

**COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE AND
THE SOFTWARE PRESERVATION NETWORK ON
ELECTRONIC DEPOSIT AND BEST EDITION RULES**

The Library Copyright Alliance (“LCA”) consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 117,000 libraries in the United States.

Software Preservation Network (“SPN”) is a non-profit organization established to advance software preservation through collective action. Its 20 institutional members are libraries, museums, and archives on the cutting edge of software preservation. SPN members are keenly aware of the difficulties associated with collecting and preserving our digital cultural heritage and the crucial role of the Library of Congress as the only institution with unique legal authority to collect born-digital materials.

LCA and SPN welcome the opportunity to respond to the Copyright Office’s Notice of Inquiry (“NOI”) on electronic deposit and best edition rules. We oppose removing the best edition requirement from the registration deposit process in section 408 because we believe it would have an adverse effect on the deposit of works and therefore on the collection of the Library of Congress (“the Library”). Even if the Library of Congress were still able to request deposit of the best edition under the mandatory deposit provision of section 407, some rightsholders would respond to such requests slowly or would ignore them altogether, to the detriment of the Library’s collection. The value of deposit to the Library and the creative ecosystem is so great, the burden of deposit on the rightsholder is so small, and the benefits of copyright to rightsholders are so vast that the existing statutory framework for deposit should remain as it is. To be sure, the Copyright Office should

continue to exercise its regulatory authority to fine-tune the deposit requirements for specific categories of works. But the paramount concern should be building the Library's collection.

These comments focus on the importance of the deposit requirement to the preservation and promotion of our cultural heritage and therefore to fulfilling the purpose of the copyright system. As the Copyright Office examines the technical details of deposit and best edition, it must not lose sight of the critical role deposit plays in the creative ecosystem by ensuring future generations of creators have access to our cultural heritage.

I. Introduction

Deposit of the best edition of a work is essential to supporting the efforts of the Library of Congress to provide public access to a comprehensive national collection. The Library participates in many programs that ensure that library users throughout the country have access to those works, both during and after copyright owners' period of exclusivity. That public access is part of the essential bargain struck by our copyright laws and the mission of libraries and other cultural heritage institutions.

A fundamental part of the *quid pro quo* of our copyright system is a temporary and federally enforced period of exclusivity for copyright owners—with appropriate limitations and exceptions—in exchange for public access to creative works after the period of exclusivity. Congress included the deposit requirement to help effectuate that bargain by channeling significant published works into the Library's national collection.

The deposit requirement's connection to the purpose of copyright has only strengthened over time. With the birth of the Library of Congress, the deposit requirement has served to preserve works in a national collection available to the public both during and after the term of copyright

protection. It is unsurprising that Congress chose to retain the requirement even after dispensing with formalities to conform the Copyright Act to the Berne Convention.

The deposit requirement allows the Library and the Copyright Office to ensure that significant works enter the national collection regardless of popularity or commercial exploitation. This ability is particularly important as copyright terms now span longer than rightsholders' interests in preserving the works they own. As more and more creative works are distributed only in licensed, online formats no other library can acquire or preserve, the Library of Congress's unique ability to receive and preserve copies of these works pursuant to the deposit requirement is literally the only assurance the public has that such works will be accessible to future generations. Without the Library's extensive efforts to preserve deposit copies, many works would be lost long before the period of exclusivity expires. The Library's efforts to put deposit copies into the hands of the public, regardless of their location or disability, similarly furthers the purpose of copyright.

Finally, the costs of complying with the deposit requirement are modest compared to the benefits rightsholders receive and a fair exchange for copyright's tax on readers. An assessment of those costs must include the flexibility the Copyright Act already affords the Copyright Office to ensure that the requirement does not impose undue burdens. It must also account for the full benefits that creators receive from copyright, including the ability to draw inspiration from works they find in libraries.

I. The Deposit Requirement Is a Valid Condition on a Statutory Right Because It Helps Fulfill the Essential Bargain of Copyright.

The deposit requirement is foundational to U.S. copyright law and helps fulfill the constitutional purpose of copyright. Congress, through the Copyright Act, has “creat[ed] a balance between the artist's right to control the work during the term of copyright protection and the public's need for access to creative works.” *Stewart v. Abend*, 495 U.S. 207, 228 (1990). The

deposit requirement is an essential part of that balance because it ensures “public access to the products of [authors’] genius after the limited period of exclusive control has expired.” *See Sony Corp. of Am. V. Universal City Studios*, 464 U.S. 417, 429 (1984). It is thus rationally related to a legitimate government interest and a valid condition on a statutory benefit.

