



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

Best Edition Study

Docket No. 2022-3

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Inquiry](#) (NOI) published by the U.S. Copyright Office in the Federal Register on June 3, 2022, regarding the Copyright Office public study on copyright deposit and best edition requirements.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 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.

Before responding to the specific questions in the NOI, we wish to make some general statements about the current deposit and best edition requirements as well as changes that might be made to these requirements. First, while we suggest several ways to improve the deposit and best edition requirements and practices throughout these comments, we do not intend for and do not believe that any of these suggestions will adversely impact the Library of Congress or its ability to expand its collections. The Library of Congress is one of our nations most respected and cherished institutions, and its collections are the envy of the world. A significant percentage of those collections have been amassed from the deposit copies submitted by rightsholders when they apply to register their copyrighted works with the Copyright Office. Our suggestions below are aimed at updating—not upending—that process or the Library’s collections. We believe these changes would make the deposit process more efficient for all and better reflect current business practices and new technologies that may impact the types of deposit copies rightsholders can provide and that the Library and Copyright Office want.

Second, the primary problem with the existing system is that the “best edition” requirements conflate and thus serve two entirely separate purposes: (i) submitting copies necessary to facilitate the Copyright Office’s ability to examine works that are submitted for registration; and (ii) building the Library of Congress’ collections with archival-quality “best edition” copies as an adjunct to the Copyright Office registration process. The Copyright Office does not need archival quality “best edition” copies to complete the registration process. The Library, however, seeks to build its collections, other than by gift or other acquisition means, through the registration system and the acquisition of best edition copies of certain works.

This system, which may have at one point worked for primarily analog print materials, now places an undue burden on rightsholders. Under section 408 of the Copyright Act, all rightsholders who submit copyright registration applications to the Office must generally submit two copies of the best edition of the work to the Copyright Office. Those copies are then made available to the Library so that it can augment its collections. In many cases, the Library chooses not to add the deposit copy to its collections and instead donates or otherwise disposes of the copies. There are many classes of works that the Library curators have no interest in acquiring, yet the registration and best edition requirements still require submissions of best editions. In other instances, very expensive and demanding best edition requirements persist, putting a

tremendous burden on rightsholders.¹ Since many of the registration materials are not acquired by the Library, the present system results in a considerable waste of time, money, and resources for all those involved in the copyright registration and collections systems, but these inefficiencies and burdens fall primarily and inequitably on the shoulders of rightsholders who register their copyrighted works with the Copyright Office. A better, more efficient system, would result if the Library would update and limit the classes of works, and materials, it does want to acquire through registration, and in formats that do not over-burden rightsholders, especially now that many works are available in digital formats that are considered to be of archival quality copies.

Moving forward it is essential that the responsibility for adequately and appropriately supplying the Library's collections through the Copyright registration system be more evenly divided between the Library and rightsholders. That can be achieved by requiring that the Library articulate which deposits, and in which formats, it wants to add to its collections and which it does not rather than indiscriminately demanding all deposit copies and then disposing of copies it does not want, as is presently the case. As a result, if a type of work is not listed by the Library, then only one copy of that work should be required for examination purposes and a best edition copy would not be required. On the other hand, when a particular type of work is explicitly required by the Library, a best edition copy of that work would need to be deposited so that the Library can include that copy in its collections, and when practicable, in a digital format to facilitate Copyright Office registration examinations and to suit the Library's collection needs

To be clear, we are not suggesting that the Library's identification of the works for which it needs the best edition be static or that the Library is precluded from adding a type of work to the list on a permanent or ad hoc basis (so long as rightsholders are given proper notice). For

¹ There are numerous examples of the burdens that the best edition requirement places on rightsholders—too many to discuss here. But it may be helpful to discuss one example for illustrative purposes: graphic artists often supply their works to clients in digital form and may not know which commissioned works are used for the final, printed product, or when the works are printed or produced. Furthermore, clients rarely supply copies to the artist (even when contracts stipulate that they must). As a result, in order to satisfy the best edition requirement, the graphic artist must track down the printed or produced work and purchase it. If the work appears in an expensive volume, for example, the graphic artist is forced to pay the cost of the purchase of the best edition on top of the registration costs. That additional cost often deters them from registering the work.

example, Library staff could review registrations deposits and make requests for certain best editions if there is a particular deposit that the Library needs. Furthermore, although we do not know for certain, we estimate that the Library has not updated best edition requirements in many years. An annual review process of the best edition system in which the public is invited to comment seems sensical.

