



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8359

The Honorable Thom Tillis  
United States Senate  
113 Dirksen Senate Office Building  
Washington, DC 20510

December 1, 2022

Dear Senator Tillis:

I am writing to report the results of the Copyright Office's study on the feasibility and advisability of revising the "best edition" requirements in the Copyright Act. Currently, the Act contains two separate deposit obligations, both requiring the provision of "best edition" formats. Section 407 requires deposit with the Library of Congress of two copies of the best edition of any copyrighted work published in the United States; section 408 requires a copyright owner applying to register a published work to deposit best edition copies. Your letter asked us to explore the impact on the copyright registration process—as well as on the Library and its collections—if section 408 were to be amended to remove the best edition requirement.<sup>1</sup> Finally, you asked us to opine on whether any statutory changes should be made to the Act's definition of the term.

In response to your requests, the Copyright Office undertook a review of the best edition deposit requirements and underlying policy objectives, solicited public comments,<sup>2</sup> and consulted with the Library of Congress regarding the impact of any potential changes. We appreciate the concerns raised by commenters about these requirements in the Copyright Act and are committed to addressing them as discussed below. In fact, there have already been a number of ongoing efforts by the Library and the Office to reduce copyright owners' burden in complying with the requirements. We expect these efforts to have a meaningful positive impact on the concerns that have been raised.

Notably, the Library, drawing on its recent experience working with digital deposits of e-serials, e-books, and newspapers, has determined that for most textual works, its collections

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<sup>1</sup> Letter from Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop., to Shira Perlmutter, Register of Copyrights, U.S. Copyright Office at 1 (May 24, 2021), <https://www.copyright.gov/policy/best-edition/5-24-21-Ltr-USCO-Copyright-Examination-and-Registration-Requirements-Studies-Final.pdf>. The letter specifically inquired about the possibility of removing the requirement that deposits of works submitted for copyright registration be the "best edition" versions of the work, as defined by the Copyright Act. *Id.*

<sup>2</sup> The Office published a Notice of Inquiry on June 3, 2022. Best Edition Study: Notice and Req. for Pub. Comment, 87 Fed. Reg. 33,836, 33,836–39 (June 3, 2022) ("Best Edition NOI"). In response to the Best Edition NOI, the Office received fourteen relevant comments, mainly from groups representing copyright owners.

needs can be largely met with deposits of complete digital files. The Library expects to transition to an e-preferred system for most books and serials, where it will make clear that it generally prefers the electronic version of a work when the content is available in both digital and analog (physical) formats. The Office and the Library are working to expand our regulatory and technical capacities to accept increased electronic deposits of such works through the registration process. Finally, as described below, the Office is pursuing additional avenues to improve the deposit system and make registration simpler.

Because the best edition requirement is primarily designed to support the Library's collections, which serve to document American creativity and knowledge both while works are within their copyright term and after they enter the public domain, we begin with a brief discussion of how the requirement affects the Library. Next we describe its role in the copyright registration system and summarize the efforts of both the Library and the Office to provide greater flexibility. We then turn to our study and provide our conclusions. In light of the current and pending changes to the best edition deposit requirements described here and the potential impact on the Library's collections, we do not recommend any statutory changes at this time.

## **I. THE LIBRARY OF CONGRESS AND SECTION 407**

### **A. The Nation's Library**

The Library of Congress serves as the nation's library, supporting congressional work and giving the general public access to its collections.<sup>3</sup> Founded in 1800, the Library has become the world's largest library, with a collection of over 173 million items, including over 51 million cataloged books and other print materials, as well as maps, manuscripts, and sheet music.<sup>4</sup> Every day, the Library receives approximately 10,000 items, and adds roughly 8,000 items to the collection.<sup>5</sup>

A wide variety of individuals and organizations use the Library on a day-to-day basis. In the last year the Library responded to over 730,000 requests from Congress, federal agencies, and the public, and circulated over 21 million Braille and recorded materials to readers who required accessible materials.<sup>6</sup> The Library houses the Congressional Research Service, which researches policy issues for Congress drawing on the Library's vast collections.<sup>7</sup> The Supreme Court, Congress, and other parts of the federal government use the Law Library's collections to

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<sup>3</sup> The Library's mission is "to engage, inspire, and inform Congress and the American people with a universal and enduring source of knowledge and creativity." *Legal*, LIBRARY OF CONGRESS, <https://www.loc.gov/legal/>; *see also About the Library*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/> ("The Library preserves and provides access to a rich, diverse and enduring source of knowledge to inform, inspire and engage you in your intellectual and creative endeavors.").

