deposits or engaging in additional consultation with rightsholders, including on issues involving transmission standards and the potential of downloading or emailing copies of deposited electronic works.³⁵

In considering how to define “electronic-only books,” the Office notes that the Copyright Act itself does not contain a definition of “books,” but refers to them as “material objects” that may embody a literary work.³⁶ Similarly, the Office’s regulations simply contemplate that books are a tangible medium of expression for literary works.³⁷ The Office received several helpful considerations on this topic. Some commenters noted that a definition could be in reference to the file format or medium of the work, such as works published in PDF or HTML format.³⁸ Others noted that an electronic-only book could be defined with reference to the content of the work.³⁹ Others suggested that the definition of an electronic-only book should include consideration of how the work is transmitted. For example, the Association of American Publishers (“AAP”)

³⁵ 75 FR at 3866, 3868; AAP Comments at 13.

³⁶ 17 U.S.C. 101.

³⁷ See 37 CFR 202.16(b)(1)(iv) (describing a preregistration class of “[l]iterary works being prepared for publication in book form”); see also *Hadley v. Comm’r of Internal Revenue*, 819 F.2d 359, 361 (2d Cir. 1987) (noting, for the purposes of the Tax Code, “[t]here are many definitions of ‘book,’ but a principal one relates to the tangible property consisting of a collection of written, printed, or blank pages fastened together along one edge, bound between covers into a volume”).

³⁸ Copyright All. Comments at 3.

³⁹ Nat’l Writers Union et al. Comments at 16.

recommended that electronic-only books would include downloaded works but not works available “through online display, streaming, or apps.”⁴⁰ As the Authors Guild points out, “[a] vast amount of text is ‘published’ online today that might qualify as a ‘book,’ depending how ‘book’ is defined.”⁴¹

As commenters correctly indicate, defining a book as the physical embodiment of a literary work does not translate neatly to the digital environment. It is clear to the Office that, through mandatory deposit, the Library wishes to acquire textual works that are marketed or presented as “electronic books” and other monographic works such as organizational reports and long-form essays; it does not intend to obtain blog posts, social media posts, and general webpages through that mechanism.⁴² The Office recently issued a rule governing deposits of “literary monographs”⁴³ and adopted a definition of that category of works for those purposes.⁴⁴ With minor modification, that definition can also be adopted to define the category of works subject to mandatory deposit in this proposed rule. Accordingly, the Office proposes that an “electronic-only book” should be defined broadly as an electronic literary work published in one volume or a finite number of volumes published in the United States and available only online, with specific exclusions for certain types of works, including serials, audiobooks, computer programs, websites, blogs, and emails.

⁴⁰ AAP Comments at 16.

⁴¹ Authors Guild Comments at 2 (footnote omitted).

⁴² The Library currently obtains website material through means other than mandatory deposit, such its web archiving program. *See generally* Library of Congress, *Web Archiving*, <https://www.loc.gov/webarchiving/> (last visited Apr. 6, 2018).

⁴³ 83 FR 2371 (Jan. 17, 2018).

⁴⁴ 37 CFR 202.19(b)(5) (“The term *literary monograph* means a literary work published in one volume or a finite number of volumes. This category does not include serials, nor does it include legal publications that are published in one volume or a finite number of volumes that contain legislative enactments, judicial decisions, or other edicts of government.” (emphasis added)).

For clarity's sake, the proposed definition specifies that electronic-only books would be subject to mandatory deposit only if they are available to the public as electronic copies—for example, through download. Electronic-only books accessed through online display or streaming would generally be excluded, unless they were “published” within the meaning of the Copyright Act.⁴⁵

The Office believes that its definition of an electronic-only book balances the concerns of copyright owners who expressed concern about giving the Library sweeping discretion to demand various types of electronic works with the Library's reasonable need to obtain electronic works for its collections.

