



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

Access to Electronic Works

Docket No. 2023-3

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 September 1, 2023, regarding updates to the regulations governing access to electronic deposits of published works submitted to the Office that have been selected for addition to the collections of the Library of Congress (“Library”).

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 copyrighted works for the public to enjoy.

We believe that the proposed rule is premature at this time, and that additional time for examination and engagement is warranted to address our concerns arising from the NPRM which prevent us from supporting the proposed rule. Commensurate with the gravity of the issues introduced by the expansive scope of the proposed rule which would grant the Library access to *all* electronic deposit copies of *every* published copyrighted work, further examinations of, critical updates to, and

consultations on the registration and deposit systems and the Library’s security systems, programs, and practices are paramount. Any future rule must contain language that sufficiently addresses:

- (1) the capabilities of the Library’s security systems and procedures to guard against significant vulnerabilities and the potential for cyberattacks or other leakage of copyrighted works;
- (2) the implementation of prohibitions against the Library, the Copyright Office, and authorized users from copying or transferring of electronic deposit copies, unless notice to and written consent from the copyright owner has been secured; and
- (3) the deployment of technical protection measures (“TPMs”) in accordance with industry best practices and standards to protect electronic deposit copies and implementation of improvements to registration and best edition practices to support copyright owners.

The current amendments in the proposed rule fail to address these concerns, and thus we urge the Library and Copyright Office to table this rulemaking in order to allow more time to address and examine these issues with copyright owners through study and consultations.

Heightened Security and Protection of Electronic Deposit Copies Must Be Addressed Before a Rule is Proposed

We appreciate the Copyright Office and the Library offering reassurances in the NPRM related to deposit security, including descriptions of how access to electronic deposit copies will remain restricted as it is in the current rule to two simultaneous authorized users at the Library’s physical premises in Washington, D.C. and Culpepper, VA (except for securely connected access for offsite Library employees acting within the scope of their duties),¹ how on-site access is monitored, what the characteristics of the computer terminals are, and how the Library encrypts electronic deposit

¹ Access to Electronic Works: Notice of Proposed Rulemaking, 88 Fed. Reg. 60413, 60416 (proposed Sept. 1, 2023) (“Access to Electronic Works NPRM”). In this regard, we encourage the Library to put systems in place to coordinate between the Library’s facilities in Washington, DC and Culpepper, VA to ensure that the aggregate number does not exceed two simultaneous users.

copies.² We also appreciate the Office and Library’s clarifications of current security measures and protocols in the recent Best Edition Study.³

It would seem that the Office and the Library have made considerable progress in addressing security issues. However, the proposed rule would greatly expand the Library’s access to include all possible electronic deposit copies of commercially valuable copyright-protected works. Because electronic copies are especially susceptible to wide-scale piracy with little to no degradation in the quality or integrity of such files, the new rule would dramatically heighten security vulnerabilities and thus our concerns related to deposit security.

Naturally, security of electronic deposits is a major concern for copyright owners and registrants of all types and for all copyrighted works and warrants constant vigilance and examination of the Library’s IT systems—including regular audits by third-party security professionals. Such measures are necessary to improve the ability of the Library’s security systems to respond to possible security breaches, like cyberattacks, and to keep pace with changes in the security landscape. If copyright owners perceive that electronic deposit copies of their works are vulnerable to security breaches, they will have reservations about submitting deposit copies and participating in the registration system in general. This would result in fewer deposit copies flowing through the Copyright Office and into the Library’s collections.

Any future rule should explicitly address the means or processes by which the Library and the Copyright Office will:

- improve the Library’s current security systems so that such systems are (i) at least as effective as the security standards and best practices of the relevant copyright industry and (ii) create an impenetrable commercially secure system that prevents cyberattacks and leakage via onsite terminals that might result in unauthorized access to electronic deposit copies and/or alteration of those copies or the associated registration data;
- implement a clear and effective process so that, in the event of a breach or cyberattack, the Copyright Office and Library will take immediate steps to stop it and prevent any harm, and immediately notify any copyright owners that may be affected; and

² Access to Electronic Works NPRM, 88 Fed. Reg. at 60414, 60416. The security of any encryption is determined by a variety of factors including, but not limited to how it is implemented, what encryption is used, how encryption keys are managed and who has access to those keys, how often encryption keys are changed, and whether there is one key for everything or separate keys for different things. Stakeholders need a better understanding of how the Library implements encryption in order to determine if it is adequate.

³ Letter from Shira Perlmutter, Reg. of Copyrights, U.S. Copyright Off., to Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop. 18–20 (Dec. 1, 2022) (“Best Edition Study”).

- finesse and continue developing a security system which protects electronic deposit copies at the point of uploading and ingestion into the Office’s online system.

The Copyright Alliance and our members stand ready to assist the Library’s IT staff in strengthening the Library’s security capabilities and to consult on relevant security measures and protocols that are compliant with the best practices and standards of the different creative industries. We urge that the Copyright Office and Library to consult with stakeholders on these issues before any regulatory change is enacted.

Further Engagements and Adjustments are Necessary as to the Use of Electronic Deposit Copies in Library Programs and Policies to Prevent Unauthorized Copying and Transferring of Electronic Deposit Copies

While the Copyright Alliance and our members are fully supportive of the Library’s continuing efforts to build its digital collections, it is essential that any future rule regarding such collections directly prohibit unauthorized copying and transferring of electronic deposit copies. There are major differences between digital and physical copies, including the fact that digital copies are subject to licenses and that certain exceptions, like the first sale defense, do not apply to digital copies. These crucial differences between digital and physical copies makes it even more vital for the Library to engage with the copyright owners. Historically copyright owners have not been consulted by the Library and have had no opportunity for meaningful public engagement on Library programs and practices in which their deposit copies are used. As the Library transforms to electronic deposits that can no longer be the case.