<sup>4</sup> *General Information*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/general-information/>.

<sup>5</sup> Material not selected for the Library's collection can also be exchanged with other institutions for materials the Library needs that are otherwise unavailable. *Fascinating Facts*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/fascinating-facts/>.

<sup>6</sup> *General Information*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/general-information/>.

<sup>7</sup> *Congressional Research Service*, LIBRARY OF CONGRESS, <http://www.loc.gov/crsinfo/>.

obtain legal research materials.<sup>8</sup> The Copyright Office is also a service unit within the Library, and it too conducts research using the Library's materials. And for members of the public, the Library offers onsite researchers access to items in its collections, which are preserved and made available consistently with copyright law.

## **B. Mandatory Deposit of Published Works for the Library**

At the core of the Library of Congress is its unparalleled collection of over 173 million items. The foundation of that collection consists of an astounding accumulation of American knowledge and creativity—books, periodicals, newspapers, music, maps, photographs, motion pictures and materials in other formats. This unique storehouse of Americana has been built largely through Copyright Office deposits. For over 150 years, American copyright law has required copyright owners to deposit the “best edition” of published copyrighted works for use by the Library.<sup>9</sup> This requirement is codified in section 407 of the Copyright Act,<sup>10</sup> which provides in part:

[T]he owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication –

- (1) two complete copies of the best edition; or
- (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

The Act defines the “best edition” of a work as “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.” Historically, the version of the work determined to be the most suitable has generally been a high-quality physical edition.<sup>11</sup>

Section 407 requires these mandatory deposits to be made through the Copyright Office for subsequent transfer to the Library.<sup>12</sup> While copyright owners who apply to the Office to register their published works generally satisfy the Library's best edition deposit requirement as part of the registration process,<sup>13</sup> not all copyright owners seek to register their works. In those situations, section 407 requires the copyright owner or its exclusive licensee to deposit the best

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<sup>8</sup> *Welcome, Law Library of Congress*, LIBRARY OF CONGRESS, <https://www.loc.gov/research-centers/law-library-of-congress/about-this-research-center/welcome/#:~:text=The%20Law%20Library%20of%20Congress,and%20the%20global%20legal%20community>.

<sup>9</sup> *See An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights* § 93, 16 Stat. 198, 213 (1870) (requiring copyright owners to mail “the best edition issued” of published books or other articles to the Library of Congress).

<sup>10</sup> 17 U.S.C. § 407(a), (b). *See generally* 37 C.F.R. § 202.19.

<sup>11</sup> *See* 17 U.S.C. § 101 (definition of “best edition”); 37 C.F.R. § 202, App. B.

<sup>12</sup> 17 U.S.C. § 407.

<sup>13</sup> Copyright owners who provide identifying material as a deposit with their registration applications may not satisfy the best edition mandatory deposit requirement.

edition of the work within three months of its publication. If the deposit is not made on time, the Register of Copyrights may send a written demand.<sup>14</sup>

In each of the past three fiscal years, the Office transferred to the Library approximately 500,000 works deposited pursuant to section 407 (*i.e.*, not through section 408 and the copyright registration process).<sup>15</sup> A significant number of these 407 deposits were digital (books and serials published only in digital form). These deposits represent a substantial contribution to the Library's collections. As a result, the national collection remains current and reflects the diversity of the American experience. Ultimately, the availability of these materials allows the Library to meet its mission to serve Congress and the American people.

## II. THE COPYRIGHT REGISTRATION SYSTEM AND SECTION 408

### A. Examination of Deposit Copies

The copyright registration system serves three important policy goals.<sup>16</sup> First, it provides a public record containing “authoritative information about millions of vetted copyright claims,” which can facilitate licensing and provide other forms of support for copyright owners and users.<sup>17</sup> Second, it increases judicial efficiency by providing courts an expert opinion on copyrightability and other registration requirements, narrowing the issues they may need to resolve.<sup>18</sup> Third, and most relevant to this study, copyright deposits received through the registration system are an important resource for the Library of Congress to grow its collections for the benefit of the American people.<sup>19</sup>

Section 408 of the Copyright Act provides that an applicant for copyright registration must submit a deposit along with the application and filing fee.<sup>20</sup> The deposit plays an important role in the registration process. A registration specialist examines it to determine whether the

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<sup>14</sup> 17 U.S.C. § 407(d). Upon request, the Copyright Office may grant special relief from the mandatory deposit requirement to copyright owners or exclusive licensees, based on a balancing of the Library's acquisition policies and hardship to the copyright owner. Special relief could include permitting the copyright owner to deposit non-best edition copies of the published works.