In its comments on the earlier NOI, AAP sought to confirm that “the mandatory deposit exemption of ‘tests and answer material for tests when published separately from other literary works’ is preserved even if the Interim Rule is expanded to ebooks available only online.”⁴⁶ To be clear, the existing exemption for tests and answer materials will continue to apply across the board, including tests and related material that are distributed solely online, but the Office does not believe that this exemption needs to be repeated in the regulatory language defining electronic-only books.

Additional commenters noted potential issues that might arise with respect to works that are both available for download and print-on-demand.⁴⁷ In particular, the concern appears to be that it will be difficult for publishers to determine whether such works are subject to the general exemption for electronic-only works (and the demand-

⁴⁵ 17 U.S.C. 101 (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”).

⁴⁶ AAP Comments at 16.

⁴⁷ *See, e.g.*, Nat'l Writers Union et al. Comments at 17.

based mandatory deposit scheme proposed here), or whether they are subject to affirmative mandatory deposit requirements. As a potential solution, the Authors Guild recommended that “books ‘initially’ or ‘originally’ published only online but also available in [print-on-demand] format” be essentially treated as works published “only” online, regardless of whether the book has actually been printed.⁴⁸

The issue defies easy resolution. It may be that a book is *available* to print on demand, but has not been actually printed by anyone, in which case it would be strange to conclude that the book has nonetheless been published in physical format. But it would be equally strange for a book to be subject to one mandatory regime or another depending on whether a consumer has actually obtained a printed copy on demand. Indeed, some print-on-demand copies may be printed privately, in consumers’ homes, or at kiosks at brick-and-mortar bookstores, in which case it would be difficult to determine whether a physical copy has been made. The Office is aware that the same issue arises with some frequency with respect to electronic-only serials, many of which are available for print on demand. This issue potentially arises for other types of works as well.⁴⁹ Accordingly, the growing availability of print-on-demand type services for works that are otherwise available online may cause broader uncertainty regarding the scope of the general exemption for electronic-only works.

On balance, the Office believes that the Authors Guild’s approach is the most administrable for the Office and for publishers. The Proposed Rule thus provides—for all electronic-only works—that a work shall be deemed to be “available only online” even if

⁴⁸ Authors Guild Comments at 5.

⁴⁹ Eliot Van Buskirk, *Tunecore, Amazon Set to Unveil On-Demand CD Sales*, WIRED (May 21, 2009), <https://www.wired.com/2009/05/amazon-to-unveil-on-demand-cd-printing-service-with-tunecore/>.

physical copies or phonorecords have been made available on demand for individual consumers, so long as the work is otherwise available only online. In other words, if the work is *only* available online or if the work is only available in physical format to individual consumers on demand, it will be subject to the general exemption for online only works in section 202.19(c)(5). Electronic-only books and serials that meet those qualifications will only be subject to the on demand mandatory deposit scheme in section 202.24, not the affirmative mandatory deposit requirements in 202.19.

C. Library Access Policies

In its NOI, the Office also asked for opinions on the Library's access policy as applied to both electronic-only serials and, potentially, to electronic-only books.⁵⁰

Commenters representing libraries and user groups generally supported increased access and found the Library's existing access policies for eserials too restrictive. They also noted that limiting access to two users is "not in accord with current practices in the library community" and that "[increased] access is an essential component of the Library's mission."⁵¹ Those representing creators voiced concerns that increased access, particularly to digital works, would bring increased risks of piracy or potential market substitution.⁵² Significantly, these commenters protested that the Library's access policy has not been codified in the regulations.⁵³

As discussed above, in January 2018, the Office issued a rule that codified the rules⁵⁴ governing access to electronic copies of newspaper issues that are made part of the

⁵⁰ 81 FR at 30509.

⁵¹ LCA Comments at 4; *see also* Univ. of Va. Libr. Comments at 5–6.

⁵² Authors Guild Comments at 6.

⁵³ RIAA Comments at 11–12.

⁵⁴ 37 CFR 202.18.

