



copyright alliance

Connecting creators · Protecting creative work

**BEFORE THE
U.S. COPYRIGHT OFFICE**

**Mandatory Deposit of Electronic
Books and Sound Recordings Available
Only Online**

Docket No. 2016-3

COMMENTS OF THE COPYRIGHT ALLIANCE

Introduction

The Copyright Alliance appreciates the opportunity to respond to the Notice of Inquiry seeking feedback on extending the Interim Rule governing mandatory deposit of electronic works not available in a physical format to include electronic books and sound recordings available only online.

The Copyright Alliance is the unified voice of the copyright community, representing the interests of thousands of individuals and organizations across the spectrum of copyright disciplines.¹ The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their

¹ The Copyright Alliance is a non-profit, public interest and educational organization that counts as its members over 15,000 individual creators and organizations across the spectrum of copyright disciplines. The Copyright Alliance represents the interests of authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, game designers and many other individual creators. The Copyright Alliance also represents the interests of book publishers, motion picture studios, software companies, music publishers, sound recording companies, sports leagues, broadcasters, guilds, unions, newspaper and magazine publishers, and many more organizations.

creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

Legal deposit is an important component for building the collections of the Library of Congress.² Many of our members, through copyright registration, contribute works to the Library. Additionally, to further support the Library's collections, many of our members enter into negotiated agreements with the Library to contribute their works outside the legal deposit regime.

Questions about the Library's collections strategy

While the Copyright Alliance and our members are full supportive of the Library's continuing efforts to build its collections, we believe that *it is essential that the Library first develop an eCollections strategy* before expanding the Interim Rule. We do not get a sense that the Library has such a strategy, and if it does, that strategy has not been communicated. Online-only works present considerable legal, technical, security and other challenges to the legal deposit system. Digital collections cannot be built using the ad hoc process that has been used in the past with physical works. The copyright community stands ready to continue our long-standing support for the Library's efforts to build its collections, but we need to understand how the Library intends to address these significant challenges.

The Copyright Office's Notice of Inquiry raises a number of threshold questions, some of which were previously raised during the 2010 rulemaking process that led to the Interim Rule.³ It is unclear what progress, if any, has been made answering these questions. In a 2015 audit of the Library's electronic collection and deposit strategy, the Office of the Inspector General (OIG) "could not determine whether the Library's progress to-date on the eDeposit Program had met

² In its 1960 report on deposit of copyrighted works, the Copyright Office said, because of legal deposit, "By 1875 copyright had become the Library's largest source of acquisitions for books and almost the only source for some other materials." Elizabeth K. Dunne, *Deposit of Copyrighted Works*, US Copyright Office, Copyright Law Revision Study No. 20 (1960).

³ Mandatory Deposit of Published Electronic Works Available Only Online, 75 Fed. Reg. 3,863 (Jan. 25, 2010) (to be codified at 37 C.F.R. pt. 202).

Library management’s expectations.”⁴ It said, “Because the Library’s senior leadership did not establish quantifiable expectations related to cost, performance, and project completion, OIG could not determine whether progress made to-date had met the Library’s expectations.” Though the OIG identified such causes as “challenges pertaining to strategic planning, leadership, and governance, as well as organizational and financial management issues,” at the very minimum, the Library should develop and implement an eCollections strategy before expanding the Interim Rule.

Once an eCollections strategy in place, we will be able to assess whether the strategy would benefit from the proposed categorical expansion of the Interim Rule or whether an alternative approach for expanding the Library’s collections would be better. For now, it is unclear what the Library’s collections strategy is—why does it want sound recordings and electronic books and not other types of works, does it need all sound recording and electronic books or just certain types, what does it plan on doing with these sound recordings and electronic books, how will it secure these sound recordings and electronic books from hackers, whether and if so, how and to whom will it provide access to these works, does it foresee expanding mandatory deposit to other categories of online-only works in the future? These are just a few of the unanswered questions we have about this new initiative by the Library.

It is also unclear how the Library intends to define the types of works identified in the Notice of Inquiry. What is an “electronic book”? Will it refer only to works offered only in standalone file formats like PDF or include text-based works offered in native web formats like HTML?⁵ Will online-only sound recordings include such works as podcasts or audio clips?

Some of our most significant concerns are those relating to public access and security policies. Although both the Interim Rule and the current Notice identify the Library’s policies

⁴ Library of Congress Office of the Inspector General, *The Library Needs to Determine an eDeposit and eCollections Strategy* (2015), available at <https://www.loc.gov/portals/static/about/documents/edeposit-and-ecollections-strategy-april-2015.pdf> (hereinafter *eCollections Report*).

⁵ A related question is whether and to what extent the Library anticipates that its collection of online-only works through mandatory deposit will interact with its Web Archiving process. See <http://www.loc.gov/webarchiving>. More clarity on this point would be helpful.

regarding public access of electronically deposited works, it is not clear to what extent these policies are actually implemented. For example, the Library states that “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.” It also says “users are presented with a set of fair use criteria in a short training manual stored next to the terminal.” Can the Library confirm that these statements are accurate? We tried to confirm the latter, but when we did so, we were informed by Librarian staff that there were no fair use guidelines, and that any users seeking guidance on fair use would be directed to informational websites or legal counsel.

Security measures to prevent the unauthorized reproduction and distribution of digital works in the Library’s collections are critical to our members. What security measures are currently in place for existing online-only works? The eCollections Report provides little clarity on what—if any—security measures the Library has taken. What security measures would be put in place for future online-only works collected by the Library (as different works may require different types of security)? What steps will the Library take to limit damage when it becomes aware that this security has been breached? What steps will the Library take to routinely and frequently evaluate the effectiveness of the existing security and explore new security technologies? These are all questions that a 21st Century Library of Congress needs to have answered before it can expect the owners of the works that would comprise the collections to support these new efforts.

Beyond clarification on the issues raised above, does the Library have plans for greater transparency in general? Transparency can serve a number of important purposes. For example, the Dutch national library, the Koninklijke Bibliotheek, collaborates with the Dutch Publishers Association on a digital legal deposit scheme and shares top-level statistical data on the use of publications stored in its depository to the Association, as well as providing access to statistical

reports to individual publishers regarding their own publications.⁶ This transparency reassures publishers that legal deposit copies are not being abused.

Given the issues raised above, is expanding the 2010 Interim Rule the most effective avenue for advancing the Library's digital collections strategy? As the Notice itself indicates, the Library's OIG has admitted that "negotiated arrangements with private and public entities may be the only way forward" for obtaining electronic deposits. Indeed such arrangements may be the most effective and efficient way of addressing the specific circumstances for particular sources of works, certainly more effective than blanket demand rules directed at broad categories of works.

In a study on legal deposit schemes in various countries, the International Publishers Association reached a similar conclusion, saying that "the more voluntary a digital legal deposit scheme is at the outset, the better." It recommended pilot schemes to familiarize publishers and librarians with processes and an emphasis on collaboration "to address key concerns such as copyright protection, digital security and monitored access."

⁶ International Publishers Association, *Digital Legal Deposit: An IPA Special Report* (July 24, 2014), available at <http://www.internationalpublishers.org/images/news/2014/digital-legal-deposit-2014.pdf>.

Conclusion

While we will continue to support the efforts of the Library of Congress to build its collection, if we are going to do that, it's only fair that the Library have answers to all these important questions before moving blindly forward. We again thank you for the opportunity to participate in the proceeding and welcome any further questions.

Respectfully submitted,

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