<sup>15</sup> See U.S. COPYRIGHT OFFICE, ANNUAL REPORT FY21 37 (2021), <https://www.copyright.gov/reports/annual/2021/ar2021.pdf>; U.S. COPYRIGHT OFFICE, ANNUAL REPORT FISCAL 2020 40 (2020), <https://www.copyright.gov/reports/annual/2020/ar2020.pdf>; U.S. COPYRIGHT OFFICE, ANNUAL REPORT FISCAL 2019 48 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf>.

<sup>16</sup> Letter from Shira Perlmutter, Register of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop. at 3 (Aug. 1, 2021) (“Deferred Examination Letter”), <https://www.copyright.gov/policy/deferred-examination/Letter-on-Deferred-Registration-Examination-2022.08.01.pdf>.

<sup>17</sup> See Deferred Examination Letter 14 & n.81.

<sup>18</sup> *Id.* at 16. Copyright deposits also serve as an important resource for courts to understand what elements particular copyright registrations cover. See, e.g., *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1061 (9th Cir. 2020) (en banc) (holding that deposit copy of a music composition submitted to the office “define[d] the scope” of the copyright at issue).

<sup>19</sup> Deferred Examination Letter at 17.

<sup>20</sup> 17 U.S.C. § 408(a).

work constitutes copyrightable subject matter and contains the requisite originality.<sup>21</sup> The specialist also confirms that the facts stated in the application are not contradicted by information in the deposit.<sup>22</sup> For example, if an application states that applicant created the “text” and “photographs” in a work but a statement on the deposit copies indicates that the photographs were taken by a different person, the specialist may communicate with the applicant to resolve that variance and ensure an accurate public record.

### **B. Section 408’s Best Edition Requirement**

For works first published in the United States, the deposit submitted with a copyright application must ordinarily consist of two complete copies or phonorecords of the “best edition” of the work that exists at the time the claim is filed.<sup>23</sup> To avoid the burden of providing two separate sets of best edition deposits, section 408 provides that “copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section.”<sup>24</sup> Thus, applicants for copyright registration may deposit a single set of best edition materials with their applications, which will satisfy their obligations under both sections 407 and 408. Many copyright owners do in fact satisfy all of their best edition deposit obligations through the copyright registration process.

All published copyright deposits are available for selection by the Library for inclusion in its collections.<sup>25</sup> The Copyright Office’s registration division decides which materials to transfer based on selection criteria provided by the Library. Once transferred, these materials may be added to the Library’s collections or offered for exchange or transfer to another government agency, library, or nonprofit institution. Published deposits not transferred to the Library are stored by the Office for a specified retention period.<sup>26</sup> In fiscal year 2019, the Office transferred to the Library over 220,000 registered works received pursuant to section 408.<sup>27</sup>

## **III. OPERATION OF THE “BEST EDITION” REQUIREMENT**

The Copyright Office and the Library are aware that the best edition requirement can sometimes cause delays due to the mailing and handling of physical deposits or impose burdens on copyright owners. In some cases, copyright owners may find it more difficult to deposit the

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<sup>21</sup> *Id.* § 102; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 302 (3d ed. 2021) (“COMPENDIUM (THIRD)”).

<sup>22</sup> COMPENDIUM (THIRD) § 618.8(E).

<sup>23</sup> 17 U.S.C. § 408(b)(2); 37 C.F.R. § 202.20(c)(1)(iii). There are various exceptions to this general rule. For example, only one complete best edition copy of the work is required for certain types of works, including for literary monographs, motion pictures, and architectural works. *See* 37 C.F.R. § 202.20(c)(2)(i). For unpublished works, the applicant generally should submit one complete copy or phonorecord of the work. 17 U.S.C. § 408(b)(1); 37 C.F.R. § 202.20(c)(1)(i).

<sup>24</sup> 17 U.S.C. § 408(b).

<sup>25</sup> *Id.* § 704(b).

<sup>26</sup> *Id.* § 704(b), (d). The Office’s retention period for deposits is 20 years for published works and the full copyright term for unpublished works. COMPENDIUM (THIRD) § 1510.1.

<sup>27</sup> *See* U.S. COPYRIGHT OFFICE, ANNUAL REPORT FISCAL 2019 48 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf>.

“best edition” instead of a different version of the work, such as when the best edition differs from the mass-market version.<sup>28</sup> Additionally, the best edition requirement for section 408 deposits may require copyright owners to submit versions of works that are higher quality than necessary for the examination process. In administering the deposit requirements, the Copyright Office and the Library have sought to reduce the impact on copyright owners where possible, while still retaining the benefits to the Library and the public of acquiring marketplace best edition copies.