Library's collection through the group registration process.⁵⁵ That rule aims to provide access to electronic works as similar as possible to the access provided to analog works, with some modifications to address the unique nature of digital works. The proposed rule modifies section 202.18 to apply the same access restrictions to electronic material obtained through mandatory deposit.

A number of comments expressed concern regarding the extent to which the Library informs patrons about copyright limitations.⁵⁶ While the NOI pointed to “a set of fair use criteria in a short training manual” in the Library’s Microform & Electronic Resources Center, meant to guide users when accessing electronic serials, commenters noted that such a manual could not be located.⁵⁷ The Office confirmed with the Library that the manual was not a fair use training manual, but a short notice warning that Library patrons are personally liable for any copyright infringement. The Library has stated that it is fully committed to taking steps to prevent infringement of the material in its collections. At the same time, the Library believes that patrons must have sufficient access to the Library’s collections to engage in legislative work, research, or activities protected by fair use. The proposed access policies balance these goals.

The University of Michigan Library suggested that the depositor should be asked whether any public licenses apply to the deposited works, to give the Library “more flexibility in providing access to the deposited copy of the work.”⁵⁸ The Office understands that this idea may be helpful as the Library’s develops its overall eCollections strategy, but at this time, the Office believes collecting such information in

⁵⁵ 83 FR at 4146.

⁵⁶ Authors Guild Comments at 6; Nat’l Writers Union et al. Comments at 21–22.

⁵⁷ 81 FR at 30508; AAP Comments at 12–13; Copyright All. Comments at 4.

⁵⁸ Univ. of Mich. Libr. Comments at 4.

the context of this rule will only impose administrative burdens on the collection of electronic works. The National Writers Union, Western Writers of America, and American Society of Journalists and Authors voiced concerns over whether the access rules had a provision to protect confidential information or trade secrets.⁵⁹ The Office appreciates this concern, but notes that only *published* works will be subject to the demand requirements.

D. Information Technology, Security, and Related Requirements

The Office asked parties to “comment on the information technology, security, and/or other requirements that should apply to the Library’s receipt and storage of, and public access to, any online-only books . . . collected under section 407.”⁶⁰ Some commenters suggested that the Library’s information technology infrastructure and planning were not ready to accept electronic-only books, based on the status of the Library’s security infrastructure in 2015.⁶¹

Since that time, the Library has taken major steps to address its information technology needs. The Librarian has appointed a permanent Chief Information Officer, who is responsible for information technology operations, strategy, and alignment with the Library’s mission. The Library’s aforementioned information technology strategic plan includes strategies to protect the Library’s information technology systems, including following best practices for consistent security measures based on the National Institute of Standards and Technology’s (“NIST’s”) Risk Management Framework. The Library has implemented that Risk Management Framework and has developed a new

⁵⁹ Nat’l Writers Union et al. Comments at 16.

⁶⁰ 81 FR at 30509.

⁶¹ See AAP Comments at 14–15.

Information Technology Contingency Plan template addressing NIST guidance and Library policy. It has also implemented an updated overarching System Security Plan policy, has updated existing System Security Plans, and continues comprehensive and effective security testing for all systems.

While no security plan is flawless, the Library is encouraged that the existing system protecting electronic-only serials subject to mandatory deposit has not encountered security threats. The Library's efforts to improve information technology, including systems security, are ongoing and commenters will continue to be helpful to the Library in implementing its information technology plans going forward.⁶² The Office is reasonably relying on the Library's assurances regarding information technology security in moving this rulemaking forward.