While copyright law in the United States has changed significantly, library deposit has remained an important fixture. In 1846, through the Smithsonian Act, Congress formally initiated deposit for use in libraries in order to build a national collection. Elizabeth K. Dunne, *Study No. 20: Deposit of Copyrighted Works*, in *Copyright Law Revision Studies Prepared for the Subcomm. On Patents, Trademarks, and Copyrights of the Comm. On the Judiciary*, 86th Cong., 2d Sess. (Comm. Print 1960), at 11–12. Even after the Berne Convention, Congress retained the deposit requirement for library use because it is a necessary tool in building a national collection. *See S. Rep. No. 100-352* at 45 (1988). As the mission of the Library of Congress has evolved, the deposit requirement’s connection to the core purpose of copyright has only strengthened.

A. The Deposit Requirement Is Part of the *Quid Pro Quo* of Copyright Protection.

As the Court in *Monsanto* explained, Congress may condition voluntarily sought benefits on the furnishing of certain private property if that condition rationally relates to a legitimate government interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (conditions on voluntarily sought government benefit (registration to sell pesticides) were “rationally related to a legitimate Government interest” and constitutional).

It has been clear since at least *Wheaton v. Peters* that copyright is not a common-law property right, and that Congress may prescribe the conditions under which it is enjoyed. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663–64 (1834). Nor does the Copyright Act rest on “any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will

be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.” *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 445 (D.C. Cir. 2018) (citing to H.R. Rep. No. 60-2222, at 7 (1909)). Far from a natural property right of authors, “the principle of copyright is a ‘tax on readers for the purpose of giving a bounty to writers.’” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021) (quoting Thomas Macaulay, *Speeches on Copyright* 25 (1913)). And Congress, “weighing advantages and disadvantages, will determine the more specific nature of the tax, its boundaries and conditions, the existence of exceptions and exemptions, all by exercising its own constitutional power to write a copyright statute.” *Id.* At 1195–96.

Just as fair use is a valid limitation on the scope of exclusive rights conferred by the Copyright Act, the deposit requirement is a valid condition on the enjoyment of those exclusive rights. *See* 17 U.S.C. § 107. This is true regardless of whether noncompliance with that condition results in forfeiture of the exclusive rights. Both fair use and the deposit requirement ensure that copyright “ultimately serves the purpose of enriching the general public through access to creative works.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). The deposit requirement accomplishes this objective by promoting public access to works both during and after the period of copyright exclusivity.

B. The Deposit Requirement and the Library of Congress Have Become More Essential to Fulfilling the Purpose of Copyright Over Time.

The purpose of the deposit requirement has evolved over time. The most notable development in that evolution has been the creation of the Library of Congress and its public-facing mission. As the Ninth Circuit explained in *Ladd*, “[t]he Copyright Clause grants copyright protection for the purpose of promoting the public interest in the arts and sciences. Conditioning copyrights on a contribution to the Library of Congress furthers this overall purpose.” *Ladd v. L.*

& Tech. Press., 762 F.2d 809, 814 (9th Cir. 1985). Although the failure to deposit works with the Library is no longer grounds for forfeiture, the connection between the deposit requirement and the purpose of copyright persists.

The deposit requirement finds a precursor in the Statute of Anne. The Copyright Act of 1710 (the Statute of Anne), 8 Ann. C. 19. (1710) (Gr. Brit.). The Statute required nine copies of each published work to be deposited for distribution to prominent libraries such as the Bodleian at Oxford University. *Id.* art. V. Massachusetts' 1783 copyright statute similarly provided that one copy of every copyrighted book be forwarded "to the library of the university at *Cambridge* [Harvard], for the use of said university." An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions for Twenty-One Years, in *The Perpetual Laws of the Commonwealth of Mass.* 369–70 (Adams and Nourse, 1789). The first federal copyright law, the Copyright Act of 1790, contained a deposit requirement to the office of the Secretary of State, which appears unrelated to access and preservation. Craig Joyce, "*A Curious Chapter in the History of Judicature*": *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 Hous. L. Rev. 325, 361 (2005).