#### **A. Current Guidance and Flexibility for Copyright Owners**

Because the statute does not explain how copyright owners should identify the “best edition” of a work, the Copyright Office has enacted regulations to provide guidance and flexibility. Instead of requiring a specific format, the regulations set out the Library’s order of preference for formats of different types of works.<sup>29</sup> Copyright owners can identify which version of a work best matches the Library’s preferences. For example, for printed textual matter, the Library prefers that the deposit be the largest possible size (other than a large-type edition for the partially-sighted) and illustrated in color, and contain “archival-quality rather than less-permanent paper,” a hard cover, library binding, and a sewn rather than glued binding.<sup>30</sup> In most cases, when a physical copy is published, the best edition requirement requires copyright owners to submit the published version. When a work is only published electronically, the Office does not require the publishers to create a physical copy solely for deposit.

The Copyright Act also grants the Office authority to waive or adjust the best edition requirement in appropriate circumstances, including to “provid[e] a satisfactory archival record of a work without imposing practical or financial hardships on the depositor.”<sup>31</sup> This authority has been exercised for works that the Library clearly does not need for its collections, as to which the Office does not require submission of physical best edition copies. For those works, copyright owners can instead deposit identifying material, defined as any material that provides at least “an adequate representation” of the content sought to be registered.<sup>32</sup> For example, a claimant seeking to register a copyright in any three-dimensional sculptural work, such as a piece of jewelry, a model, or a statue, is only required to submit photographs or similar reproductions that illustrate the sculptural authorship in the work.<sup>33</sup> The Office has also promulgated regulations that permit applicants for certain types of published works to submit electronic

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<sup>28</sup> For example, the best edition requirement for motion pictures prefers film deposits over DVDs, even though most motion pictures are not distributed on film and DVDs are more commonly used by consumers. *See* 37 C.F.R. § 202, App. B(III)(A).

<sup>29</sup> *See, e.g., id.* § 202, App. B.I.C.2 (For printed textual works with illustrations, the best edition is the version with “[i]llustrations in color rather than black and white.”). The Best Edition Statement divides works into 10 categories: I. Printed Textual Matter, II. Photographs, III. Motion Pictures, IV. Other Graphic Matter, V. Phonorecords, VI. Musical Compositions, VII. Microforms, VIII. Machine-Readable Copies, IX. Electronic-Only Works Published in the United States and Available Only Online, and X. Works Existing in More Than One Medium. *Id.*

<sup>30</sup> *See id.* § 202, App. B(I).

<sup>31</sup> 17 U.S.C. § 407(c).

<sup>32</sup> 37 C.F.R. § 202.21(b).

<sup>33</sup> *Id.* §§ 202.20(c)(2)(xi)(A)(I), 202.21(a).

deposits, including serials, newspapers, newsletters, photographs, contributions to periodicals, short online literary works, and secure test items.<sup>34</sup>

In addition to waiving the best edition requirement for certain categories of works by regulation, the Copyright Office can, and frequently does, accept non-best edition copies of any work for registration on a case-by-case basis. This is referred to as “special relief.”<sup>35</sup> Applicants who are unable or unwilling to deposit two best edition copies of their work may seek special relief to deposit other more convenient formats.<sup>36</sup> When considering such requests, the Office consults with the Library as appropriate and considers both the Library’s acquisitions policies<sup>37</sup> and the Office’s need to examine the deposit for registrability purposes.<sup>38</sup>

## **B. The Library’s New Digital Collections Strategy**

The Library is working to make the best edition deposit requirement more flexible as it moves towards increasing its focus on collecting works in digital form. Digital materials, and the work related to their acquisition, preservation and access, have become increasingly central to the Library’s processes and its mission to serve Congress and the nation.

In September 2021, the Library approved its new Digital Collections Strategy for Fiscal Years 2022–26 (“*Strategy*”).<sup>39</sup> Among other things, the new *Strategy* contemplates “regulatory updates to Library and registration deposit requirements” to permit copyright owners to deposit digital versions of works that were also published in physical form.<sup>40</sup> This approach will involve evaluation of the Library’s different collections streams, including Copyright Office deposits, to determine when its default approach should be “acquiring a digital instance of content instead of acquiring an analog version.”<sup>41</sup>

In keeping with the goals of the *Strategy*, the Office and the Library are working together to identify opportunities for copyright owners to provide electronic deposits instead of physical

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<sup>34</sup> 37 C.F.R. § 202.20(c)(2)(i)(N) (single issue serial); *id.* § 202.4(d)(3) (group registration of serials); *id.* § 202.4(e)(6) (group registration of newspapers); *id.* § 202.4(f)(3) (group registration of newsletters); *id.* § 202.4(g)(8) (group registration of contributions to periodicals); *id.* § 202.4(h)(9) (group registration of unpublished photographs); *id.* § 202.4(i)(9) (group registration of published photographs); *id.* § 202.4(j)(7) (group registration of short online literary works); *id.* § 202.13(c) (secure tests).