The Library develops its eCollections and circulation strategy as internal policies and processes without public consultation and does not make them publicly accessible. This means that copyright owners are unaware how Library programs and practices may affect their deposit copies and implicate or conflict with their copyrights. For example, though physical versions of deposit copies of books are donated by the Library, we would have grave concerns if this donation program were extended to digital versions of copyrighted works. Moreover, because the Library is not governed by the Administrative Procedures Act and its activities are excused under the doctrine of sovereign immunity, there is no opportunity for redress when copyright harms arise from such programs. Thus, meaningfully engaging copyright owners in the development of Library programs and practices that effect digital deposit copies is crucial.

Perhaps most significantly, though we appreciate clarifications as to the effects of certain Library programs and practices on electronic deposit copies—for example, how the Library does not

currently have plans to offer offsite public access to such deposits⁴—these clarifications are *not* actually incorporated into regulations and therefore lack the force of law. Such policies, programs, and practices can also change over time due to new leadership changes and other changes and updates within the Library.⁵ Accordingly, in addition to continual engagement with copyright owners, it is essential that any new rule regarding access to electronic deposits codify these assurances by adding language to the rule that makes clear:

- that the Library, its authorized users, and the Copyright Office shall not copy or transfer any electronic deposit copy without notice to and written consent from the copyright owner;
- the steps the Library will take to ensure that an authorized user cannot make a copy of or otherwise transfer an electronic deposit copy, including limiting on-site access by authorized users to Library premises through computer terminals located in the Library’s reading rooms, which are not connected to the internet, having USB and other ports disabled, and are under the supervision of Library staff, and collecting personal electronic devices before an authorized user accesses the on-site terminal;
- that the Library will not transfer or grant off-site access to electronic deposit copies via remote access, loans, donations, or any other Library programs (such as the Interlibrary Loan Program and Surplus Books Programs) or offerings without notice to and written consent from the copyright owner;
- that the Library shall not expand on-site access to premises outside of its facilities in Washington, D.C., and its Culpepper facilities; and
- to the extent TPMs are not already implemented by the copyright owner as submitted in the copy via the electronic deposit copy submission process, the Library shall employ security measures and TPMs according to the industry standards corresponding to the specific type of copyrighted work during the uploading and transferring of an electronic

⁴ Best Edition Study, at 18–19.

⁵ The Best Edition Study references the Surplus Book Program, in which the Library states that it “has no plans to share digital files of copyright deposits *that are not added to its collections.*” *Id.* at 18 (emphasis added). This raises questions over whether any future plans the Library may have regarding digital deposits that are added to its collections via the deposit and registration systems, and whether stakeholders will have a meaningful opportunity to weigh in on any changes.

deposit copy from the Copyright Office into the Library's collections and maintenance of such copies in the Library's collections.⁶

The Copyright Office and the Library have divergent goals resulting from the deposit system. The Copyright Office's use of deposit copies is for examination and record-keeping for litigation purposes. But the Library's use of deposit copies is for curation and archival purposes. In both instances, copyright owners are the ones who bear the full burden of providing the deposit copies that enable the Office and the Library to fulfill their respective goals. Obtaining the appropriate consent and authorizations and continual input from copyright owners about the systems and programs that use their deposit copies is critical, particularly as many of these works are being simultaneously commercialized by their copyright owners. Thus, it is vital for the Library to meaningfully engage copyright stakeholders on issues of Library programs and practices that pertain to deposit copies.

Improvements in the Registration System Are Necessary to Facilitate the Electronic Deposit Copy System

As the Library begins the transformation to a system where electronic deposit copies are preferred, it is vital that the Copyright Office and Library either remove or update the best edition requirements in order to accommodate the submission of such deposits and allow registrants to submit electronic deposit copies that are protected by the same TPMs used in the ordinary course of their businesses.⁷ Any updated best edition requirements must include a variety of format options, selected after consulting with the copyright owner of each type of copyrighted work.

It is imperative that registrants retain the option to deposit physical copies instead of an electronic copy and any updated best edition requirements must always include such an option. Flexible copyright registration options can also facilitate the Copyright Office and Library's digital strategies and goals—such as introducing a much-needed registration option for dynamic web content. Doing so would not only enable copyright owners to register these works and adequately protect their copyrights in a digital age but would also enable the Library to increase its acquisition of web content as part of its Digital Collections Strategy.⁸

⁶ Amending best edition requirements to allow for the submission of electronic deposit copies which include technical protection measures, as done in the copyright owner's normal course of business would mean the Library would not be tasked with doing so.

⁷ Copyright Alliance, Comments on Best Edition Study: Notice and Req. for Pub. Comment 3, 13 (July 18, 2022), <https://copyrightalliance.org/wp-content/uploads/2022/07/Best-Edition-Study-Comments-FINAL.pdf>.

⁸ LIBRARY OF CONGRESS, DIGITAL COLLECTIONS STRATEGY OVERVIEW 2022-2026 4 (Oct. 2021), https://www.loc.gov/acq/devpol/Digital%20Collections%20Strategy%20Overview_final.pdf.

Conclusion

We urge the Copyright Office and the Library to pause this rulemaking and conduct a deeper examination into the security, access, best edition requirements and other issues that this proposed rule raises. The Copyright Alliance and its members look forward to continuing working with the Copyright Office and the Library on these important digital and modernization issues that affect the copyright registration system and the creators who depend on it.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Kupferschmid', written over a light gray rectangular background.

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