The Smithsonian Institution Act of 1846, however, established a direct connection between deposit and the building of a national collection. The Act provided that one copy of each work should be delivered to the Librarian of the Smithsonian Institution and to the Librarian of Congress within three months after publication to build a national library. An Act to Establish the "Smithsonian Institution," for the Increase and Diffusion of Knowledge Among Men, 9 Stat. 102, 106 (1846). Charles Jewett, the librarian appointed to the Smithsonian, stressed the importance of the deposit requirement in building a national library: "[t]o the public, the importance, immediate and prospective, of having a central depot, where all the products of the American press may be

gathered, year by year, and preserved for reference, is very great.” Fourth Annual Report of the Board of Regents of the Smithsonian Institution, Sen. Misc. Rep. No. 120, 31st Cong., 1st Sess. at 35 (1850).

In an effort to centralize copyright registration and deposit, the Copyright Act of 1870 transferred all deposits to the Library of Congress. John Y. Cole, *America’s Greatest Library: An Illustrated History of the Library of Congress* 42 (GILES 2017). Originally built as a reference library for members of Congress, the Library has expanded to become a key resource for the American public. Ellen C. Dement, *The Making of a National Library*, 2 Vand. Hist. Rev. 74 (2017).

While eliminating copyright formalities, the Berne Convention left room for member countries to request deposit copies and to impose fines for failure to comply. Jane C. Ginsburg, *The U.S. Experience with Formalities: A Love/Hate Relationship*, 33 Columbia J. L. & Arts 311, 316 (2010). When implementing Berne, the Senate Committee on the Judiciary recognized that deposits worked to advance the purposes of the Copyright Clause of the Constitution. S. Rep. No. 100-352, at 45 (1988). The Committee reasoned that, even though deposit would no longer be a condition of copyright protection, it remained “an element of the ‘quid pro quo’ paid by authors and copyright owners for the benefits they enjoy as copyright proprietors.” *Id.* The Committee also emphasized that the expansion of the deposit requirement to include works that were published without copyright notice “further underscores the importance of the requirement, and should enhance the usefulness of this means of acquisition by the Library of Congress of works for its collections.” *Id.* Nothing about changes to U.S. copyright law to implement the Berne Convention disturbs the Ninth Circuit finding in *Ladd v. Law & Tech. Press* that § 407 deposit “sustains a national library for public use.” 762 F.2d at 810.

Today, the Library of Congress continues to further the goals of copyright law via library deposits. The Register of Copyrights and the Librarian of Congress declared the deposit requirement “has been one of the most important methods for building the Library’s collections and making it the world’s largest repository of knowledge and creativity.” Mandatory Deposit of Published Electronic Works Available Only Online, 75 Fed. Reg. 3863, 3865 (Jan. 25, 2010); 37 C.F.R. § 202.24. The Library of Congress is an unmatched world resource for creative works, with a collection of more than 171 million items, including more than 25 million cataloged books and 74.5 million manuscripts. *See* Libr. Of Cong., *Annual Report of the Librarian of Congress for the Fiscal Year Ending Sept. 30, 2020*, 11 (2020) [hereinafter “*Library Annual Report for 2020*”]. As explained more fully below, these works are available in perpetuity for the public to access, learn from, and build on in new expressive works.

II. The Deposit Requirement Ensures Preservation of and Access to Significant Works at Risk of Disappearance.

The deposit requirement enables the bargain and balance of the Copyright Act by ensuring that the public may access works even after owners lose their incentive to preserve and disseminate them. As the nation’s “library of last resort,” the Library of Congress has a duty to collect and preserve even obscure works that may not be found in other collections or on the market. *See* Robert Wedgeworth & Barbara Ringer, *Advisory Committee on Copyright Registration and Deposit: Report of The Co-Chairs A/5* (1993) (deposit “allows the Library to act as a library of last resort for recording the existence of cultural works”). The Library dedicates significant resources to preserving these works throughout their period of copyright exclusivity and after they enter the public domain.