<sup>35</sup> 37 C.F.R. § 202.20(d)(1)(ii).

<sup>36</sup> *Id.* § 202.20(d).

<sup>37</sup> See *Recommended Formats Statement 2022–2023*, LIBRARY OF CONGRESS, <https://www.loc.gov/preservation/resources/rfs/RFS%202022-2023.pdf>.

<sup>38</sup> 37 C.F.R. § 202.20(d)(2).

<sup>39</sup> See LIBRARY OF CONGRESS, DIGITAL COLLECTIONS STRATEGY OVERVIEW 2022–2026 1 (Oct. 2021) (“Strategy Overview”), [https://www.loc.gov/acq/devpol/Digital%20Collections%20Strategy%20Overview\\_final.pdf](https://www.loc.gov/acq/devpol/Digital%20Collections%20Strategy%20Overview_final.pdf). The Strategy Overview is a public summary of the lengthier *Strategy* document, omitting names and strategic planning targets. The *Strategy* reflects the input and expertise of staff from across the Library of Congress, including the Library Collections and Services Group, the Office of the Chief Information Officer, and the Copyright Office.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 4–5.

best editions.<sup>42</sup> For the Library, a move towards “e-preferred” collecting will mean that it will generally prefer the electronic version of a work when the content is available in both digital and analog (physical) formats. The Library has determined that its collections needs for textual works, such as books and serials, can generally be met by deposits of complete digital files that would not be considered the “best edition” under current regulations. For this reason, the Library and Office have begun to give copyright owners the option to make deposits of certain textual works in electronic form and will continue to provide digital options for additional types of works, although deposits in physical form will still be permitted.<sup>43</sup>

The move towards e-preferred acquisitions, including copyright registration deposits,<sup>44</sup> will be a gradual, multi-year transition. Both the Office and the Library plan to pilot any changes to the deposit requirements to ensure that an e-preferred approach is convenient for applicants, is easy to administer, meets the needs of the users of the Library’s collections, and provides for the security of the collections. Pilot work may include enabling applicants to register books, serials, and other textual material by submitting either a best edition print copy or a digital version, in a file format acceptable to both the Copyright Office and the Library. We expect significant numbers of publishers will choose to deposit digital files. But these changes will necessarily be incremental, as the Library adjusts its processes to account for receiving a larger volume of digital material than in the past.<sup>45</sup>

The impact on the Library’s users is a major factor when considering a change to mandatory deposit. Some priority authorized borrowers—including some users from Congress and the United States Supreme Court—are currently dependent on the Library’s print collections. The scope of the transition to digital collecting will require consideration of their needs. In addition, physical copies are used for interlibrary loans, through which the Library plays a valuable role in providing materials that would otherwise be unavailable. As the Library begins collecting more digital materials, it will have to consider how to handle interlibrary loan requests for content held only in digital form, including ensuring its security. These considerations are discussed further below.

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<sup>42</sup> See *id.* at 4.

<sup>43</sup> See, e.g., 37 C.F.R. § 202.20(c)(2)(i)(N) (providing option to deposit digital copies of single serials). For some works deposited in digital form during copyright registration, the Library may still prefer a physical version for its collections. While the Office will continue to have the authority to demand physical versions of such works under section 407 for the benefit of the Library, the requirements for registration of textual works will be more flexible than the current system.

<sup>44</sup> One objective of the *Strategy* is to “[e]xpand the depth and breadth of digital content acquisition via the Copyright Office.” *Strategy Overview* at 4.

<sup>45</sup> Because the Library has traditionally focused on the collection of physical material, it will need time to develop new workflows and infrastructure to review and ingest digital materials into the collection. This is why the *Strategy* charges the Office of the Chief Information Officer to “invest in end-to-end modernization of IT infrastructure to support the centrality of digital collecting.” *Id.* at 5. Similarly, the Library will need to train additional staff in processing and providing appropriately rights-restricted access to digital content of all types, including but not limited to copyright deposits.