Also, as the NOI discusses, while the Copyright Office routinely waives best edition requirements to lessen the burden placed on certain rightsholders, in the present system there is too much reliance on these waivers. And even though a waiver may alleviate the burden of providing a best edition copy, the process of requesting a waiver essentially trades one burden for another. If the approach suggested above is taken, then waivers should be needed much less frequently, which in turn would reduce both the workload of the Office in having to consider waiver requests and the burden on rightsholders to request the waiver.

The Copyright Alliance would be happy coordinate with our members so that all three groups—the Library of Congress, the U.S. Copyright Office, and rightsholders groups—can meet regularly to reach agreement on best edition and archival quality copies as technology and markets change.

The approach we suggest in these comments would benefits all parties:

- The Library would retain its ability to obtain deposit copies in best edition format through the Copyright Office registration system and could permit electronic copies, which take up much less physical space and are easier to access.
- The Copyright Office would be able to reduce (i) registration pendency times because digital (non-best-edition format) copies will be easier and quicker for examiners to access and examine; and (ii) the burden on examiners caused by rightsholder confusion about best edition requirements since examiners would no longer have to examine for compliance with the best edition requirement in every case.

- Rightsholders would be able to more easily and affordably comply with deposit requirements when registering their works with the Office.

Third, it is essential that any changes to the system not adversely impact rightsholders. Any change to the deposit and best edition requirements and practices should benefit rightsholders by reducing the complexity and cost of compliance with the best edition requirement, or at the very least should be impact neutral. For example, a rights holder may register multiple sound recordings as well as accompanying text and artwork as a “unit of publication,” if they were physically packaged or bundled together and if all of the recordings were first published together in that integrated unit.² The unit of publication registration option should be available regardless of whether the deposit copy is in physical or electronic form. If registration of a unit of publication is not allowed in electronic form and the new deposit rules require electronic copies, then the rightsholder is worse off under new rules. Such an approach is untenable.

Similarly, presently, electronic-only publications (such as web-based news sites) that do not have a print component need not provide a best copy edition unless the Library specifically requests that publication. It is difficult, if not impossible, for rightsholders of these valuable works to print out entire web sites. Any change to the deposit and best edition rules should not require that a physical deposit of such electronic-only publications be required as a best edition for deposit under section 407 as it would be almost impossible to comply with such a requirement.

1. One way to address concerns raised regarding the best edition requirement would be to limit the categories of deposits to [which] it applies. To what category(ies) of deposits do you think the best edition requirement should apply and why? What would be the impact

² In addition, the entity that bundles the works together as the integrated unit must be the claimant in all the works that are submitted for registration. For example, ABC Records bundles ten sound recordings on a CD with an insert containing text and photographs, distributes the packaged unit to the public, and owns the copyright in the sound recordings, text, and photographs. ABC Records may register the sound recordings, text, and photographs with one application as a unit of publication. The registration will cover all copyrightable content in the sound recordings, text, and photographs. For more information concerning these special registration accommodations, see Multiple Works (Circular 34).

on Library collections? What would be the impact on claimants' ability to register their copyrights?

The best edition requirement should be limited to certain types of copyrighted works. The first step in determining to which types of copies the best edition requirement should apply is for the Library to determine and disclose the types of works it needs to have the best edition of and which it does not. Presently the deposit and best edition requirements apply to all works because the Library has never explicitly done that, so copyright owners must submit best edition copies (unless there is a waiver)—even when the Library does not need or want them.

Presently, there is no transparency to the best edition process—rightsholders have no idea what the Library needs best edition copies of and how the Library decides what the best edition is and why. The best way to fix the system is to make it more transparent and to work with stakeholders to assure the system works correctly and efficiently. The present system is also a one-size fits all system. But there are a plethora of different types of copyrighted works and different formats and, therefore, it is essential that they each be treated differently.