E. "Best Edition" Requirements for Electronic-Only Serials and Electronic-Only Books

The final question the Office asked in its NOI was how the "best edition" requirements should be applied to mandatory deposit of electronic-only books, including "whether and how the 'best edition' criteria for electronic serials . . . or the guidelines from the Library's Recommended Formats Statement, might or might not be adapted [for the Best Edition Statement]."⁶³ The Library's Recommended Formats Statement encompasses the formats and related criteria which the Library prefers for the purposes of ensuring the preservation and long-term access of its collection; the Library uses the Recommended Formats Statement for its collection efforts outside of the Copyright Act. The Library's Recommended Formats Statement identifies six criteria for the works it

⁶² See, for example, Portico's detailed comments regarding issues such as server room temperature, staff access, and preferred file transfer and synchronization tools. Portico Comments at 3.

⁶³ 81 FR at 30509.

covers, including: technical characteristics, formats, rarity and special features, completeness, metadata, and technological measures.⁶⁴ In many instances the Best Edition Statement tracks, but does not mirror exactly, the Recommended Formats Statement. While the best edition of a work should be the edition published in the United States that the Library of Congress determines to be most suitable for its purposes, as with other aspects of any deposit requirement, deposit of such editions should not be overly burdensome to copyright owners. Thus, the goal in creating best edition criteria is to make depositing works as simple and inexpensive as possible while ensuring that the Library fulfills its role in acquiring and preserving the creative output of the nation.

As an initial matter, commenters voiced concerns that the best edition of electronic-only books would differ from the publication version of the electronic-only book.⁶⁵ The statute, however, requires the deposit only of the best *published* edition of a work.⁶⁶ It does not require the publisher or producer to create a special preservation copy simply for the benefit of the Library of Congress.

Relatedly, the Office does not agree with AAP's suggestion that books created solely in proprietary formats should be automatically exempt from the mandatory deposit requirements.⁶⁷ To begin with, the Library doubts this will be an issue with respect to the kinds of works that it wishes to include in the Library's collections. But in the unlikely event that the Library seeks to acquire a work that is *only* published in a proprietary

⁶⁴ *Recommended Formats Statement*, LIBR. OF CONG., <https://www.loc.gov/preservation/resources/rfs/textmus.html> (last visited Mar. 29, 2018).

⁶⁵ See AAP Comments at 16–17; Portico Comments at 4; SIIA Comments at 2.

⁶⁶ 17 U.S.C. 101 (“The ‘best edition’ of a work is the edition, *published in the United States* at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.” (emphasis added)).

⁶⁷ AAP Comments at 16–17.

format that cannot be viewed by the Library, the Office will work with the publisher to identify a means to access the work.

In responding to this inquiry, a few commenters addressed the viability of the Library's Recommended Formats Statement as an appropriate basis for the Best Edition Statement for electronic-only books.⁶⁸ While the University of Michigan Library voiced general support for use of the Recommended Formats Statement,⁶⁹ others offered input on that Statement's "formats" and "metadata" requirements as well as the "completeness" components. For instance, Portico suggested that several of the format and metadata standards found in the Recommended Formats Statement were acceptable, including XML-based markup formats (including BITS-, JATS-, and EPUB-compliant formats) and PDFs.⁷⁰ AAP voiced concerns, however, that the desired metadata identified by the Recommended Formats Statement included more fields, including "creation date," "place of publication," and "contact information," than are required by the ONIX for Books standard ("ONIX"), which they prefer.⁷¹ Portico offered additional helpful comments, suggesting that the Library should be able to accept metadata, such as a MARC record, apart from "rendition" material and that the Library "should encourage publishers to send ISBNs for all available formats of the book in the metadata record."⁷²

⁶⁸ Only Portico indirectly addressed the use of the electronic serials' best edition statement as the basis for a Best Edition Statement for electronic books, when it stated during its analysis of security-related concerns that "academic electronic book content typically utilizes the same range of formats as electronic serial content." Portico Comments at 2.

⁶⁹ Univ. of Mich. Libr. Comments at 4.

⁷⁰ Portico Comments at 2–3.

