



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

**Mandatory Deposit of Electronic-Only
Books**

Docket No. 2016-03

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Proposed Rulemaking](#) (NPRM) published by the U.S. Copyright Office in the Federal Register on April 16, 2018, regarding on-demand mandatory deposit of electronic-only books (e-books).

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. 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 creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

The Library of Congress is home to over 167 million¹ books, photographs, manuscripts, recordings, and other works produced throughout history, adding an additional 12,000² new

¹ *FY 2019 Budget Hearing- Library of Congress, Before the Subcomm. on the Legislative Branch Comm. on Appropriations of the House Committee on Appropriations*, 115th Cong. 1 (2018) (statement of Dr. Carla Hayden, The Librarian of Congress).

items daily. Copyrighted works deposited by creators through the copyright registration process accounts for a significant portion of the Library's collection.³ While we appreciate the value of the Library's ongoing efforts to preserve culturally significant works, before making the decision to expand the Interim Rule regarding e-serials ("Rule") to any other class of works, it is essential that the Library first thoughtfully consider the needs and concerns of its largest constituency—the copyright community.

Copyright registration in the United States is not a prerequisite to copyright protection. Since registration is a wholly voluntary system, any change in the registration process should be considered very cautiously with a primary focus on how that change may affect creators' decisions regarding whether to register their works. We encourage our members and the creative community as a whole to register their copyrighted works with the Copyright Office. In doing so, we promote the various incentives that accompany registration. But some of these incentives have little or no value to certain creators, especially in relation to the rising cost of registration. For example, although registration allows the registrant-copyright owner to sue for copyright infringement in federal court, the high cost and complexity of federal court litigation make this benefit meaningless to many professional creators and small businesses.

The proposed Rule may also adversely affect the registration system. If the Rule is expanded *before* proper steps are taken to assure the copyright community that their works will be adequately protected in the Library's care, this may create yet another reason for creators to avoid registration. We stand ready to help and work with the Library in achieving its goal of developing the eCollections, but it is vital that this goal be reached in a way that ensures that the needs of creators are respected and proper steps are taken *beforehand* to protect copyrighted works that are made available to the public by the Library.

² See OFFICE OF THE INSPECTOR GEN., THE LIBRARY OF CONG., SEMI-ANNUAL REPORT TO THE CONGRESS 2 (2014), <https://www.loc.gov/portals/static/about/office-of-the-inspector-general/annual-reports/documents/september-2014-semiannual-report.pdf>.

³ See THE LIBRARY OF CONG., ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS 21 (2016), <https://www.loc.gov/portals/static/about/reports-and-budgets/documents/annual-reports/fy2016.pdf> ("The U.S. Copyright Office forwarded more than 636,000 copies of works with a net value of \$35.6 million to the Library's collections in fiscal 2016.")

Questions about the Library’s Digital Collections Strategy

We reiterate the concerns we voiced previously regarding the lack of a clear and cohesive digital collections strategy within the Library of Congress.⁴ Transparency is an essential part of maintaining the positive relationship between the Library and the copyright community on which its collections rely. While the Copyright Alliance and our members are fully supportive of the Library’s continuing efforts to build its collections—aside from contributing materials through copyright deposit, many of our members also work directly with the Library to provide materials for its collections—it is essential that the Library first develop an eCollections strategy and communicate that strategy to stakeholders before expanding the Rule. The NPRM suggests that this strategy has not been fully developed and, instead, that the Library’s strategy is being developed contemporaneously with its execution.⁵

We would appreciate the opportunity to review and understand the eCollections strategy—and how this proposed rule fits into the larger context of that overall strategy—and to provide feedback where appropriate. For example, in a report,⁶ the Library states that it “will be selective regarding the digital content it acquires” but goes no further in explaining specifically how that content will be chosen. That same report says that “[a]ppropriate methods will be put in place to ensure that rights-restricted digital content remains secure” but fails to specify what those methods would be. In responding to a point raised by AAP, the NPRM states that “[t]o 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,” again giving no additional information as to “the kinds of works” the Library wishes to include. This further demonstrates the problem with requesting feedback where stakeholders have not been made privy to the details of the matter on which they are supposed to comment. Additionally, it is unclear whether sound recordings were not addressed in the NPRM because the Library and Office have determined that such an

⁴ Copyright Alliance, Public Comment on the Interim Rule on Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online, (Aug. 19, 2016), <https://www.regulations.gov/contentStreamer?documentId=COLC-2016-0005-0007&attachmentNumber=1&contentType=pdf>.