It is important to note that in our response we used the phrase “type of works,” not “categories of works.” Categories of works is much too broad a concept to be helpful to anyone. Categories of works might simply be one of the categories listed in section 102 of the Copyright Act, like “literary work” or “pictorial, graphic, and sculptural works,” which are much too broad for best edition purposes. For example, it is not uncommon for a wedding photographer to take close to 2,000 photographs for a single wedding, but it is highly unlikely that the Library needs or wants the best edition of these wedding photographs. It is a burden for the photographer to upload all these photographs, especially in the best edition format, and would easily and quickly overwhelm the Library’s and Copyright Office’s storage capacity. On the other hand, it is quite likely that the Library may want the best edition of photographs of specific historic, cultural, or newsworthy events. So broadly requiring the best edition for the category of “pictorial, graphic, and sculptural works” just so the Library can be assured of receiving the best edition of these historic, cultural, and newsworthy photographs is not helpful. The Library needs to state with more specificity than categories of works, the types of best editions it needs and does not need.

Most right holders would likely prefer not to deposit two copies of the best edition because the best edition requirement can be expensive, time consuming, confusing,³ and difficult⁴ for rightsholders to comply with.⁵ But rightsholders also understand and appreciate that the Library needs the best editions of their works to augment its collections, and therefore discontinuing the best edition requirement isn't a practical solution. Thus, any limitation on the best edition requirement will be welcome by rightsholders so long as the limitation is clear, reasonable, and consistently applied, and to the extent that the Library or the Office seeks to change the scope of the limitation in the future, that any such changes are only done after their views have been solicited beforehand and they are given ample notice of any changes.

After the Library specifies what types of works it needs and does not need, the next step would be for rightsholders groups to meet with Library and Copyright Office officials to discuss whether and how the best edition requirements for those types of works that are needed by the Library should apply. These meetings would help ensure that rightsholders understand precisely what the Library is looking for and to ensure that the Library understands what types of best editions are more easily or difficultly provided by rightsholders. For example, through this dialogue, rightsholders can explain why they might not have a copy of the best edition in their possession or why they might not know whether a work is published and thus what constitutes the best edition.⁶ Rightsholders can also explain different business models and new technologies that have recently arisen or are anticipated in the future and how this might impact best edition requirements. Through this dialog, all three groups—the Library of Congress, the U.S. Copyright Office, and rightsholders groups—can develop a definitive list of works to which the best edition requirements apply in a way that works for all involved. The Copyright Alliance would be happy to help schedule and coordinate these meeting(s), as appropriate.

³ When applicants are confused by the requirement it may result in application noncompliance, which in turn may adversely affect the applicant in a variety of ways.

⁴ For example, where they do not have a copy of the best edition to provide or do not know if the work has been published.

⁵ For different reasons, the Copyright Office would also probably prefer not to require a best edition because compliance with the best edition requirement further complicates the registration examination system.

⁶ No applicant should have to purchase a best edition for the Library just to register their work. Nor should an applicant be prevented from registering just because they can't determine what the best edition is. This is something that must be fixed through this process.

- 2. If registration and mandatory deposit requirements were no longer linked how would this affect the deposit burden on copyright owners? How would it affect the Library's collections? How would it affect claimants' ability to register their copyrights?***

By default, the Copyright Office's requirements for deposit copies under section 408 should be consistent with the requirements for legal deposits under section 407 so that an applicant can satisfy both requirements when registering a copyright. Thus, after the process we describe in our answer to question #1 takes place, where the Library requires a best edition copy, provision of that copy as a deposit under section 408 should satisfy the best edition requirement in section 407. The same is true where the Library specifies that it does not need a best edition copy of a particular work. In that case, the provision of the type of copy required by the Copyright Office should suffice to satisfy the section 407 requirement. In short, whether sections 407 and 408 continue to be linked is less important if the best edition requirements are clarified as we suggest above.

In the event that the Library and the Office balk at our suggested approach as explained in our answer to question #1, we point out that the Office does have flexibility under section 408(c)(1) to provide for registration deposit requirements that differ from the requirements for deposits under section 407, and it can and should exercise that authority whenever the Office deems it appropriate—particularly where doing so would reduce examination costs and pendency, reduce burdens on applicants, and in cases where the class of works in question are not necessarily desired for legal deposit under section 407.