A. The Deposit Requirement Supports a Comprehensive and Diverse National Collection.

The deposit requirement is essential to the Library’s ability to serve “an indivisible world of culture and books and ideas” and display “the full spectrum of the cultures of mankind.” Daniel J. Boorstin, *The Indivisible World: Libraries and the Myth of Cultural Exchange*, in *Center for the Book Viewpoint Series No. 15* 11-12 (1985). The deposit requirement helps fulfill this goal by enhancing the Library’s collections, particularly when it comes to rare or less marketed titles. See JA 117–18; Libr. Of Cong., *Library of Congress Collections Policy Statements: Literature and Language*, 2–3 (Rev. Mar. 2022). It also enables the Library to collect and preserve works that no other library can: the large and growing body of works (from award winning motion pictures and sound recordings to software sold only “as a service”) available exclusively through licensed and “streamed” distribution channels that preclude libraries from purchasing and preserving copies.

B. The Library of Congress’s Preservation Efforts Allow the Public to Access Works After Rightsholders Lose Their Incentive to Provide Them.

The deposit requirement places rare works in the hands of Library staff with the training, resources, and incentive to preserve those works indefinitely. Throughout history, natural disasters, conflicts, and poor preservation techniques have resulted in the loss of large portions of recorded knowledge and culture. Upholding its core mission, the Library of Congress dedicates significant resources to cutting-edge preservation techniques. These efforts are essential to ensuring public access to works whose owners and publishers have lost the incentive or wherewithal to preserve them.

Major incidents, such as fires, wars, and natural disasters, can wipe out large stores of knowledge very quickly. A 2018 fire destroyed much of the National Museum of Brazil. Ed Yong, *What Was Lost in Brazil’s Devastating Museum Fire*, *The Atlantic* (Sept. 4, 2018). Among the

casualties of the fire was an audio archive of indigenous languages, which included some languages that are no longer spoken. *Id.* More recently, a 2021 fire devastated the special collections at the University of Cape Town, including irreplaceable South African works. Nora McGreevy, *Why the Cape Town Fire Is a Devastating Loss for South African Cultural Heritage*, *Smithsonian Mag.* (Apr. 20, 2021). In war, libraries are often destroyed, intentionally or otherwise. Ukrainian cultural history is threatened by the current Russian invasion; multinational library efforts seek to preserve Ukrainian cultural information stored in libraries and museums before it is destroyed by Russian forces. Pranshu Verma, *Meet the 1,300 Librarians Racing to Back Up Ukraine's Digital Archives*, *Wash. Post* (Apr. 8, 2022). Major weather events also lay waste to libraries. Hurricane Katrina damaged 700,000 library items at Tulane University and destroyed 23 public libraries across Louisiana. Parul Zaveri, *Damage to Libraries Due to Water Related Disasters*, *Library Philosophy and Practice*, *Libr. Phil. Prac.*, Aug. 2014, at 4.

Works can disappear even without the intervention of external events. Many forms of paper deteriorate over time, particularly when stored in inhospitable environments. *See Gen. Info. Programme and UNISIST, Lost Memory – Libraries and Archives Destroyed in the Twentieth Century*, 21, UNESCO CII-96/WS/1 (Mar. 1996). Likewise, as media formats change, many works are not transferred to new formats and fall victim to technological obsolescence. *See generally* Mike Casey, *Why Media Preservation Can't Wait: The Gathering Storm*, 44 *Int'l Ass'n of Sound and Audiovisual Archives J.* 14, 15 (2015).

Commercial archives and collections may be vulnerable to loss when owners lack a strong economic incentive to properly preserve their works. A 2008 fire at the sound recordings library of Universal Music Group destroyed the masters of an estimated 500,000 song titles. Jody Rosen, *The Day the Music Burned*, *N.Y. Times* (June 11, 2019). The fire destroyed important masters by

iconic performers, such as Chuck Berry, Patsy Cline, Duke Ellington, and Ella Fitzgerald. *Id.* These masters can never be recovered. *See id.* While not as sudden, the slow degradation of collections can lead to even more devastating losses of cultural knowledge. More than 80 percent of American feature films before 1930 have been lost because movie studios did not store them properly. *A Study of the Current State of American Film Preservation: Volume 1*, Libr. of Cong. (June 1993). Unfortunately, rightsholders who are no longer exploiting works commercially may not view expensive preservation methods as worth their costs. *See Rosen, The Day the Music Burned.*

The repeated extensions of the term of copyright protection have exacerbated the loss of copyrighted works due to market failures. The original fourteen-year term (with an additional fourteen years upon renewal) has been extended multiple times to finally reach the term of life of the author plus 70 years. *See William F. Patry, 3 Patry on Copyright § 7:1 (2022)* (summarizing the extensions of copyright term). Now the term of copyright protection can easily reach 130 years or longer (assuming that an author created a work at a young age) and protects works long after owners lose their interest in exploiting them. *See id.* § 7:2. The lengthy term along with the elimination of formalities that previously helped track ownership of works makes it all the more important for the Library to collect and preserve works long enough to enter the public domain.

