



LIBRARY OF CONGRESS

U.S. 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: Final rule.

SUMMARY: The Copyright Office is amending its regulations to make electronic-only books published in the United States subject to the Copyright Act’s mandatory deposit provisions if they are affirmatively demanded by the Office. The final rule largely adopts the language set forth in the Office’s June 2020 notice of proposed rulemaking, with one additional clarification regarding the rule’s applicability to print-on-demand books.

DATES: Effective **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

I. Background

Under section 407 of title 17, the owner of the 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” with the Copyright Office

“for the use or disposition of the Library of Congress.”¹ The “best edition” is defined 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 purposes.”² 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.

Under the statute, the Register of Copyrights may issue a written demand for works at any time after they have been published in the United States, and failure to deposit after a demand may subject the recipient to monetary liability.³ Compliance with this section is separate from the copyright registration process, 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

The Register of Copyrights may, by regulation, exempt categories of works from the mandatory deposit requirement.⁵ Under this authority, the Office issued an interim rule in 2010 (the “2010 Interim Rule”) codifying its established practice of excluding from mandatory deposit requirements all “[e]lectronic works published in the United States and available only online.”⁶ The 2010 Interim Rule referred to such works as

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

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

³ 17 U.S.C. 407(d).

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. 407(c).

⁶ Mandatory Deposit of Published Electronic Works Available Only Online, 75 FR 3863, 3869 (Jan. 25, 2010) (“2010 Interim Rule”); 37 CFR 202.19(c)(5).

“electronic-only.” The Office also, however, adopted an exception to this exemption, requiring the deposit of electronic-only serials if affirmatively demanded by the Office.⁷

In 2016, the Office issued a notice of inquiry (“NOI”) that proposed adding a new category of online works—electronic-only books—to the mandatory deposit framework. As with electronic-only serials, the Office proposed that electronic-only books would be subject to mandatory deposit only upon demand by the Office.⁸ In April 2018, following consideration of public comments received in response to the NOI, the Office issued a notice of proposed rulemaking (“2018 NPRM”) setting forth regulatory language to implement this change. The 2018 NPRM proposed to define “electronic-only book” 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 some exclusions for specific types of works such as serials, audiobooks, websites, blogs, and emails.⁹

The Office received nine comments in response to the 2018 NPRM. Commenters generally expressed agreement with the broad goal of supporting the Library’s acquisition and preservation of digital materials for the benefit of the American public,¹⁰

⁷ 2010 Interim Rule at 3865–66. “Electronic works” are themselves defined as “works fixed and published solely in an electronic format.” 37 CFR 202.24(c)(3).

⁸ *Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online: Notice of Inquiry*, 81 FR 30505, 30506–08 (May 17, 2016). The NOI also included online sound recordings as a potential additional category of works to subject to mandatory deposit, but the Office has decided to postpone further consideration of this issue until after the conclusion of this rulemaking.

⁹ *Id.* at 16272.

¹⁰ *See, e.g.*, Library Copyright Alliance 2018 NPRM Comment at 2 (supported the proposed rule “because of the critical role of deposit in building the Library’s collection and ensuring long-term preservation” of digital materials); Authors Guild 2019 NPRM Comment at 2 (noting Library “cannot fulfill [its] mission today without collecting books that are published only in electronic form”); American Association of Publishers 2018 NPRM Comment at 3–4 (stating “[p]ublishers have long supported the special privilege of the Library to collect works”).

but they raised questions about what material would be collected¹¹ and how the Library's IT security infrastructure would keep deposited materials secure.¹²

In response to those comments, the Office issued a revised NPRM on June 29, 2020 ("2020 NPRM").¹³ To address questions about the scope of the rule, the 2020 NPRM clarified that short online works such as social media posts would not be subject to demand but that that online-only books preloaded onto electronic devices such as tablets would be covered if otherwise available only online.¹⁴ The 2020 NPRM also explained that the rule did not apply to copies of e-books printed by an author, publisher, or distributor in response to purchases by individual consumers. Such books would "instead remain subject to the general mandatory deposit obligation under section 407."¹⁵

