
Before the Copyright Office

Library of Congress

In the Matter of)

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Mandatory Deposit of Electronic Books

Available Only Online

) Docket No. 2016-3

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Comments of the Authors Guild, Inc.

Submitted by Mary Rasenberger, Executive Director

The Authors Guild—the nation’s largest and oldest society of published authors—submits these comments on behalf of its approximately 10,000 members in response to the Copyright Office’s April 16, 2018 Notice of Proposed Rulemaking (the “NPRM”) regarding the mandatory deposit of online-only books and sound recordings. The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors’ copyright, free speech and contractual interests since the League's founding in 1912. Among our current members are historians, biographers, poets, novelists and freelance journalists.

The Authors Guild refers the Copyright Office to the comments it filed on August 19, 2016 (the “2016 Comments”) in response to the Copyright Office’s Notice of Inquiry dated May 17, 2016. The comments below address the revised, final proposed regulations for the mandatory deposit of e-books.

In principle, the Authors Guild supports extending mandatory deposit to books published only in electronic form. An increasing number of books, including many

important books, are published today only as e-books and/or through print on demand. As our national library, the Library of Congress develops “universal collections which document the history and further the creativity of the American people and which record and contribute to the advancement of civilization and knowledge throughout the world.”¹ It cannot fulfill this mission today without collecting books that are published only in electronic form, and mandatory deposit is an appropriate way for it to acquire the books. The percentage of culturally and historically important texts published only as e-books will only increase in the coming years—and if the Library does not start acquiring these texts in a systematic manner soon, there will be a gaping hole in the Library’s collections. We risk losing the knowledge contained in those books, and our cultural heritage may suffer as a result. Moreover, failing to collect these works would be treating the authors of these works in a discriminatory manner, since their works would not be preserved for future generations by our nation’s library.

Collecting and preserving e-books, however, is not as simple as deciding to acquire them through mandatory deposit. Just as libraries have procedures, shelf space, and systems for collecting, safely storing, cataloging, and preserving books printed on paper, they need to develop strategies for collecting, safely storing, cataloging, and preserving e-books before they start acquiring them en masse. In a report dated March 31, 2017, the Library’s Inspector General commended the Library for taking initial steps toward digital collection, and “emphasize[d] that the development of an eCollections strategy must be a component of a comprehensive digital strategic plan that thoroughly aligns with the Library’s direction, priorities, and strategic plan, including the IT strategic plan.”²

It is our understanding that the Library has not yet created and adopted a comprehensive strategy for safely storing books published in electronic form, despite the fact that e-books and electronic audio books have been a significant and growing percentage of books published for over a decade. Until such a plan is put in place—and, in particular, until the security of e-books can be ensured—it is premature for the Copyright Office to issue the regulation for the mandatory deposit of e-books.

¹ <https://www.loc.gov/about/>

² *Office of the Inspector General Semiannual Report to the Congress*, Libr. Of Cong., 10 (Mar. 2017) <http://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>

Library Access and Information Technology, Security and Related Requirements

The Copyright Office's stated goal is to mirror the access the Library provides to print works, but providing electronic access to two people at a time onsite is not sufficient to provide the requisite degree of security. Storing and making electronic versions of books available without a clear and strong security system may increase the already rampant e-book and print-on-demand piracy. Unless repositories with a high level of security are developed and maintained, it is foreseeable, even inevitable, that a commercial copyright pirate or a hacker might copy books from the collection or even the entire collection and post them on a publicly available platform. This could decimate the market for many books, making it impossible for publishers to invest in similar books in the future and therefore for authors to continue to write such books.

The Library has implemented certain security measures, as described in the NPRM, but nowhere are its security measures for e-books described. Its mere assurance that it is "fully committed to taking steps to prevent infringement of the material in its collections" is not sufficient when the Library has not said what those steps are, or even what they might be in the future. Nor does the fact that the Library "is encouraged that the existing system protecting electronic-only serials subject to mandatory deposit has not encountered security threats" instill confidence. A full plan must be vetted with publishers (including independently published authors) and implemented *before* the Library starts acquiring e-books through mandatory deposit.

The proposed extension of mandatory deposit to e-books necessitates the creation of a secure e-book repository to protect against hacking and illegal access to the books. The NPRM itself acknowledges that "implementing mandatory deposit for electronic-only books would require an update to the Copyright Office's information technology systems," which has not yet been done.³ The Authors Guild objects to the adoption of the proposed regulation in the absence of a comprehensive collection strategy developed with the assistance of the various sectors of the publishing community.

Demand-based Deposit and the 2010 Interim Rule

The proposed regulation creates a new demand-based mandatory deposit scheme for electronic-only books, similar to the one in place under the interim rules for electronic-only

³ 37 CFR Part 202 [Docket No. 2016-03], 83 Fed. Reg. 73 at 16271 (Apr. 16, 2018).

serials. As the Authors Guild explained in our 2016 Comments,⁴ we agree with that approach in principle because there are hundreds of thousands of books published in electronic form every year that the Library might reasonably choose not to acquire for its collections.

