



LIBRARY OF CONGRESS

U.S. Copyright Office

37 C.F.R. Part 202

[Docket No. 2016-3]

Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online

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

ACTION: Notice of inquiry.

SUMMARY: In 2010, the U.S. Copyright Office, acting pursuant to section 407 of title 17 and following a public rulemaking process, adopted an interim rule governing mandatory deposit of electronic works that are not available in a physical format. The interim rule refers to such works as “electronic works published in the United States and available only online” (or “online-only works”). The interim rule created a limited exception to the Register’s longstanding regulatory exemption that online-only works are not subject to mandatory deposit requirements. It also established best edition criteria and regulations as to electronic serials requested pursuant to section 407. The Library has adopted policies for the use of such materials, including limiting public access to deposited works to dedicated terminals located at the Library of Congress in Washington, D.C. These policies were anticipated and discussed during the rulemaking process, but are not memorialized in the regulations.

The Library of Congress is now interested in extending the interim rule to apply to online-only books and sound recordings. Because over six years have passed since the interim rule was adopted, and because the interim rule was intended to inform a more

permanent solution and rule, the Copyright Office is initiating a notice of inquiry to further guide its work in this area. The Copyright Office seeks feedback from affected communities regarding the experience with mandatory deposit of electronic serials, generally, as well as comments pertaining to the potential application of mandatory deposit to online-only books and sound recordings, specifically. Based on this feedback, the Office will solicit further written comments and/or invite stakeholder meetings before moving to a rulemaking process.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 60 DAYS AFTER 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 therefore to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <http://copyright.gov/policy/mandatorydeposit/comment-submission/>. 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: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, jcharlesworth@loc.gov; or Sarang V. Damle, Deputy General Counsel, sdam@loc.gov. Both can be reached by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

A. Mandatory Deposit Under the Copyright Act Generally

Mandatory deposit provisions, sometimes called “legal deposit” in foreign countries, permit national libraries to demand creative works for their respective collections pursuant to applicable laws, rights, restrictions, regulations, and fines. In the United States, the authority to demand, exempt, and otherwise regulate such works vests with the Register of Copyrights, who administers section 407 of title 17 of the United States Code, part of the Copyright Act.

Section 407 provides that the owner of copyright, or of the exclusive right of publication, in a work published in the United States is required to deposit two complete copies (or, in the case of sound recordings, two phonorecords) of the “best edition” of the work with the Copyright Office¹ for the use or disposition of the Library of Congress.² The Library is not entitled to works that fall outside of the statutory framework, *e.g.*, editions not published in the United States.

Section 202.19 of title 37 of the Code of Federal Regulations sets forth a number of rules governing the mandatory deposit of copies and phonorecords under section 407, including certain best edition requirements. Appended to part 202 is a list, entitled “‘Best Edition’ of Published Copyrighted Works for the Collection of the Library of Congress” (referred to as the “Best Edition Statement”), which sets forth the best edition criteria for particular categories of works.³ The same appendix specifies which published version

¹ 17 U.S.C. 407(a).

² *Id.* at 407(b).

³ 37 CFR pt. 202 app. B.

must be deposited in instances where “two or more editions of the same version of a work have been published.”⁴ The term “best edition of a work” is defined by statute as 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 purpose.”⁵ The Register has observed that it is really a preservation copy, rather than the best published copy, that is of interest to the Library, and has suggested that section 407 may need to be updated accordingly.⁶

Section 407 further provides that deposit is to be made within three months after such publication.⁷ If mandatory deposit is not satisfied, the Register of Copyrights may issue a demand for the work.⁸ The copyright owner may be subject to fines and other monetary liability if the owner fails to comply after a demand for deposit is made by the Register.⁹

These general provisions, however, are subject to limitations. Section 407 provides that the Register of Copyrights may by regulation “exempt any categories of material from the deposit requirements of [that] section, or require deposit of only one copy or phonorecord with respect to any categories.”¹⁰ Thus, in carrying out the authority provided under section 407, the Register seeks to fulfill the stated needs of the Library of Congress while balancing any competing concerns or requirements of the

⁴ *Id.*

⁵ 17 U.S.C. 101.