In addition, the 2020 NPRM revised the requirement proposed in the 2018 NPRM that technological protection measures ("TPMs") controlling access to or use of deposits be removed. Instead, the Office proposed to update the Best Edition regulations in Appendix B to Part 202 to reflect the Library's preference for a TPM-free edition, if such a version has been published.¹⁶ If no TPM-free edition has been published, the proposed

¹¹ See, e.g., Authors Guild 2018 NPRM Comment at 3–4 (raising questions about the Library's collections policies and recommending changes to definition of "electronic-only book"); National Writers Union 2018 NPRM Comment at 3–4 (expressing uncertainty about what material would be demanded based on Library collections policies); Copyright Alliance 2018 NPRM Comment at 3 (raising questions about Library's collections strategy). All public comments in this rulemaking may be accessed at <https://www.copyright.gov/rulemaking/ebookdeposit/>.

¹² Copyright Alliance 2018 NPRM Comment at 4 (requesting the Library "demonstrat[e] the adequacy of the Library's IT system" before finalizing the rule); Authors Guild 2018 NPRM Comment at 3 (seeking additional specifics about the "security measures for e-books" and requesting more information about Library's creation of a secure e-book repository); American Association of Publishers 2018 NPRM Comment at 2–3 (seeking additional information about "the state of the Library's technology capabilities, protocols, and security measures").

¹³ 85 FR 38806 (June 29, 2020) ("2020 NPRM").

¹⁴ 2020 NPRM at 38809.

¹⁵ 2020 NPRM at 38809–10.

¹⁶ 2020 NPRM at 38811.

rule would next accept a copy for which the copyright owner has elected to remove such measures.¹⁷ If the owner declines to do so, the deposit must otherwise comply with the general requirement that copies can be accessed and reviewed on an ongoing basis.¹⁸

Finally, the 2020 NPRM addressed questions raised by commenters regarding the Library's collections policies and security practices. With respect to digital collections, the Office explained that, since the close of the 2018 NPRM comment period, the Library had provided additional information about its digital strategy and collections plans in several publicly available documents.¹⁹ As to concerns about the Library's IT security, the 2020 NPRM noted the many steps the Library has taken to improve its IT systems in recent years, as reflected in congressional testimony, Inspector General's reports, and other public materials. Those efforts include hiring a Chief Information Officer, centralizing all IT efforts in a single office, and implementing almost all of the thirty-one public recommendations from a 2015 report by the Government Accountability Office.²⁰ The 2020 NPRM concluded that "these security upgrades, together with the additional IT-related information made public since the close of the prior comment period, may reasonably address the concerns raised by commenters regarding the security of digital deposits."²¹ To ensure, however, that stakeholders had an adequate opportunity to consider and respond to this new information, the Office invited further public comment.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 2020 NPRM at 38810 (citing Library of Congress, *Enriching the Library Experience: The FY2019–2023 Strategic Plan of the Library of Congress*, https://www.loc.gov/static/portals/strategic-plan/documents/LOC_Strat_Plan_2018.pdf and Library of Congress, *Digital Strategy* (Apr. 26, 2019), <https://www.loc.gov/static/portals/digital-strategy/documents/Library-of-Congress-Digital-Strategy-v1.1.2.pdf>).

²⁰ 2020 NPRM at 38812.

²¹ 2020 NPRM at 38814.