#### IV. THE COPYRIGHT OFFICE’S STUDY

Your letter asked that we study the possibility of removing the best edition deposit requirement from section 408 (regarding copyright registration), including exploring the impact on the Library. The Office is aware that, in some situations, the best edition requirement in both sections 407 and 408 can create challenges for copyright owners. We have received comments in prior proceedings that described instances in which locating or submitting the best edition of a work may be difficult or burdensome.<sup>46</sup>

In conducting this study, the Office analyzed how modifying the best edition requirement for registration deposits would affect congressional policy goals for the copyright system and the national library. We also considered the effect of any change on the operations and costs of both the Office and the Library. As requested, we held extensive consultations with the Library on the potential impact of decoupling the best edition requirements of section 407 from the registration deposit requirements in section 408.

As a first step, the Office published a Notice of Inquiry (“NOI”), which posed a number of questions to help guide our consideration of the consequences of potential changes in the best edition requirement.<sup>47</sup> The NOI asked the public to comment on how further limiting the categories of copyright deposit subject to the best edition requirement would impact copyright owners, as well as on the impact of decoupling the registration and Library deposit requirements. The NOI also requested comment on a proposal that would expand the options for submitting electronic deposits for the purpose of examining registration applications while retaining the requirement to submit best edition copies upon demand by the Library pursuant to section 407. Other questions related to how any such changes would affect the ability to register copyrights, the resulting impact on the Library’s collections and operations, the potential for security concerns, the effects on researchers’ abilities to use the collections, and the effect on the public record of copyright registrations. Finally, the Office inquired as to whether the best edition definition could be interpreted to include digital file formats that were not distributed to the public but contained the same copyrightable material as the version distributed to the public.

As discussed in greater detail below, the comments received reflected a wide variety of opinions. While commenters had divergent views on specific approaches, nearly all agreed that the registration and mandatory deposit processes could be improved. They also voiced support for the needs of both the Office and the Library in preserving, respectively, the public record and our shared history. There was no consensus, however, on the key question: whether decoupling

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<sup>46</sup> Several comments on the Office’s ongoing registration modernization efforts offered examples of when depositing the best edition of a work may be difficult. For example, Shaftel & Schmelzer stated that some visual artists may not have copies of the published version of their works and need to obtain them in the commercial market in order to make a registration deposit. Shaftel & Schmelzer Registration Modernization Comment at 21. And the American Association of Publishers has expressed a preference for depositing digital files in the ePub format, which is currently not permitted under the existing best edition regulations. AAP Registration Modernization Comment at 2.

<sup>47</sup> See generally Best Edition NOI, 87 Fed. Reg. 33,836, 33,836–39 (June 3, 2022).

the best edition requirement from the registration process is feasible or desirable as a policy matter.

As explained further below, there are ways that administration of the best edition requirement can be improved without statutory amendment. The Office and the Library are actively working on approaches, including through regulatory channels, to make the deposit process more flexible and less burdensome. As this work is ongoing, we believe it would be premature to consider statutory changes at this time.

## **V. STUDY FINDINGS**

In response to the NOI, the Office received fourteen comments from a variety of interested parties, including individual and corporate copyright owners, their representatives, and a library association and preservation organization. Commenters generally were in favor of steps that could make the copyright registration process easier and faster. Many supported removing the best edition requirement from the copyright deposit requirements in section 408 for this reason. But not all commenters favored moving from a registration system requiring, or permitting, physical deposits to one that only accepts electronic copies, for several reasons, including security. Some raised concerns about the difficulty of complying with the best edition requirement for any reason, whether pursuant to the mandatory deposit provision in section 407 or as part of the copyright registration system in section 408. At the same time, commenters acknowledged that removal of the best edition requirement in section 408 could have a negative impact on the Library and its collections.

### **A. Amending Statutory Definition of “Best Edition”**

The Copyright Act defines the “best edition” of a work as “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”<sup>48</sup> This statutory definition provides flexibility on the part of the Library and can encompass electronic and physical copies,<sup>49</sup> as well as electronic and physical publication.<sup>50</sup> The NOI asked whether the definition should be amended.

We received few comments addressing this question. One commenter recommended that the statutory best edition requirement be interpreted as including “digital file formats that were not themselves distributed to the public but contain the same copyrightable material as the

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<sup>48</sup> 17 U.S.C. § 101.

<sup>49</sup> Note that the Best Edition Regulations—37 C.F.R. § 202, App. B—and the Library’s Recommended Formats Statement—<https://www.loc.gov/preservation/resources/rfs/index.html>—include standards for electronic editions. *See also* Authors Guild Comment at 5 (acknowledging that “there is no reason that the best editions have to be physical copies, although currently that is mainly the case as the Library finds those physical copies ‘most suitable for its purposes’”).