⁶ Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUMBIA J. OF L. & THE ARTS 316, 336 (2013).

⁷ 17 U.S.C. 407(a).

⁸ *Id.* at 407(d).

⁹ *Id.*

¹⁰ *Id.* at 407(c). With respect to certain pictorial, graphic and sculptural works that are published in limited numbers, the statute requires the Register to issue regulations that “provide either for complete exemption from the deposit requirements” of section 407 or “for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor.” *Id.* These regulations can be found in 37 CFR 202.19.

copyright system and affected parties. Such concerns are considered through a public rulemaking process carried out under the Administrative Procedure Act.¹¹

Finally, the registration and deposit provisions of section 408 as to published works generally require the submission for examination of two complete copies of the best edition.¹² And section 408 further states that deposits made under section 407 may be used to satisfy the deposit requirements of section 408 if application, fee and regulatory conditions are met.¹³ As such, the extension of mandatory deposit to new categories of online-only works under section 407, and the particular deposit requirements that may be adopted, will necessarily affect registration practices as to works that are typically, or frequently, registered.

B. Mandatory Deposit of Electronic Materials Available Only Online

When regulations implementing section 407 were first promulgated by the Copyright Office in 1978, the Office adopted a broad exemption from the mandatory deposit requirements for “[l]iterary works, including computer programs and automated databases, published in the United States only in the form of machine readable copies (such as magnetic tape or disks, punch cards, or the like) from which the work cannot ordinarily be visually perceived except with the aid of a machine or device.”¹⁴ Over time, the Office narrowed this exemption to require the deposit of certain electronic materials if they are made available in a physical medium, such as electronic databases that are

¹¹ See 17 U.S.C. 701(e).

¹² 17 U.S.C. 408(b)(2).

¹³ *Id.* at 408(b).

¹⁴ 37 CFR 202.19(c)(5) (1978).

published in CD-ROM copies.¹⁵ Until 2010, however, Copyright Office practice exempted from mandatory deposit requirements all electronic works not made available in physical format.¹⁶

On January 25, 2010, after a period of notice and public comment, the Copyright Office adopted a new interim rule to address the mandatory deposit requirements for published electronic works that are only made available online.¹⁷ For purposes of the interim rule, “electronic works” are defined as “works fixed and published solely in an electronic format.”¹⁸ “Online-only works” thus encompasses works that are not published in physical formats and are made available via a live internet connection or downloaded from the internet onto a device and viewed, heard, or used offline. In this regard, it should be noted that the interim rule covers only works that are *published* online, not online works that are only publicly displayed or publicly performed online.¹⁹

The interim rule did two key things. First, it codified the Office’s longstanding practice of exempting online-only works from the requirements of mandatory deposit as a general matter.²⁰ Second, notwithstanding the general exemption, the interim rule provided, for the first time, a mechanism by which the Office could demand one particular type of online-only work for the Library—namely, “electronic serials.” An

¹⁵ In 1989, the Copyright Office amended the machine-readable copies exemption to require the deposit of machine-readable works published in physical form, exempting only “automated databases available only in the United States.” 54 FR 42295, 42296, Oct. 16, 1989. Two years later, the Copyright Office amended its regulation to clarify that CD-ROM packages were the preferred form of deposit for machine-readable works published in physical form. 56 FR 47402, Sept. 19, 1991.

¹⁶ See 74 FR 34286, 34287, Jan. 15, 2009 (explaining that the established Office practice was to interpret the exclusion for “automated databases available only online in the United States” to refer to all online-only publications). By contrast, works that are published both in an electronic and physical format are subject to the mandatory deposit requirement. 37 CFR 202.19(c)(5).

¹⁷ 75 FR 3863, Jan. 25, 2010; see also 74 FR 34286, Jul. 15, 2009.