These problems are exacerbated by changes in the way increasingly many works are commercialized, as the copyright-reliant industries pivot from selling physical copies to licensing online access to works. Licensed access models are used exclusively by award winning and market dominating movie and television distributors such as Netflix, Amazon, and Apple, music distributors like Spotify, Tidal, and (again) Apple, and computer software and video game companies like Nintendo, Steam, and Google. When works are not available for purchase in

physical formats, they cannot be acquired and preserved by libraries. Many of these platforms do not even have a model for licensing to libraries. *See, e.g.,* Judy Tsou & John Vallier, *Ether Today, Gone Tomorrow: 21st Century Sound Recording Collection In Crisis*, 72 Notes 461 (2016). For this large and growing body of work, the Library of Congress is literally the only library in the United States that has the right and ability to acquire and preserve copies on behalf of future generations. From *The Marvelous Mrs. Maisel* to *Adobe Creative Cloud* to *The Joe Rogan Experience*, cultural heritage that is released exclusively on licensed cloud platforms will be at grave risk of loss if the Library of Congress loses its unique power to acquire and preserve the best edition of copyrighted works.

This loss of copyrighted works due to market failures is ironic as proponents justified the extension of copyright term on the ground that works entering the public domain would be less likely to be preserved and disseminated. *See Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003) (discussing “projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works”). However, an empirical study of mostly digital works found just the opposite: “[c]opyright term extensions have clearly prevented the development of a market for reprinting a massive number of ‘missing’ works from the 20th century.” Heald, *How Copyright Keeps Works Disappeared*, at 861.

Fortunately, the Library is not constrained by market forces in deciding what to preserve and make available. The Library invested more than \$31 million in preservation efforts in 2020. Libr. of Cong., *Fiscal 2022 Budget Justification* 79 (2021). These preservation efforts include both preventative and restorative care. In the past 19 years, the Library has dedicated \$5.5 million annually to its “mass deacidification” project, neutralizing acid contained in the pages of older books. Libr. of Cong., *Fiscal 2021 Budget Justification* 67 (2020). The Library also builds and

maintains facilities that are environmentally optimized to store books for long-term preservation. *Id.* at 68. Additionally, the Library converts works that are “unstable” in their current format to more stable formats like microfilm and digital formats. Kenneth E. Harris & Susan E. Schur, *A Brief History of Preservation and Conservation at the Library of Congress* 25–26 (Oct. 2006). When works are damaged, the Library’s sophisticated Collections Care Division applies repair techniques to restore them to their original form. *Id.* at 12–15.

C. Access to Deposited Works Expands the Store of Public Knowledge and Leads to the Creation of New Works.

The public benefits of the Library’s efforts to collect and preserve works accrue long before those works enter the public domain. The Library makes its expansive collection accessible to members of the public to facilitate the distribution of knowledge. Open to the public, the Library of Congress supports “literacy and an educated citizenry for democracy” and “in many ways [is] seen as the foundation for a democratic society.” ACCORD Report, Working Paper 1, at A/60. Through its unparalleled collection, the Library is “a place where any citizen can study any topic or issue on which they might have an interest.” *Id.* Any person over the age of sixteen can patronize the Library of Congress and use its Main Reading Room. *LC Lowers Age of Users for Main Reading Room*, 19 *Libr. of Cong. Gazette* 1 (May 2, 2008). Researchers who are unable to make a trip to Washington D.C. can receive items from the Library’s collections anywhere in the world via interlibrary loan. *Request Items Through Interlibrary Loan*, 5 *Libr. of Cong. Mag.* 6 (2016). In 2019, the Library circulated more than one million items for use inside and outside the Library. *Libr. of Cong., Annual Report of the Librarian of Congress for the Fiscal Year Ending September 30, 2019*, at 11.