⁷¹ AAP Comments at 17; *see also* Univ. of Mich. Libr. Comments at 4 (noting support for accepting ONIX metadata as opposed to the Library's web forms). ONIX is a XML-based standard for communicating metadata, created in part by the Association of American Publishers, and includes information such as title, author, ISBN, BISAC Subject Codes, and more. *See ONIX for Books*, BOOK INDUS. STUDY GRP., <http://bisg.org/page/ONIXforBooks> (last visited Mar. 29, 2018).

⁷² Portico Comments at 2–3.

Based on this record, the Office believes that the Recommended Formats Statement is a viable basis for the Best Edition Statement with regards to format and metadata standards. Moreover, for purposes of consistency, the Office proposes to incorporate more of the requirements of the Recommended Formats Statement into the Best Edition Statement, for *both* electronic-only books and electronic-only serials.

Importantly, to address AAP's concern, submitting metadata will be required only if the metadata has been distributed together with the published copy of the electronic-only book, alleviating parties' concerns that widely-used standards, such as the ONIX standard, will fall short of the metadata requirements. Publishers do not need to gather or generate additional metadata that has not been published with the electronic-only serial or book to comply with the Best Edition Statement.

The University of Michigan Library suggested that if the Recommended Formats Statement is used as a basis for the Best Edition Statement, the "Completeness" section should be clarified to explain what is meant by the requirement to provide "[a]ll updates, supplements, releases, and supersessions published as part of the work and offered for sale or distribution" ⁷³ The Office agrees with this suggestion and proposes adding clarifying language in the Best Edition Statement for both electronic-only books and electronic-only serials indicating that all updates, supplements, releases, and supersessions to a previously demanded and delivered electronic-only book or serial must be submitted by the publisher to the Office. Finally, commenters discussed the value of requiring works to be deposited without technological measures that control access or use

⁷³ Univ. of Mich. Libr. Comments at 4–5 (quoting *Recommended Formats Statement*, LIBR. OF CONGRESS, <https://www.loc.gov/preservation/resources/rfs/textmus.html> (last visited Mar. 29, 2018)).

of the work, as is currently the case for electronic-only serials.⁷⁴ While the Office agrees that such technological protection measures provide significant security assurances,⁷⁵ it also believes that encumbering deposited copies with such protections would conflict with the Library's purposes of preserving the works.⁷⁶ The Office proposes that the existing requirement to remove technological measures that control access to or use of the work should remain a deposit requirement for electronic-only serials and should be included in the new regulation for electronic-only books.

III. CONCLUSION

In summary, the proposed rule would chiefly do the following:

(1) Create a new demand-based mandatory deposit scheme for electronic-only books, similar to that for electronic-only serials.

(2) Define electronic-only books to be an electronic literary work published in one volume or a finite number of volumes published in the United States and available only online.

(3) Create "best edition" requirements for electronic-only books, mirroring the Library's Recommended Formats Statement.

(4) Specify for all electronic-only works that a work shall be deemed to be available only online even if physical copies can be produced for consumers on demand.

(5) Clean up and clarify the existing rule on electronic-only serials, including the best edition requirements.

⁷⁴ 37 CFR pt. 202 app. B.IX.A.3.

⁷⁵ See Authors Guild Comments at 6.

⁷⁶ See Benetech Comments at 1; Univ. of Mich. Libr. Comments at 4; Univ. of Va. Libr. Comments at 6.

The Copyright Office hereby seeks comment from the public on the amendments proposed in this Notice of Proposed Rulemaking.

List of Subjects in 37 CFR Part 202

Copyright.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 202 as follows:

PART 202—GENERAL PROVISIONS

1. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408(f), 702.

2. Amend § 202.18 as follows:

a. In paragraph (a) add the words “and § 202.19, and transferred into the Library of Congress’s collections,” after “under § 202.4(e)” in the first sentence.

b. In paragraph (b), add the words “and § 202.19” after “under § 202.4(e)” in the first sentence.

c. In paragraph (c), add the words “and § 202.19” after “under § 202.4(e)” in the first sentence.

d. Add paragraph (f) to read as follows:

§202.18 Access to electronic works.