¹⁸ 37 CFR 202.24(c)(3).

¹⁹ See 17 U.S.C. 101 (“A public performance or display of a work does not in itself constitute publication.”).

²⁰ 37 CFR 202.19(c)(5) (exempting “[e]lectronic works published in the United States and available only online”).

“electronic serial” is defined as “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.”²¹ The interim rule states that this class include “periodicals, newspapers, annuals, and the journals, proceedings, transactions, and other publications of societies.”²²

In extending mandatory deposit requirements to online-only serials, the Office observed that “the Internet has grown to become a fundamental tool for the publication and dissemination of millions of works of authorship.”²³ The Office noted that there were then “more than five thousand scholarly electronic serials available exclusively online, with no print counterparts.”²⁴ Even where the Library purchased a subscription to such a work, it would rarely be able to acquire a permanent copy for its collections, placing the “long-term preservation of the works at risk.”²⁵

Under the interim rule, a publisher does not need to proactively deposit copies of electronic serials with the Copyright Office.²⁶ An electronic serial is subject to mandatory deposit only if the Register of Copyrights specifically demands a copy of the online-only serial for the Library; or, put another way, the longstanding exemption continues to apply until overtaken by a demand for a specific work.²⁷ A publisher receiving such a demand must deposit “one complete copy or a phonorecord” of “the

²¹ *Id.* at 202.19(b)(4).

²² *Id.*

²³ 75 FR at 3864.

²⁴ *Id.*

²⁵ *Id.* at 3864-65.

²⁶ 37 CFR 201.19(c)(5) (providing that the exemption from mandatory deposit for online-only works “includes electronic serials available only online only until such time as a demand is issued by the Copyright Office under the regulations set forth in § 202.24 of these regulations”).

²⁷ *See* 37 CFR 202.24(a).

demanded work within three months of the date the demand notice is received.”²⁸ The interim rule also amended the “Best Edition Statement” in appendix B of part 202 of title 37, Code of Federal Regulations, to specify the criteria that should be applied in cases where a publisher has distributed two or more editions of a particular serial.²⁹ In such a case, for example, the statement indicates that the Library prefers to receive the edition that was published in a “[s]erials-specific structured/markup format,” namely, “[c]ontent compliant with the NLM Journal Archiving (XML) Document Type Definition (DTD), with presentation stylesheet(s), rather than without.”³⁰ If the serial was published with metadata elements, the statement also notes that “descriptive data (metadata) should accompany the deposited material,” such as “serial or journal title,” “volume(s), numbers, issue dates,” and “article author(s).”³¹ If the serial was published with technological protection measures, the statement also notes that the Library prefers that “[t]echnological measures that control access to or use of the work should be removed.”³²

The interim rule also provides for public access to deposited works, stating that “[c]opies or phonorecords deposited in response to a demand must be able to be accessed and reviewed by the Copyright Office, Library of Congress, and the Library’s authorized users on an ongoing basis.”³³ More specifically, in response to stakeholders seeking clarification regarding the Library’s downloading, distribution, and interlibrary loan practices with respect to electronically deposited works, the Federal Register notice

²⁸ 37 CFR 202.24(a), (a)(3).

²⁹ 37 CFR pt. 202, app. B, sec. IX.

³⁰ *Id.* at sec. IX.A.1.a(i).

³¹ *Id.* at sec. IX.A.2.

³² *Id.* at sec. IX.A.3.