The Library offers a specific program for users with print disabilities. The program, called the National Library Service for the Blind and Print Disabled (“NLS”), distributes braille books

and audiobooks both physically and electronically. *Overview*, The Nat'l Libr. Service for the Blind and Print Disabled (2020). The Library converts works into accessible formats in-house. *See id.* The NLS Catalog includes more than 74,000 braille books and more than 207,000 audiobooks. *Id.* In 2020, more than 20 million accessible materials were distributed by NLS. *Library Annual Report for 2020* at 31.

Preservation and access foster a better-informed society and facilitate the creation of new works, serving both First Amendment and copyright interests. This is the core function of the deposit requirement and, indeed, a core function of libraries and archives. These institutions “collect and bring together in single repositories books, journals, music, and a wealth of other materials from a variety of sources in a way that no single individual could, thereby streamlining and facilitating the process by which authors and creators learn from and build upon the work of others.” The Section 108 Study Group Report, U.S. Copyright Office, Mar. 2008, at 14.

III. Costs Imposed by the Deposit Requirement Are Minor Compared to the Benefits That Rightsholders Receive From the Copyright System.

It is reasonable to ask rightsholders to deposit copies of a work in exchange for decades of an exclusive and federally enforced statutory right. However, it is not even the case that all rightsholders must comply with that requirement. Both Section 407 and 408 give the Copyright Office significant leeway to modify the deposit requirement in specific cases or to exclude classes of works from the requirement entirely. 17 U.S.C. §§ 407(c), 408(c). The Office has exercised that authority to alleviate burdens and avoid absurd results. It should continue to do so, ever mindful of the paramount need to build a national collection of copyrighted works of enduring value.

To require the Library to purchase all (or most) works in the national collection would simply add an additional tax on the public's right to read. When recommending against this option in 1993, members of ACCORD estimated that the cost of additional staff and operational

expenses—excluding space and office equipment—would cost the Library approximately \$34 million per year. ACCORD Report, Working Paper No. 1, at A/58. This is more than the Library currently spends each year on preservation efforts. Further, a purchase-only policy would raise unavoidable First Amendment concerns: “[i]f the library chose not to purchase an item for any reason, it would be open to charges of censorship. If it purchased controversial material (as of course it would), like publicly supported libraries everywhere, it might be asked not to purchase such material.” *Id.* Thus, Committee members advised retaining the deposit requirement as “one of the few costs charged to copyright owners for the copyright system.” ACCORD Report, Working Paper 11, at A/318.

D. Rightsholders Benefit From Copyright Protection and Enforcement.

In justifying the measured costs of deposit, ACCORD members explained that rightsholders “can be fairly charged this expense [because of] the existence of the statutory benefits of copyright, which provide enormous commercial advantages to copyright owners.” *Id.* Copyright is a government-granted monopoly that, unlike other forms of intellectual property, “vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020).

An extensive enforcement regime accompanies those exclusive rights. See 17 U.S.C. §§ 501-509. Rightsholders may initiate extrajudicial notice-and-takedown procedures when they find their works posted by others online. 17 U.S.C. § 512(c). They may also pursue cases against those who circumvent access controls on their works regardless of registration status. 17 U.S.C. § 1201. Private parties are not without government support in seeking those penalties. The Departments of Justice, Commerce, State, and Homeland Security, in accordance with a Joint Strategic Plan set forth by an ambassador-level appointee within the Executive Office of the President, all participate

in the protection of rightsholders' copyright interests. 15 U.S.C. § 8111. Most recently, Congress created a new felony offense for infringing copyrighted works via streaming. *See* 18 U.S.C. § 2319(c).

E. Authors and Publishers Benefit From Library Deposits.

Deposit ensures that culturally significant works are not lost simply because the market no longer justifies commercial distribution. Those works are preserved in the national collection and made available to the public. They then become the foundations for new creative works, expanding our horizons and furthering the aims of the Copyright Clause and the Copyright Act. *See* Zechariah Chafee, Jr., *Reflections on Copyright: I*, 45 Colum. L. Rev. 503, 511 (1945) (“The world goes ahead because each of us builds on the work of our predecessors. ‘A dwarf standing on the shoulders of a giant can see farther than the giant himself.’”). Copyright law and policy presuppose that works will be accessible in depositories, where authors will be able to reflect upon them and create new works. ACCORD Report, Summary of Third Meeting, at A/22.