<sup>50</sup> “Published” does not necessarily mean “created”—many works (*e.g.*, novels, photographs, sound recordings) are created in electronic format but “published” for copyright purposes in physical editions. *See* 17 U.S.C. § 101 (defining “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending”). The Copyright Office understands the as-published requirement to refer to the specific edition distributed or offered to the public, and not the version created initially by the author.

edition distributed to the public.”<sup>51</sup> In our view, however, such an interpretation would make no practical difference. As addressed above, the Office is already able to establish regulations or special relief agreements allowing digital deposits of works published only in physical editions. Additionally, while interpreting “best edition” in that broad manner may make it easier for copyright owners in some circumstances, it may present challenges in other circumstances. For example, copyright owners generally may not want the Office to be able to demand a pre-production or non-public digital version of a work that contains the same copyrightable material as the published version.

Accordingly, the Copyright Office does not recommend amending the section 101 definition of “best edition.” In our view, the statutory definition does not erect any significant roadblocks to the efficient processing of registration or mandatory deposits. To the extent complying with the best edition “as published” requirement presents difficulties, we are actively working to address those issues through our broad regulatory authority in administering the best edition requirement.<sup>52</sup>

## **B. A Simpler and Faster Registration Process**

Several commenters expressed a desire to make registration faster and less burdensome. Many identified expanded acceptance of electronic deposit copies as a way to reach this goal.<sup>53</sup>

### *1. The Effect of Physical versus Electronic Deposits on Registration*

As noted in the NOI, applications with physical deposits take much longer for the Office to process than those with electronic deposits. On average, examination of electronic applications that do not need correspondence takes 1.2 months for those with electronic deposits and 6.5 months for those with physical deposits. The average processing time for electronic applications that do need correspondence is 3.2 months for those with electronic deposits and 9.9 months for those with physical deposits.<sup>54</sup> For that reason, commenters supported increased use of electronic deposits. The Authors Guild noted that processing times for applications with physical deposits can have “drastic consequences” for copyright owners awaiting registration before they can file suit for copyright infringement.<sup>55</sup> And the National Music Publishers’ Association (“NMPA”) echoed the sentiment that electronic deposits would “certainly reduce the

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<sup>51</sup> Copyright Alliance Comment at 12–13.

<sup>52</sup> For example, the Office’s ability to provide special relief from the best edition requirement on a case-by-case basis is the result of the broad regulatory authority given to the Office to administer best edition. *See* 17 U.S.C. §§ 407(c) (Register “may by regulation exempt any categories of material from the deposit requirements of this section”), 408(c) (Register “is authorized to specify by regulation . . . the nature of the copies or phonorecords to be deposited” for copyright registration).

<sup>53</sup> National Music Publishers’ Association (“NMPA”) Comments at 2–3 (“Electronic deposit copies would mean more efficiency and lower costs for both the Office and copyright applicants.”).

<sup>54</sup> *Registration Processing Times*, U.S. COPYRIGHT OFFICE, <https://copyright.gov/registration/docs/processing-times-faqs.pdf>.

<sup>55</sup> The Authors Guild Comments at 2 (further noting that “allowing digital deposits for copyright registration purposes would make registration faster and more efficient for both the Copyright Office and the applicant”).

administrative burden and cost on copyright owners of shipping copies to the Office” while avoiding delays in the ability to file an infringement suit.<sup>56</sup>

On the other hand, commenters also noted that depositing electronic copies of a work can present unique challenges. For example, the Office imposes file size limits on electronic uploads, which can require motion picture applicants to compress and break up a single work into multiple files for upload.<sup>57</sup> Similarly, because the Office limits digital submissions to specified file extensions, the Authors Guild explained that this can pose burdens for applicants who regularly use different file formats and need to convert them before registering.<sup>58</sup> Finally, some electronic works—such as educational textbooks—contain unique dynamic or interactive material that may not be accurately captured if deposit formats are too rigid.<sup>59</sup>

The Office is committed to the efficient examination of applications and to pursuing improvements to the overall process. We have continued to shorten registration processing times significantly, even during the disruptions caused by the COVID-19 pandemic. Notably, the overall average processing time for all claims has fallen from about 8 months in the first half of FY2018 to about 2.7 months in the last half of FY2022, with eService Claims (*i.e.*, online applications with digital deposits) that do not require correspondence currently being processed in an average of about 1 month.