³³ 37 CFR 202.24(a)(4).

announcing the interim rule explained that access to such works would be available only to “authorized users at the Library of Congress” in accordance with the following policies:

- Access to electronic works received through mandatory deposit will be as similar as possible to the access provided to analog works.
- Access to electronic works received through mandatory deposit will be limited, at any one time, to two Library of Congress authorized users.
- Library of Congress authorized users will access the electronic works via a secure server over a secure network that serves Capitol Hill facilities and remote Library of Congress locations. The term “Library of Congress authorized users” includes Library staff, contractors, and registered researchers, and Members, staff and officers of the U.S. House of Representatives and the U.S. Senate. The Library will not make the copyrighted works available to the public over the Internet without rights holders’ permissions.
- Authorized users may print from electronic works to the extent allowed by the fair use provisions of the copyright law (17 U.S.C. 107 and 108(f)), as is the case with traditional publications. However, users may not reproduce or distribute (i.e., download or email) copies of deposited electronic works until the Library has explored the advisability of permitting these options and the security and feasibility of the implementing technologies. As part of this process, the Library will seek comment from the public, including copyright owners and publishers, before adopting additional policies governing electronic copying or distribution by electronic transmission.³⁴

The Library instituted these policies in recognition of the fact that “electronic works, because of their ease of reproduction and distribution, present special security concerns.”³⁵

In accordance with these policies, the Library developed a system for providing and controlling access to electronic serials collected under the interim rule. The serials are stored on a server located in the Library’s Capitol Hill facilities. The electronic files can be viewed on two secure terminals located in the Microform & Electronic Resources Center (“MERC”), located in the Library of Congress’s Jefferson Building, which

³⁴ 75 FR at 3867-68.

³⁵ 75 FR at 3867.

together constitute the sole point of public access to the files. The terminals have a web-based interface for searching and browsing the electronic serials collected by the Library. Individual articles are opened and read using customized viewing software that prevents users from being able to save or download a copy.³⁶ The software also allows users to print the entire article to a color printer attached to the terminals, without charge. To help guide their printing activities, users are presented with a set of fair use criteria in a short training manual stored next to the terminal. While users may browse, read, and print articles on the terminals, the Library has disabled access to the terminals' USB ports to prevent users from making electronic copies. Internet access on the terminals has also been disabled.

In adopting the interim rule in 2010, the Copyright Office emphasized that “[t]he rule is interim, and not final, because the Office anticipates that the experience of issuing and responding to demands for online-only works will raise additional issues that should be considered before the regulation becomes final, *e.g.*, the technical details of how an online-only work should be transmitted to the Copyright Office.”³⁷ After issuing the interim rule, the Office met with members of the publishing community on May 24, 2011 to further discuss the Library's expectations and submission questions, but has not further sought or received public comment on the qualified exemption and demand-based deposit system for online-only works through an additional rulemaking process. Since the

³⁶ It appears that, as a technical matter, the article is copied to a temporary location on the terminal's hard drive before it is opened by the viewing software.

³⁷ 75 FR at 3864.

promulgation of the interim rule, the Library has collected over 400 electronic serial titles that are now available through the two dedicated computer terminals in the MERC.³⁸

II. Proposed Expansion of Mandatory Deposit Requirements to Include Online-only Books and Sound Recordings

Although the 2010 interim rule requires publishers to deposit only electronic serials—and only when the Office issues a demand for such a work—in promulgating that rule, the Register noted that mandatory deposit might be expanded over time to encompass new categories of online-only works.³⁹ At this time, the Library has communicated to the Copyright Office its interest in obtaining online-only books and online-only sound recordings via mandatory deposit. Accordingly, the Office requests public comment regarding the imposition of a demand-based deposit system, akin to that provided under the interim rule for electronic serials, to these new categories of online-only works.

A. Online-only Books

The Library has requested that the Copyright Office issue demands for electronic books that have been published solely through online channels. To be clear, in the case of a book published in both physical and electronic formats, the publisher would still be

³⁸ Nonetheless, there is some agreement that the underlying provisions of the Copyright Act, codified in 1976, can only accomplish so much. As a general observation, the Office of the Inspector General of the Library of Congress recently commented that mandatory deposit may be one of several means of obtaining electronic deposits, but that in some cases “negotiated arrangements with private and public entities may be the only way forward.” OFFICE OF THE INSPECTOR GENERAL, THE LIBRARY NEEDS TO DETERMINE AN EDEPOSIT AND ECOLLECTIONS STRATEGY 11 (2015), available at <https://www.loc.gov/portals/static/about/documents/edeposit-and-ecollections-strategy-april-2015.pdf>. More specifically, the Register has testified that the mandatory deposit provisions in title 17 are “out of date and require attention” from Congress, and that issues include the “operation and relationship of mandatory deposit requirements to copyright registration requirements, the viability of ‘best edition’ requirements in the digital age, security of electronic works, and consideration of the Library’s stated goals.” *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on Judiciary*, 114th Cong. 37-38 (2015) (statement of Maria A. Pallante, Register of Copyrights).