* * * * *

(f) Except as provided under special relief agreements entered into pursuant to § 202.19(e) or § 202.20(d), electronic works will be transferred to the Library of Congress for its collections and made available only under the conditions specified by this section.

3. Amend § 202.19 as follows:

a. Revise paragraph (b)(4).

b. In paragraph (c)(5), add “electronic-only books and” after the phrase “This exemption includes”.

The additions and revisions read as follows:

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

* * * * *

(b) * * *

(4) For purposes of paragraph (c)(5) of this section:

(i) An *electronic-only serial* is serial as defined in § 202.3(b)(1)(v) that is published in electronic form in the United States and available only online.

(ii) An *electronic-only book* is an electronic literary work published in one volume or a finite number of volumes published in the United States and available only online. This class excludes literary works distributed solely in phonorecords (*e.g.*, audiobooks), serials (as defined in § 202.3(b)(1)(v)), computer programs, websites, blogs, and emails.

(iii) A work shall be deemed to be *available only online* even if physical copies have been made on demand for individual consumers, so long as the work is otherwise available only online.

* * * * *

4. Amend § 202.24 as follows:

- a. In paragraph (a)(2), remove “works” and add in its place “electronic-only serials”.
- b. Redesignate paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5), respectively.
- c. Add new paragraph (a)(3).
- d. In paragraph (b), remove “online-only” and add in its place “electronic-only”.
- e. Revise paragraph (c)(3).

The additions and revisions read as follows:

§202.24 Deposit of published electronic works available only online.

(a) * * *

(3) Demands may be made only for electronic-only books published on or after EFFECTIVE DATE OF RULE.

* * * * *

(c) * * *

(3) “Electronic-only” works are electronic works that are published and available only online.

6. Amend Appendix B to part 202 as follows:

- a. Revise paragraph IX.

The revision reads as follows:

Appendix B to Part 202—“Best Edition” of Published Copyrighted Works for the Collections of the Library of Congress

* * * * *

IX. Electronic-Only Works Published in the United States and Available Only Online

For all deposits, technological measures that control access to or use of the work should be removed. In addition, the following encodings are listed in descending order of preference for all deposits in all categories below:

1. UTF-8.
 2. UTF-16 (with BOM).
 3. US-ASCII.
 4. ISO 8859.
 5. All other character encodings.
- A. Electronic-Only Serials:
1. Content Format:
 - a. Serials-specific structured/markup format:
 - (i) Content compliant with the NLM Journal Archiving (XML) Document Type Definition (DTD), with presentation stylesheet(s), rather than without NISO JATS: Journal Article Tag Suite (NISO Z39.96-201x) with XSD/XSL presentation stylesheet(s) and explicitly stated character encoding.
 - (ii) Other widely used serials or journal XML DTDs/schemas, with presentation stylesheet(s), rather than without.
 - (iii) Proprietary XML format for serials or journals (with documentation), with DTD/schema and presentation stylesheet(s), rather than without.

b. Page-oriented rendition:

(i) PDF/UA (Portable Document Format/Universal Accessibility; compliant with ISO 14289-1).

(ii) PDF/A (Portable Document Format/Archival; compliant with ISO 19005).

(iii) PDF (Portable Document Format, with searchable text, rather than without; highest quality available, with features such as searchable text, embedded fonts, lossless compression, high resolution images, device-independent specification of colorspace; content tagging; includes document formats such as PDF/X).

c. Other structured or markup formats:

(i) Widely-used serials or journal non-proprietary XML-based DTDs/schemas with presentation stylesheet(s).

(ii) Proprietary XML-based format for serials or journals (with documentation) with DTD/schema and presentation stylesheet(s).

(iii) XHTML or HTML, with DOCTYPE declaration and presentation stylesheet(s).

(iv) XML-based document formats (widely used and publicly documented). With presentation stylesheets, if applicable. Includes ODF (ISO/IEC 26300) and OOXML (ISO/IEC 29500).

d. PDF (web-optimized with searchable text).

e. Other formats:

(i) Rich text format.