Library deposits are also instrumental to efforts of publishers that republish works found in the public domain. Many published works tend to disappear shortly after their initial publication and commercial exploitation, only to reappear once they enter the public domain and may be freely repackaged into new works with original content. Heald, *How Copyright Keeps Works Disappeared*, at 839. Library deposits are an essential bridge between these two periods of time. Entry into the national collection and the Library's efforts to preserve and provide public access to works ensures that a work such as a nineteenth century gothic novel will still be available when a publisher takes a renewed interest in the work and republishes it with new expressive material.

V. Conclusion

From this discussion, three principles emerge:

1. Deposit of the best edition provides great benefit to the public generally and creators in particular.

2. The burden of deposit on rightsholders is small relative to the benefits they receive from the copyright system, including the preservation enabled by deposit.

3. Accordingly, the Library's needs with respect to building its collection, as determined by the professional judgments of the Library's staff, especially that of Library Collections and Service Group, should outweigh any concerns rightsholders may have about the burden of deposit of the best edition when they register their works. As technology evolves and the nature of the works created changes, the Library's needs change as well. The Copyright Office and the Library can adjust the regulations relating to deposit and best edition as appropriate to accommodate these changes. However, the overriding consideration when making such adjustments is what the Library needs to support its mission to create a comprehensive collection of our cultural heritage.

From these principles we can derive the following brief answers to the questions in this NOI:

- 1. One way to address concerns raised regarding the best edition requirement would be to limit the categories of deposits to it applies. To what category(ies) of deposits do you think the best edition requirement should apply and why? What would be the impact on Library collections? What would be the impact on claimants' ability to register their copyrights?**

Since works excluded from the requirement are very likely to be excluded from the Library's collections (and from the collective cultural memory the collections represent), only the Library and its expert staff should have the discretion to determine whether there are any categories of works that it does not wish to collect by means of the best edition requirement.

- 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?**

Decoupling deposit from registration would dramatically reduce the Library's ability to collect the copyrighted works that comprise our cultural heritage, undermining the public benefit at the heart of the copyright bargain. Copyright holders already benefit extensively from copyright protection, more than enough to justify the slight burden of depositing a best edition copy of their work.

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?

Requiring Library demand as a precursor to deposit of the best edition would undermine the Library's mission of collecting a diverse and comprehensive cultural record on behalf of the American people. It raises dramatically the Library's cost to acquire new works, and also increases the likelihood of works not being acquired at all.

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?

Preserving and providing access to electronic copies of works can be much more challenging than managing other formats. An electronic file cannot be perceived directly by human senses and must be read and rendered by the appropriate combination of hardware and software. The Library has expert staff and infrastructure to facilitate preservation and access to electronic copies, but these require substantial investment. In light of the cost and complexity of digital preservation, the Library should have the last word as to when electronic formats are most likely to facilitate long term preservation and access to its collections.

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?

Applicants' alleged security concerns should be weighed carefully against the Library's need for copies in accessible, stable, useful formats, suitable for long term preservation and access to cultural heritage materials. Undue deference to copyright holders' concerns about piracy already impedes acquisition and preservation of the cultural record. See, e.g., Samuel Brylawski, *Preservation of Digitally Recorded Sound*, in *Building a National Strategy for Digital Preservation: Issues in Digital Media Archiving* 64 (2002) ("copyright laws, particularly those enacted to reduce digital piracy, now can prohibit legitimate and necessary preservation functions"); Mary Ide, et al., *Understanding the Preservation Challenge of Digital Television*, in *Building a National Strategy*, op cit, at 67–79 (describing how DRM makes preservation of digital television signals challenging); Abigail De Kosnik, *Piracy Is the Future of Culture: Speculating about Media Preservation after Collapse*, 34 *Third Text* 62, 68 (2020) ("one result of the media industries' dread that piracy may lead to their collapse is that museums, libraries and archives have not been able to adequately conserve digital or digitised works, which has put these productions at a high risk of disappearing..."). Rightsholders have raised these security concerns in a variety of fora, such as the *HathiTrust* case and the triennial section 1201 rulemakings, yet never have presented any evidence that there has been any "leakage" from libraries' digital collections.

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?

Statutory interpretation should take into account the fundamental bargain that copyright law is designed to uphold. Thus, the Library should receive a copy for its collection that is adequate to its long-term preservation and access mission.

July 18, 2022