³⁹ 75 FR at 3864.

required to deposit the physical format as the “best edition” under section 407, rather than the electronic format.⁴⁰

The Library has some experience in collecting, preserving and providing limited access to electronic deposits of text-based works under the existing interim rule for electronic serials. But there are some notable differences between online-only books and electronic serials. For example, many electronic serials, such as those in certain commercial journal databases, are accessed on a subscription basis and viewed via a live internet connection. Indeed, it was this fact that originally led the Office to adopt mandatory deposit requirements for electronic serials. As the Office noted in the 2010 interim rule, “subscriptions are typically ‘access only,’ and rarely allow the Library to acquire a ‘best edition’ copy for its collections.” The lack of mandatory deposit in this context thus “place[d] the long-term preservation of the works at risk.”⁴¹

Under any rule requiring mandatory deposit of online-only books, the Library proposes to provide public access to such books under the same policies adopted in the 2010 interim rule (which could be included in the regulatory provision itself), which, as noted above, are as follows:

- Access to electronic works received through mandatory deposit will be as similar as possible to the access provided to analog works.
- Access to electronic works received through mandatory deposit will be limited, at any one time, to two Library of Congress authorized users.
- Library of Congress authorized users will access the electronic works via a secure server over a secure network that serves Capitol Hill facilities and remote Library of Congress locations. The term “Library of Congress authorized users” includes Library staff, contractors, and registered researchers, and Members, staff and officers of the U.S. House of Representatives and the U.S. Senate. The Library will not make the copyrighted works available to the public over the Internet without rights holders’ permissions.

⁴⁰ See 37 CFR 202.19(c)(5).

⁴¹ 75 FR at 3864.

- Authorized users may print from electronic works to the extent allowed by the fair use provisions of the copyright law (17 U.S.C. 107 and 108(f)), as is the case with traditional publications. However, users may not reproduce or distribute (i.e., download or email) copies of deposited electronic works until the Library has explored the advisability of permitting these options and the security and feasibility of the implementing technologies. As part of this process, the Library will seek comment from the public, including copyright owners and publishers, before adopting additional policies governing electronic copying or distribution by electronic transmission.

Although the above policies are identical to those articulated in the 2010 interim rule, the Library believes that in the future it may be able to comply with these policies using different technical means than are currently available. In addition, as noted above, the “Best Edition Statement” specifies the criteria that should be applied in cases where a publisher issues two or more editions of the same electronic serial. But these criteria, listed in 37 CFR, part 202, appendix B, do not appear to readily extend to electronic books. To this end, the Library believes it is possible that the criteria specified in the Library’s “Recommended Formats Statement”⁴² for digital textual works could be adapted for this purpose.

B. Online-only Sound Recordings

The Library has also communicated to the Copyright Office its interest in acquiring online-only sound recordings under section 407. Demands would issue only for sound recordings that are fixed and published solely in online-only electronic format. In the case of a sound recording published in both physical and electronic form, the publisher would be required to deposit the physical format as the “best edition,” rather than the electronic version.⁴³

⁴² <https://www.loc.gov/preservation/resources/rfs/TOC.html>.

⁴³ See 37 CFR 202.19(c)(5).

As with online-only books, it seems that many, if not most, published sound recordings are available not only via subscription services, but also for purchase and download. As explained above, this is distinct from electronic serials, many of which are accessible to end users only through a subscription service. The Office invites comment on this difference as it may relate to the advisability of extending on-demand deposit requirements to online-only sound recordings, including the need for such mandatory deposit to further the Library's collection and preservation goals.