II. The Final Rule

The Office received four comments on the 2020 NPRM, none of which objected to finalizing the rule. The Authors Guild stated that the revised rule “adequately addresses almost all of our prior concerns” and that it is “satisfied by the Library of Congress’ progress” in securing and managing its IT infrastructure.²² The Library Copyright Alliance also supported making the rule final, noting “the critical role of deposit in building the Library’s collection and ensuring long-term preservation of these works.”²³ An individual commenter, Owen Linback, likewise expressed support for the proposed revisions.²⁴

The University of Michigan Library Copyright Office (“UM Library”) did not state an objection to finalizing the rule, but it “strongly urge[d]” that the final rule require deposited copies to “be free from encryptions and digital rights management technologies.”²⁵ In the UM Library’s view, “[w]hen copies are encumbered with technological protection measures such as encryption or DRMs . . . they obstruct preservation, authorized access to information, and accessibility.”²⁶ The Office appreciates the need to ensure appropriate access to deposit materials, and the 2020 NPRM noted that “the Library generally prefers TPM-free editions of works to simplify and further its preservation efforts.”²⁷ As the Office discussed, however, that interest

²² Authors Guild Comments at 1.

²³ Library Copyright Alliance (LCA) Comments at 2. LCA also urged the Office to initiate a rulemaking on access restrictions on deposited electronic materials and expand the proposed rule to sound recordings. *Id.* at 4–5. As noted in the 2018 NPRM with respect to deposit of electronic-only sound recordings, the Office is “postponing further consideration of this issue until after the conclusion of the present rulemaking.” 2018 NPRM at 16270.

²⁴ Comments of Owen Linback.

²⁵ Univ. of Mich. Library Copyright Office Comments at 1.

²⁶ *Id.*

²⁷ 2020 NPRM at 38811.

must be balanced against the language of section 407, which requires only that copyright owners deposit the best *published* edition of a work. Additionally, section 1201 separately protects the right of copyright owners to distribute works with TPMs.²⁸ The Office must implement its regulatory authority against the backdrop of that legal protection. The Office accordingly proposed a more flexible approach under which TPM-free copies of a work, or copies from which the owner has voluntarily removed TPMs, are preferred for best-edition purposes. And, in all events, the rightsholder must comply with the existing requirement that deposits can be “accessed and reviewed by the Copyright Office, Library of Congress, and the Library’s authorized users on an ongoing basis.”²⁹ The Office continues to believe that this framework will adequately serve the Library’s collection needs in a manner consistent with the statute. The final rule therefore retains the Office’s proposed language.

The Authors Guild raised three additional issues. First, it suggested that further guidance from the Office on the definition of “publication” in the online context would be helpful “before or in concert with” the proposed rule.³⁰ As the Authors Guild’s comment notes, the Office is currently conducting a separate proceeding to consider potential regulatory updates interpreting the meaning of publication for purposes of copyright registration, and to provide policy guidance regarding the concept of publication more generally.³¹ A work’s publication status, however, presents somewhat less of a concern for copyright owners under this rule than in the registration context, as electronic-only books must first be affirmatively identified and demanded by the Office

²⁸ 17 U.S.C. 1201(a).

²⁹ 37 CFR 202.24(a)(4).

³⁰ Authors Guild Comments at 1–2.

³¹ *See* Online Publication Notification of Inquiry, 84 FR 66328 (Dec. 4, 2019).

before a copyright owner must deposit them. Thus, as the Authors Guild acknowledges, publication “need not be specifically defined in this particular rule.”³² For that reason, the Office believes that its separate proceeding on online publication is the more appropriate forum through which to provide additional guidance on the meaning of that term.

Second, the Authors Guild suggested clarifying edits to the language regarding the rule’s applicability to print-on-demand books. The 2020 NPRM provided that “[a] work shall be deemed to be *available only online* even if copies have been made available to individual consumers to print on demand, so long as the work is otherwise available only online.”³³ The Authors Guild suggested the phrase “individual consumers to print on demand” may be ambiguous and proposed revising the language to instead read: “made available to individual consumers **by print on demand services**.”³⁴ The Authors Guild did not identify the specific ambiguity that this suggested change is intended to clarify, but the Office does not agree that it reflects the rule’s intended scope. The reference to copies made available to consumers “by print on demand services” could be read to encompass *physical* copies printed by a service and distributed to individual purchasers. As discussed in the 2020 NPRM, “[t]hese books are outside the scope of this rule, and instead remain subject to the general mandatory deposit obligation under section 407.”³⁵

As an alternative, or in addition to the foregoing suggestion, the Authors Guild suggested that “it might add clarity” to refer to “individual” copies, such that the language would read: “A work shall be deemed to be *available only online* even if

³² Authors Guild Comments at 2.