- 3. Should the Office expand the options for submitting electronic deposits for the purpose of examining registration applications and selection by the Library for its collections while retaining the requirement to submit best edition copies upon demand by the Library pursuant to section 407? Why or why not?***

Yes, in general, the Office should expand the options for submitting electronic deposits because it would be beneficial to the Library, the Copyright Office, and to rightsholders. Electronic copies would be easier and less expensive for the Library and the Office to store than physical copies, which take up considerably more space, and they are also easier to provide access to and examine than physical copies. They are also generally less expensive and complex for rightsholders to submit.

The COVID-19 pandemic taught us all—including the Copyright Office and the Library of Congress—how to re-think existing business practices and re-fashion them to work more effectively in a world where people are working virtually. As the Office notes in the NOI, “[w]hile the Office was closed to the public during the COVID–19 pandemic, the Office provided the option for applicants submitting electronic applications for works that required deposit of “best edition” physical copies to upload electronic copies of the works in addition to mailing the required physical copies, which enabled the Office to examine the works remotely.” There were other long-held practices that the Library and Copyright Office changed for the better during the pandemic. If these new or updated practices have proven to be successful, we see no reason that these practices should not be continued moving forward. The option of uploading an electronic copy of the work being registered is a good example of a practice that should be continued.

There are several caveats to our recommendation that the Office should expand the options for submitting electronic deposits. First, options for the deposit of electronic copies should only be expanded if and when the Library and the Office have commercially effective security measures in place. We discuss security measures in more detail in our answer to question 5, below.

Second, if the Office is going to require electronic copies, it must accept a wide range of different formats. Limiting the type of acceptable formats will be burdensome on applicants and dissuade them from registering.⁷ No rightsholder should be required to create a work in a particular file format solely for the purposes of making a deposit copy. Expanding the type of

⁷ For example, according to a survey conducted by the Professional Photographers of America (PPA) in July of 2022 photographers report spending over 6 hours to complete a copyright registration application and upload the associated image files.

acceptable formats should make it easier to submit the deposit copies. The Copyright Alliance would be happy to coordinate meetings between rightsholders groups and Copyright Office and Library staff to discuss acceptable formats for electronic copies.

Third, although the options for submitting electronic deposits for the purpose of examining registration applications and selection by the Library for its collections should be expanded, that does not mean that electronic deposit copies should be required in all cases. There are many instances where the deposit of an electronic copies is not feasible. For instance:

- where there is no digital version of a work, a rightsholder should not be required to create one in order to comply with the deposit and/or best edition requirements⁸;
- while we continue to urge the Office to allow for the digital equivalent of “unit of publication”, so long as the Office continues to allow “unit of publication” only for physical copies, rightsholders should be permitted to choose to register the physical copy as a unit of publication and deposit a physical copy;
- deluxe box sets of recorded music, video games, and other software files are often very large and thus uploading them is often burdensome for the applicant.

Occasionally, the inverse may also true—where it is unrealistic to require a physical copy of the best edition for an electronic-only version of a work. For example, books published in digital or audio form only shouldn’t be subject to best edition requirement. In all these and other instances where it would be a hardship to deposit an electronic or physical copy, it is essential that the applicant be given alternative deposit options.

Fourth, an applicant can presently request special relief to deposit a different version/format. That option should continue to be made available even if the Office switches to electronic-only deposits rule that makes explicit exception for certain type of works, as we suggest. Any electronic-deposit registration system must take into account the applicants’ current

⁸ For example, some magazines are only printed in hard copy, and it is a burden to have to scan them to create a deposit copy.

production processes. In developing its digital first strategy, the Office should take into account the operational requirements of all applicants—particularly those registering potentially hundreds of works at a time, multiple times a year—and adopt an FTP-like upload option that imposes minimal set-up costs on the applicants and can be easily integrated into their existing processes. This should be done in addition to developing an Application Programming Interface (API), as we have suggested in prior comments we have submitted to the Office.