(ii) Plain text.

(iii) Widely-used proprietary word processing or page-layout formats.

(iv) Other text formats not listed here.

2. Metadata Elements: If included with published version of work, descriptive data (metadata) as described below should accompany the deposited material:

a. Title level metadata: serial or journal title, ISSN, publisher, frequency, place of publication.

b. Article level metadata, as relevant/ or applicable: volume(s), number(s), issue dates(s), article title(s), article author(s), article identifier (DOI, etc.).

c. With other descriptive metadata (e.g., subject heading(s), descriptor(s), abstract(s)), rather than without.

3. Completeness:

a. All elements considered integral to the publication and offered for sale or distribution must be deposited – *e.g.*, articles, table(s) of contents, front matter, back matter, etc.

Includes all associated external files and fonts considered integral to or necessary to view the work as published.

b. All updates, supplements, releases, and supersessions published as part of the work and offered for sale or distribution must be deposited and received in a regular and timely manner for proper maintenance of the deposit.

B. Electronic-Only Books:

1. Content Format:

a. Book-specific structured/markup format, *i.e.*, XML-based markup formats, with included or accessible DTD/schema, XSD/XSL presentation stylesheet(s), and explicitly stated character encoding:

(i) BITS-compliant (NLM Book DTD).

(ii) EPUB-compliant.

- (iii) Other widely-used book DTD/schemas (e.g., TEI, DocBook, etc.).
- b. Page-oriented rendition:
 - (i) PDF/UA (Portable Document Format/Universal Accessibility; compliant with ISO 14289-1).
 - (ii) PDF/A (Portable Document Format/Archival; compliant with ISO 19005).
 - (iii) PDF (Portable Document Format; highest quality available, with features such as searchable text, embedded fonts, lossless compression, high resolution images, device-independent specification of colorspace; content tagging; includes document formats such as PDF/X).
- c. Other structured markup formats:
 - (i) XHTML or HTML, with DOCTYPE declaration and presentation stylesheet(s).
 - (ii) XML-based document formats (widely-used and publicly-documented), with presentation style sheet(s) if applicable. Includes ODF (ISO/IEC 26300) and OOXML (ISO/IEC 29500).
 - (iii) SGML, with included or accessible DTD.
 - (iv) Other XML-based non-proprietary formats, with presentation stylesheet(s).
 - (v) XML-based formats that use proprietary DTDs or schemas, with presentation stylesheet(s).
- d. PDF (web-optimized with searchable text).
- e. Other formats:
 - (i) Rich text format.
 - (ii) Plain text.
 - (iii) Widely-used proprietary word processing formats.

(iv) Other text formats not listed here.

2. Metadata Elements: If included with published version of work, descriptive data (metadata) as described below should accompany the deposited material:

a. As supported by format (*e.g.*, standards-based formats such as ONIX, XMP, MODS, or MARCXML either embedded in or accompanying the digital item): title, creator, creation date, place of publication, publisher/producer/distributor, ISBN, contact information.

b. Include if part of published version of work: language of work, other relevant identifiers (*e.g.*, DOI, LCCN, etc.), edition, subject descriptors, abstracts.

3. Rarity and Special Features:

a. Limited editions (including those with special features such as high resolution images.)

b. Editions with the greatest number of unique features (such as additional content, multimedia, interactive elements.)

4. Completeness:

a. For items published in a finite number of separate components, all elements published as part of the work and offered for sale or distribution must be deposited. Includes all associated external files and fonts considered integral to or necessary to view the work as published.

b. All updates, supplements, releases, and supersessions published as part of the work and offered for sale or distribution must be submitted and received in a regular and timely manner for proper maintenance of the deposit.

Dated: April 6, 2018.
Sarang Vijay Damle,
General Counsel and

Associate Register of Copyrights

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