



**BEFORE THE UNITED STATES COPYRIGHT OFFICE**

**COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON  
MANDATORY DEPOSIT OF ELECTRONIC-ONLY BOOKS**

**SUBMITTED BY JONATHAN BAND, LCA COUNSEL**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year.

LCA welcomes the opportunity to submit comments regarding the June 29, 2020 notice of proposed rulemaking (“NPRM”) concerning “Mandatory Deposit of Electronic-Only Books.” LCA supports adoption of the proposed rule. These comments describe the importance of deposit in ensuring that the Library of Congress continues to build and preserve a national collection of works in all formats. These comments also discuss the public access of works collected by the Library through mandatory deposit requirements.

**Background**

In January 2010, the Copyright Office implemented an interim rule regarding the mandatory deposit of electronic works not available in a physical format; these works had previously been exempted from the mandatory deposit rules. This interim rule for “online-only

works” applies essentially to electronic serials: “periodicals, newspapers, annuals, and the journals, proceedings, transactions, and other publications of societies” without a physical counterpart. Deposit under the interim rule is only required when the Register of Copyrights specifically demands a copy of the serial for the library. The interim rule also governs public access to these deposited works, and access at any one time is limited to two authorized users who may only view the works via secured servers over a secured network at its facility or remote location. In practice, these works are viewable only at two secure terminals located in the Library of Congress’s Jefferson Building. Users cannot save or download a copy, but may print an article.

On May 17, 2016, the Copyright Office published a notice of inquiry seeking public comment on expanding the interim rule to apply to electronic-only books and sound recordings, and to make the interim rule final. On April 16, 2018, the Copyright Office issued an NPRM that proposed to expand the interim rule to electronic-only books, and to make the interim rule final. LCA submitted comments supporting the Copyright Office’s proposals. The Copyright Office now has made some technical changes to its 2018 proposal, and seeks to finalize the interim rule as amended.

### **The Interim Rule Should Be Made Final and Expanded to Electronic Only-Books**

LCA supports extending the interim rule’s on-demand deposit requirements to electronic-only books, and making the rule final, because of the critical role of deposit in building the Library’s collection and ensuring long-term preservation of these works. The rule would apply only to the specific circumstance of works available only online, not those which are also produced in a physical copy. LCA has no objection to the clarifications to the 2018 proposed rule

specified in the 2020 NPRM. They adequately respond to concerns raised by commenters on the 2018 proposed rule.

The Library's initiative to preserve and provide access to content is extremely important as it continues to build the United States' national library that represents all types of works, including those that are available only in electronic form. While the digital age allows for rapid publication of content, much of this content may be ephemeral and easily lost without proper stewardship. The Library's interest in collecting and preserving all types of works produced today will ensure that future generations of users will be able to access these materials.

Without mandatory deposit, works created in the digital age could be lost forever. Approximately half of films made before 1950 and most silent films are unavailable because of the lack of national preservation of these important pieces of our cultural heritage. The Library is actively trying to ensure that such enormous losses are not replicated in the digital era due to the lack of mandatory deposit of online-only works.

Many of the concerns regarding online-only serials exist with respect to electronic-only books. Expanding the mandatory deposit upon request requirement of the eight-year old interim rule to electronic books will ensure that the Library can continue to fulfill its responsibility to build and preserve a national collection.

The interim rule has worked well, enabling the Library to build and preserve its collection without imposing an undue burden on rights holders. The interim rule should be expanded to include electronic-only books and made final.

### **The Proposed Rule Correctly Does Not Create New Security Requirements**

The Library is well-equipped to receive, store and provide access to any online-only materials collected under mandatory deposit regulations. Digital security is more advanced today

than at the time the current interim rule was considered. Numerous institutions, such as Google and HathiTrust, hold enormous volumes of digital files in their collections and are adequately protected by security measures. Indeed, as the U.S. Court of Appeals for the Second Circuit confirmed, the type of security measures in place to protect HathiTrust's digital collections have rendered minimal the risk of harm to rights holders. As the Library completes its digital infrastructure improvements, it is even more unlikely that the Library's digital collection would be the subject of the type of security breach that would result in irreparable harm to the rights holders. Accordingly, the proposed rule correctly does not impose specific security requirements on the Library with respect to deposited electronic materials.

### **The Proposed Rule Correctly Requires Retention of Metadata**

The proposed rule includes a revision to paragraph IX of Appendix B to Part 202. Subparagraph 2 provides that "if included with the published version of the work, descriptive data (metadata)...should accompany the deposited material." Metadata, including rights metadata, is an essential component in properly curating the work and ensuring its usefulness in the Library's collection.

### **Greater Public Access to Collected Works is Essential to the Library's Mission**

Providing access to works collected through mandatory deposit is a key aspect of the Library's objective of serving the nation by providing access to our cultural heritage and information. It is therefore essential that the Library continue to be able to serve users by providing access to all types of materials.

LCA notes, however, that 37 CFR 202.18 specifies that public access to deposited electronic materials "will be limited, at any one time, to two Library of Congress authorized users via a secure server over a secure network that serves Library of Congress premises." This

provision is too restrictive and does not accord with current practices in the library community. Access is an essential component of the Library's mission and such a narrow policy hampers the spread of knowledge and culture. The notice indicates "over time the Library would like to expand" public access under section 202.18 in separate rulemakings. LCA urges the Office to initiate should a rulemaking in the near future.

### **The Proposed Rule Should Be Expanded to Sound Recordings**

The 2016 Notice of Inquiry asked for public comment on whether the interim rule should be expanded to apply to online-only sound recordings. LCA stated that it should. Unfortunately, the proposed rule--without explanation--does not address the mandatory deposit of electronic-only sound recordings. LCA believes that including such sound recordings in the Library's collection is important for the preservation of our cultural heritage. LCA hopes that the Office considers expanding the rule to include these sound recordings as soon as possible.

### **Conclusion**

Notwithstanding the limited access to deposited works provided under the proposed rule, and the exclusion of sound recordings, LCA supports adoption of the proposed rule. Further, LCA urges the Office to initiate rulemakings in the near future to expand public access and include sound recordings within the rule's scope.

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