4. Would copyright owners prefer to deposit electronic deposit copies for registration purposes instead of copies that meet the best edition standards? Why or why not? Would copyright owners like the option to provide electronic copies or best edition physical copies? Why or why not? How would the submission of electronic copies for registration affect the Library's collections and operations? What effect would the use of electronic copies have on the public record, and on a researcher's ability to use the work?

See our response to question 3. With regard to the public record, we do not think that deposit of electronic copies would adversely affect the public record or researcher's ability to review these copies.

5. Would the option to deposit electronic deposit copies create security concerns that the Copyright Office's and the Library's protocols do not currently address? What are the security concerns most important to applicants if electronic deposit copies are permitted and how could the Library address them?

Our paramount concern with regard to electronic deposit copies is security. Before the Office can mandate electronic deposit copies, the Library and the Office must fully adopt and implement an impenetrable commercially secure system to prevent cyberattacks that might result in unauthorized access to deposit copies and/or alteration of those copies or the associated registration data. And if and when there is a breach or cyberattack, the Library and the Office

must have a clear process in place to take immediate steps to stop it and prevent any harm and should immediately notify any rightsholders that may be affected. Any security system must also protect works at the point of uploading and ingestion into the Office's online system.

During the transition stage while the deposit system switches to a more electronic-deposit-copy-friendly system and until rightsholders groups have had an opportunity to review and approve these security measures, applicants should be permitted to choose whether to submit a physical or electronic deposit copy. If effective security measures are in place and the other criteria we outlined in our answers to other questions (*e.g.*, wide variety of formats accepted, easy process to upload etc.) are satisfied, it will be much easier to register and thus likely lead to increased registrations and more copies of works for the Library's collections.

In addition to the security concerns noted above we have a few additional concerns. Although we know that the Library routinely donates or gives away physical deposit copies that it does not need for its collections, we do not know if the same is true for electronic copies. We would have significant concerns if electronic copies were also to be given away, especially if the copies are not protected by technical measures of any sort and could be easily reproduced and redistributed. We also would have significant concerns if the Library and/or Copyright Office began making copies of electronic deposits that are submitted as part of the registration application system.

6. The Copyright Act requires that a "best edition" of a work must be the edition published in the U.S. Can this definition be interpreted to include digital file formats that were not themselves distributed to the public but contain the same copyrightable material as the edition distributed to the public?

Yes, to the extent this would expand the definition of best edition, we believe that the definition of a "best edition" of a work can be interpreted to include digital file formats that were not themselves distributed to the public but contain the same copyrightable material as the edition distributed to the public. So long as the deposit copy contains the same copyrightable

material as the edition distributed to the public, there should not be file format requirements that impose unnecessary burdens on the rights holder.

7. *Please identify any pertinent issues regarding digital deposit and the best edition requirement not referenced above that the Office should consider in conducting its study.*

In prior NOIs and studies, we have raised concerns about the difficulties associated with registering dynamic content like websites and online newspapers. In part, those difficulties are caused by the Office’s deposit requirements, which have failed to keep pace with market realities and new industry business practices. It is essential that the Copyright Office improve the process for registering dynamic website content by updating the deposit and best edition requirements for these types of works. Without an efficient system to register (and deposit copies of) dynamic web content, rightsholders of this content, like press publishers,⁹ are unable to register and therefore unable to enforce their rights against those who unlawfully copy their content. We therefore reiterate our concerns and our request for the Office to update its registration practices to allow for bulk registration of dynamic web content.

We appreciate the opportunity to submit these comments, and for the Copyright Office’s attention to this issue. We would welcome the opportunity to discuss these matters more thoroughly and provide additional input or answer any further questions.

Respectfully submitted,

⁹ As we have stated before, the problem of the registration of dynamic web content is especially prevalent for press publishers. As these publishers have pivoted to digital publication models, registration practices—including deposit and best edition requirements—have not kept pace, making it very difficult (and often impossible) for them to register their news content so they can enforce their rights in federal court. The tens to hundreds of pages of news content containing multiple articles that Americans read through are now encapsulated in the form of hundreds to thousands of webpages incorporating a variety of works, including, in addition to text, photographs, audiovisual works, interactive displays, and audio recordings. These websites are often updated with new or edited content on a constant basis throughout the day.

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July 18, 2022