³³ 2020 NPRM at 38814–15.

³⁴ Authors Guild Comments at 2 (bolding in original).

³⁵ 2020 NPRM at 38809–10.

individual copies have been made available to individual consumers to print on demand, so long as the work is otherwise available only online.”³⁶ In its view, “[i]t is possible that the emphasis on individual consumers could create confusion with respect to print-on-demand copies purchased by institutional consumers for their use (a school or a library for instance).”³⁷ It is not clear, however, that a reference to “individual copies” would address that concern, which relates to the phrase “individual consumers.” As to the latter phrase, the Office agrees that there could be uncertainty over whether the provision covers copies made available to institutional purchasers such as libraries. In the Office’s view, these entities are similarly situated to individual consumers in that they typically purchase a fixed number of copies of a given e-book, and the number of physical copies they may print and circulate to patrons is dictated by the terms of the purchasing agreement. That arrangement is distinguishable from a model in which a retailer continues to print copies as additional orders are received. To clarify that the definition is not intended to exclude e-books purchased by libraries and similar institutions, the final rule thus provides: “A work shall be deemed to be *available only online* even if copies have been made available to individual consumers or other end users to print on demand, so long as the work is otherwise available only online.” The Office intends the reference to “end users” to cover institutions such as libraries and universities who are the actual users of these works and not intermediate distributors such as online booksellers.

Finally, the Authors Guild suggested that the final rule provide for periodic consultations between the Library and publishers “to ensure that the Library’s recommended formats and preferences—and the Office’s adherence thereto—are aligned

³⁶ See Authors Guild Comments at 2.

³⁷ *Id.*

with the most commonly used as-published formats.”³⁸ The Office appreciates that conversations between the Library and publishers can help the Library’s collections preferences align with industry practice. Although the Office would welcome such consultations to be ongoing (and itself maintains an open door to receive stakeholder feedback), it does not believe including a mandate in the regulatory text is appropriate. As explained in the 2020 NPRM, the Library consistently seeks stakeholder input when crafting its policies,³⁹ and the Office expects that the Library will be open to continued outreach from publishers to that effect.

List of Subjects in 37 CFR Part 202

Claims, Copyright.

For the reasons set forth in the preamble, the Copyright Office amends 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 by:

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

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

³⁸ Authors Guild Comments at 2.

³⁹ 2020 NPRM at 38814.

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

d. Adding paragraph (f).

The addition reads 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 by:

a. Revising paragraph (b)(4).

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

The revision reads 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 a 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, emails, and short online literary works such as social media posts.

(iii) A work shall be deemed to be *available only online* even if copies have been made available to individual consumers or other end users to print on demand, so long as the work is otherwise available only online. A work also shall be deemed to be available only online even if copies have been loaded onto electronic devices, such as tablets or e-readers, in advance of sale to individual consumers, so long as the work is otherwise available only online.

* * * * *

4. Amend § 202.24 as follows:

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

The addition and revision reads 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 [INSERT EFFECTIVE DATE OF FINAL RULE].

* * * * *

(c) * * *

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

6. Amend Appendix B to Part 202 by revising section IX to read 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

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.

4. Technological measures that control access to or use of the work should be removed.

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).

ii. 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.

5. Technological Protection Measures:

a. Copies published in formats that do not contain technological measures controlling access to or use of the work.

b. Copies published with technological measures that control access to or use of the work, and for which the owner has elected to remove such technological measures.

c. Copies otherwise provided in a manner that meets the requirements of § 202.24(a)(5).

Dated: October 5, 2020

Maria Strong,
*Acting Register of Copyrights and
Director of the U.S. Copyright Office.*

Approved by:

Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-30-P]

[FR Doc. 2020-23101 Filed: 11/10/2020 8:45 am; Publication Date: 11/12/2020]