Under any rule requiring mandatory deposit of online-only sound recordings, the Library would provide public access to such recordings. The Library currently has a system by which authorized users can access and listen to digitized copies of physical sound recordings collected through other means at the Madison Building of the Library of Congress. Currently, users may access such recordings through six dedicated computer terminals.⁴⁴ The Library, however, expects to modify this system to bring it into compliance with the policies identified in the 2010 interim rule before it is used to provide access to any online-only sound recordings obtained via mandatory deposit.

Those policies are:

- Access to electronic works received through mandatory deposit will be as similar as possible to the access provided to analog works.

⁴⁴ The Library's Motion Picture, Broadcasting, and Recorded Sound Division currently allows Library patrons to listen to digitized versions of sound recordings in its Recorded Sound Collection via either one of five dedicated computers located in the Recorded Sound Reference Center's main listening room in the Madison Building, or at an additional terminal located in a private listening room set off from the main listening room. *See generally* Guidelines for Listening to Sound Recordings, LIBRARY OF CONGRESS, <https://www.loc.gov/rr/record/rrinstructions.html>. Public use of these facilities is by appointment only; in advance of the appointment, the Library digitizes any requested materials and copies those materials onto a server located at the Packard Campus of the National Audio-Visual Conservation Center of the Library, located in Culpeper, Virginia. The content is then downloaded to the Madison Building terminals via a 75-mile dedicated fiber optic cable network that connects the Packard Campus to the Library's Capitol Hill facilities. In describing this arrangement, the Copyright Office does not mean to suggest an opinion on the copyright implications of such a system.

- Access to electronic works received through mandatory deposit will be limited, at any one time, to two Library of Congress authorized users.
- Library of Congress authorized users will access the electronic works via a secure server over a secure network that serves Capitol Hill facilities and remote Library of Congress locations. The term “Library of Congress authorized users” includes Library staff, contractors, and registered researchers, and Members, staff and officers of the U.S. House of Representatives and the U.S. Senate. The Library will not make the copyrighted works available to the public over the Internet without rights holders’ permissions.
- Users may not reproduce or distribute (i.e., download or email) copies of deposited electronic works until the Library has explored the advisability of permitting these options and the security and feasibility of the implementing technologies. As part of this process, the Library will seek comment from the public, including copyright owners and publishers, before adopting additional policies governing electronic copying or distribution by electronic transmission.

Again, although, with the exception of the policy regarding printing of electronic works, the above policies are identical to those articulated in the 2010 interim rule, the Library believes that in the future it may be able to comply with these policies using different technical means than are currently available. In addition, no “best edition” criteria exist yet for online-only sound recordings. Here too, however, the Library is proposing that the criteria specified in the Library’s “Recommended Formats Statement”⁴⁵ for digital audio works could be adapted for this purpose.

III. Subjects of Inquiry

The Office invites written comments on the general subjects below. A party choosing to respond to this notice of inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted. In responding, please identify your particular interest in and experience with these issues.

⁴⁵ <https://www.loc.gov/preservation/resources/rfs/TOC.html>.

1. Please comment 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.

2. Please comment on the Library's adopted policies as to the interim rule and/or their application to online-only books and/or sound recordings.

3. Please 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 and/or sound recordings collected under section 407.

4. Please provide comments and observations regarding the application of "best edition" requirements to online-only books and/or sound recordings, including whether and how the "best edition" criteria for electronic serials found in part 202 of 37 CFR, appendix B, or the guidelines from the Library's Recommended Formats Statement, might or might not be adapted to address these additional categories of online-only works.

Dated: May 11, 2016

Maria A. Pallante
Register of Copyrights
U.S. Copyright Office

[BILLING CODE 1410-30-P]

[FR Doc. 2016-11613 Filed: 5/16/2016 8:45 am; Publication Date: 5/17/2016]