



Statement of
THE ASSOCIATION OF AMERICAN PUBLISHERS AND THE AUTHORS GUILD
before the
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON HOUSE ADMINISTRATION
Hearing on
“The U.S. Copyright Office: Customers, Communities, and Modernization Efforts”
June 26, 2024

The Association of American Publishers and the Authors Guild jointly and respectfully submit this written testimony for the record in connection with the Committee on House Administration’s hearing on the Copyright Office’s modernization efforts titled *The U.S. Copyright Office: Customers, Communities, and Modernization Efforts*.

We commend the Committee for holding this important hearing to ensure the effectiveness of the U.S. copyright system. We fully support the Copyright Office and applaud the efforts it has undertaken to modernize its operations and registration system. Copyright Office modernization is critical to the continued success of the mission of the Copyright Office and to ensuring that the copyrighted works of rightsholders are protected.

We align ourselves with the written hearing testimony submitted by the Copyright Alliance. Additionally, as copyright owners and rightsholders who submit works of authorship to the Copyright Office for the purpose of registration, our respective members are especially concerned about the rulemaking currently being undertaken by the Copyright Office pertaining to access to electronic works and the precedent it would set as a means to make substantive updates to statutory law. The proposed rule would give the Copyright Office authority to make and transfer electronic copies of published works of authorship—submitted by rightsholders for registration purposes—to the Library of Congress for purposes of its digital library operations, without licenses or TPM or DRM protections. The proposed rule is opposed by the creative community, conflicts with key statutory rights and limitations, and exceeds the authority that Congress has delegated to the Copyright Office.

The Association of American Publishers (AAP) is the national trade association for book, journal, and education publishers in the United States, the largest such publishing market in the world. AAP’s members include major commercial publishers of fiction and nonfiction; education publishers; small, specialized, and independent publishers; and nonprofit publishers such as university presses and scholarly research societies. Among other priorities, AAP works to ensure and advance a rational copyright framework that incentivizes and respects the intellectual and financial investments of authors and their publishers, including, especially, a vibrant and secure marketplace for the exercise and protection of exclusive rights.

The Authors Guild, Inc. (the “Guild”) is a national non-profit association of 15,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and fair contracts. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

These groups welcome efforts by the Copyright Office to modernize its registration systems, including by making it easier to submit deposits in the preferred format of registrants, whether physical or electronic. They also fully support the mission of the Library of Congress and are proud to contribute to that mission with their works. But the Copyright Office must act within the statutory authority delegated to it by Congress in the Copyright Act, and unless specifically authorized under the Copyright Act, it may not circumvent the exclusive rights of copyright owners through rulemaking.

While the Library of Congress and Copyright Office continue to pursue IT modernization efforts, it is solely the role of Congress to modernize the Copyright Act itself. Congress has done that since 1791 and recently through updates to the Copyright Act including the Music Modernization Act and the CASE Act. Notably, during the comprehensive copyright review undertaken by Congress from 2013-2018, Congress did not propose changes to the deposit and registration system. However, we are not opposed to Congressional review of those provisions.

It is a fundamental tenet of copyright law that ownership of a copyright in a work is distinct from ownership in a particular copy embodying a work.¹ In other words, it is foundational to copyright law that possession of a particular copy does not permit one to reproduce, transmit, otherwise distribute, or publicly display or perform that work. The Copyright Act also clearly recognizes that transmission of a copyrighted work embodied in an electronic format necessarily results in the creation of a new copy of the work. Thus, unlike with works in physical formats, the transfer and use of works in electronic formats, including by the Copyright Office and Library of Congress, implicates a copyright owner’s exclusive rights.

This longstanding statutory framework is critical to the ability of copyright owners to protect and market their works in the digital world.² The proposed rule runs contrary to the law, and contrary to Congress’s repeated recognition of the “risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work.”³

Nothing in the Copyright Act provides an exception to the Copyright Office or Library of Congress to make copies of creative works or to transmit them to the Library of Congress for the purposes in the proposed rule. To be clear, the statutory provisions and legal arguments relied on to promulgate this Rule clearly do not grant the Copyright Office such authority for the following reasons:

¹ 17 U.S.C. § 202.

² See U.S. Copyright Office, DMCA Section 104 Report, pp. 97-101 (Aug. 2001), <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

³ S. Rep. No.105-190 at 61 (1998).

- The authorization to create a “facsimile reproduction” of deposit materials for registration records before transferring the materials to the Library of Congress in 17 U.S.C. § 704 does not permit the Copyright Office to create digital copies of deposit materials for the Library of Congress’s collections. Further, the definition of “facsimile reproduction” does not include digital copies based on its use in the Copyright Act, legislative history, and the Office’s own materials.⁴ Nothing in § 704 otherwise permits the Copyright Office to authorize the Library of Congress to reproduce electronic deposit materials it has acquired and make them publicly accessible in ways that implicate the exclusive rights of copyright owners.
- The fact that deposit copies become the property of the United States Government under 17 U.S.C. § 704(a) does not permit either the Copyright Office or Library of Congress to reproduce the deposit copies. As noted above, the Copyright Act distinguishes between ownership of a copyright (which includes the exclusive right to reproduce a work) and ownership in a copy in which the work is embodied and provides that transfer of ownership of any copy “does not of itself convey any rights in the copyrighted work embodied in the object.”
- Nothing in the Copyright Act excuses the creation of digital copies if the user attempts to “replicate” the experience of physical lending without licensing the digital uses implicated. This very issue has been adjudicated by the Southern District Court of New York, which affirmed that “no case or legal principle” supports such a notion.⁵

In sum, the proposed rulemaking is effectively a means by which the Copyright Office is creating law—a policy that would benefit the Library of Congress but work to the detriment of creators. Moreover, while rulemakings may be carried out by the Copyright Office, they must be formally approved and publicly promulgated by the Library. This inherent tension is further support for the fact that Congress, not the government agency, must be the governing body over any digital deposit amendments that would benefit the agency but are opposed by the copyright owners whose works are at issue. We submit that Congress is best situated to weigh the needs of all stakeholders, including the Library.

We are aware and deeply appreciative of the immense amount of regulatory and advisory work undertaken by the Copyright Office on so many issues that are so important to the integrity of the copyright system, but the Office does not have authority to update registration and deposit provisions in a manner that fundamentally alters what Congress has enacted. Any rule like this one, which disregards key copyright principles and bypasses the statutory authority of Congress, sets a troubling precedent for both government reach and copyright licensing in the digital age.

Thank you for the opportunity to share these views with the Committee on House Administration.

⁴ See, e.g., H.R. Rep. No. 94-1476 at 75 (1976) (“Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form ... Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in ‘machine-readable’ language for storage in an information system.”); U.S. Copyright Office, The Section 108 Study Group Report, at 19 (2008) (“Until the DMCA was enacted, copying under subsections 08(b) and (c) was limited to a single copy of a work ‘in facsimile form.’ The DMCA changed these provisions ... to allow those copies to be made in digital form, in recognition of the changing practices of libraries and archives.”).

⁵ Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 391 (S.D.N.Y. 2023).