Definition of Electronic-Only Books

The proposed regulation set out in the NPRM defines an “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. 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.

The new definition acknowledges and attempts to address concerns expressed by the Guild and others by excluding such text-based works as “websites, blogs and emails” and specifying that a work shall be deemed to be available “only online” even if physical copies can be produced for consumers on demand—a change suggested by the Guild, since many books published electronically are also available for print on demand.

The Authors Guild recommends two additional changes to the definition. First, the proposed definition does not address the length of the works in question. As explained in our 2016 Comments, books are generally defined as longer literary works: “a long written or printed literary composition,” as stated in Merriam Webster. Limiting the category to electronic literary works published in one or a finite number of volumes does not necessarily exclude very short works, such as a single poem or a string of tweets. The definition should be modified to make it clear that only longer literary works are covered by the regulation.

Second, the regulation states that the works must be “available only online.” We suggest that the relevant phrase, wherever it is used, be changed to “made available in electronic form”. E-books can be downloaded onto and made available on a device (e.g., pre-loaded onto the device) without being available online, in which case, strictly speaking, the books would not be “available only online.”

Meaning of “Published”

The proposed regulation would apply only to electronically *published* books that are *published* in the United States. And yet, it is still unclear what constitutes

⁴ Comments of the Authors Guild, Inc., Dkt. No. 2016-3, Aug. 19, 2016.

“publication.” Creators of electronic works often have great difficulty determining when their work is deemed “published” under the definition in Section 101 of the Copyright Act, as we have previously reported to the Copyright Office. As such, it is often difficult for creators to know how to complete the publication section of an application for registration or to know if they can utilize a particular group registration that applies to only published or unpublished works.

Accordingly, the Copyright Office should clarify when an electronic book is “published” prior to adopting the proposed regulation for e-books. For instance, in the case of e-books, is a book “published” if it is only made available for reading in the cloud, such that readers never download copies? If not, why not? Shouldn’t books be collected by the Library because of their content, regardless of the technologies used to make them available to readers?

The regulation could be revised to provide that it applies to “books that are made available to the public only in electronic form” rather than to “electronically *published* books.” Although outside the immediate scope of this NPRM, alternatively and preferably, the Copyright Office should request that Congress amend the definition of “publication” in Section 101 of the Copyright Act to include all works made publicly available by or under authority of the copyright owner. This would update the definition to reflect the way many works are currently made available and would resolve much of the existing confusion around the issue. To include the legal term “published” in a new regulation without amending the definition only perpetuates the ongoing ambiguity.

“Best Edition” Requirements for Electronic-Only Books

The Authors Guild objects to the requirement that technological measures that control access to or use of a work be removed from the deposit copies. It not only puts the author’s work at risk of piracy,⁵ but it puts an unnecessary burden on publishers, especially on authors who independently publish and small publishers. Today, most e-books are made available in EPUB, MOBI, KPF or Web PDF formats with access controls. The Authors Guild is concerned that by requiring that access controls be removed, the Copyright Office would in some cases be requiring the depositor to transfer the files to new formats or use hacking codes to remove the controls. This would essentially require the publisher to create a new edition in order to

⁵ Comments of the Authors Guild, Inc., p. 6 (Aug. 19, 2016).

provide the Library with the requisite deposit copy, in contradiction of the rule set forth in the NPRM:

The statute, however, requires the deposit only of the best published edition of a work. It does not require the publisher or producer to create a special preservation copy simply for the benefit of the Library of Congress.

Indeed, the current regulation in 17 C.F.R. § 202.19(b)(1)(i) provides:

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.

Accordingly, the Authors Guild supports “best edition” requirements that allow the deposit of a commercial edition of the book, with any technological protections that are already in place. If the Library absolutely requires the filing of non-protected formats to create preservation copies, it should acquire those copies or create them itself by special agreement with the publisher (including independently published authors, as the case may be).

The Authors Guild does not object in principle to having “best edition” requirements that mirror those set out in the Library’s Recommended Formats Statement, provided those recommended formats are subject to revision from time to time and the Library consults with publishers of all types and sizes (including independently published authors), to ensure that the current Recommended Formats Statement comports with existing as-published formats. We are not aware of such consultations to date. The Library and/or the Copyright Office should have processes in place to regularly consult with publishers large and small, including independently published authors, as well as e-book providers and platforms to ensure that the best edition requirements—whether or not they mirror the Library’s Recommended Formats—are reasonable and workable for all publishers and are the most cost-effective way for the Library to ingest electronic literary books.

We thank the Copyright Office for the opportunity to submit these comments, and we are available for consultation.