⁵ “The Office understands that this idea may be helpful as the Library’s develops its overall eCollections strategy. . .” Mandatory Deposit of Electronic-Only Books, 83 Fed. Reg. 16,269, 16,273 (Apr. 16, 2018)(to be codified at 37 C.F.R. pt. 202).

⁶ LIBRARY OF CONGRESS, COLLECTING DIGITAL CONTENT AT THE LIBRARY OF CONGRESS 3 (2017), <https://www.loc.gov/acq/devpol/CollectingDigitalContent.pdf>.

expansion would be inappropriate at this time, or if that class of work will be addressed later with a similar NPRM.

Security

Just as we believe that the Library should develop and communicate a clear and cohesive digital collections strategy before expanding the Interim Rule, we believe that it is critical that the Library's IT infrastructure be updated to support such an expansion and ensure that adequate, effective, and commercially reasonable security measures are in place *before* expanding the Rule. To begin laying the groundwork for expanding the Rule prior to developing such a strategy and demonstrating the adequacy of the Library's IT system is putting the cart before the horse and asking copyright holders to put blind faith in the Library—whose stated aim is to make these deposit copies “as broadly accessible to users as possible”⁷—to protect their property based solely on assurances.⁸ This approach also further illuminates the tension between the goals of the Copyright Office in encouraging copyright registration and protecting copyrighted works, and the Library's priority of enabling broad access above and before all else. At the very least, we believe that the Office should commit to postponing any demands for deposits of e-books until a comprehensive strategy is in place and publicly available, and the proper IT security and infrastructure is in place and fully functional.

These concerns are amplified given the Library's past failures to follow its own information security policies, including by failing to perform triennial security assessments and develop plans to address any weaknesses identified by those assessments.⁹ This is even more troubling given the fact that the Library will require these e-book deposits to be stripped of their technological protection measures (TPMs), whose very purpose is to encourage copyright owners to make their works available in digital formats by minimizing the risk of infringement in

⁷ *Id.* at 1.

⁸ In an effort to assure stakeholders that adequate measures have been put in place, the Notice of Inquiry dated May 17, 2016 states that “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” which turned out not to be the case. *See* Mandatory Deposit of Electronic-Only Books, *supra* note 3, at 16,273. “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. 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.”

⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-315, LIBRARY OF CONGRESS: STRONG LEADERSHIP NEEDED TO ADDRESS SERIOUS INFORMATION TECHNOLOGY MANAGEMENT WEAKNESSES 58-59 (2015).

the digital environment. Without these important safeguards, how will the Library ensure that digital content remains safe and secure? The Library's lack of adequate security is alarming enough, but combine that with its history of lapses in following security protocol and the stripping away of TPMs— measures which Congress considered critical enough to secure with independent legal protection¹⁰—makes the level of risk unacceptable.

The NPRM references an updated System Security Plan policy as well as “comprehensive and effective security testing” but fails to cite to any such plan or report regarding security testing. It also references an updated information technology strategic plan, which “includes strategies to protect the Library's information technology systems” but this plan does not appear to be publicly available, so we are unable to assess the adequacy of those strategies. It would be helpful to stakeholders to be kept informed of the various improvements to IT and system security, especially when those stakeholders are asked to comment on a rulemaking in which such matters are extremely relevant. The copyright interests of our members are too important to risk on the basis of assurances alone.

Conclusion

While we recognize the value of the Library's ongoing efforts to preserve culturally significant works, in light of the issues discussed above, we believe that the decision to expand the Rule is premature at this time. We appreciate the opportunity to submit these comments, and we would be happy to provide any additional input or answer further questions.

Respectfully submitted,

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¹⁰ 17 USC § 1201.