The Office finds persuasive many of the commenters’ arguments for expanding the list of acceptable file formats and for increasing file size limits. However, before we can make these changes, we must first develop the technology to accept the upload of more and larger files, and to efficiently render these files for examination. Work on enhanced upload capabilities, storage, secure rendering, and selection by the Library is planned for FY2023. Expansion of the acceptable file format list to include formats such as ePub is currently being explored. The Office and the Library are collaborating to achieve these enhancements in the new Enterprise Copyright System (“ECS”). At the same time, offering applicants the option to submit electronic deposit of works, instead of physical best editions, for registration examination purposes could reduce the processing time for applications. While ECS is being built, the Office has introduced opportunities for electronic deposits to be submitted with several registration application options, including for serials, newspapers, newsletters, photographs, contributions to periodicals, short online literary works, and secure test items.

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<sup>56</sup> NMPA Comments at 2.

<sup>57</sup> See Motion Picture Association (“MPA”) Comments at 2 (while file-size restriction “has not posed particular hardship to MPA members,” members cannot submit identical digital versions of their works as distributed to the public due to file-size restrictions and must instead break up the deposit files to upload them within eCO).

<sup>58</sup> See The Authors Guild Comments at 3–4 (suggesting the Office accept file formats regularly used by registrants); see also Copyright Alliance Comments at 9 (for electronic deposits, file format limitations “will be burdensome on applicants and [could] dissuade them from registering”).

<sup>59</sup> Association of American Publishers (“AAP”) Comments at 3 (noting that “claimants who publish exclusively digital content with interactive or dynamic elements—such as educational materials—have struggled with the currently rigid deposit requirements”).

2. *Decoupling the Best Edition Requirement from Copyright Registration Process*

As part of this study, we examined the link between copyright registration deposits (section 408) and mandatory deposits for the Library (section 407), which makes it necessary for applicants for copyright registration to deposit best edition copies of their works with the Office. Some commenters argued that removing that link, allowing copyright owners to submit digital deposits with registration applications instead of best edition copies, would simplify and accelerate the registration process.<sup>60</sup> For example, the NMPA stated that “[e]liminating the best edition requirement for registration application deposits could possibly reduce fees and would certainly reduce the administrative burden and cost on copyright owners of shipping copies to the Office, making registration more affordable for claimants.”<sup>61</sup> If the Office were to permit digital deposits for additional types of applications, commenters indicated a desire to retain the option to submit physical deposits.<sup>62</sup> However, they were also concerned that decoupling the two sections could require submission of two separate sets of deposit copies, which would “eliminate a key efficiency in the statute as it exists today.”<sup>63</sup>

The chief concern with the prospect of decoupling registration and mandatory deposit is the likely negative impact on the Library’s collections.<sup>64</sup> As mentioned above, *see supra* at 7–8, for books, serials and other textual materials, at this time the Library believes it will be well-served by a flexible e-preferred approach in which applicants can submit either a best edition print copy or a complete digital version, in a file format acceptable to both the Office and the Library. In some cases, depositing a print version of a work will be preferable to depositing a digital version for the Library’s collections. However, many works can now be registered with electronic deposits (in fact, over three-quarters of the registration applications that the Office receives are now submitted with electronic deposit copies). The Library and the Office’s move towards e-preferred deposits for textual works will provide additional flexibility for many works that currently require best edition physical copies. For other types of works, we are continuing to work together to identify additional options for deposit copies without negatively affecting the Library’s collections.

After carefully reviewing the comments received and consulting with the Library, the Office has concluded that removing or decoupling the best edition requirement from the registration deposit in section 408 would not result in a more efficient registration process. The proposed change would increase costs incurred by the Office to manage two different deposit

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<sup>60</sup> *See, e.g.*, The Authors Guild Comments at 3; NMPA Comments at 2; AAP Comments at 2.

<sup>61</sup> NMPA Comments at 2.

<sup>62</sup> Copyright Alliance Comments at 5; Recording Industry Association of America (“RIAA”) Comments at 2; NMPA Comments at 4.

<sup>63</sup> NMPA Comments at 3; *see also* RIAA Comments at 3 (“[a]ny shift away from the best edition requirements for registration deposits should not create any new burdens for copyright owners who wish to continue submitting one set of deposit copies”); MPA Comments at 6 (a requirement to submit different or even the same version to the Library and to the Office would “negative[ly] impact [members’] ability to register works and the Library’s collection”).

<sup>64</sup> *See* The Authors Guild Comments at 1–2 (noting that the Library needs the ability to collect best edition print copies of literary works published in physical form).

processes. Additionally, some copyright owners who continue to make physical registration deposits would have to provide two separate deposits to meet the Library's and Office's requirements. Moreover, such a step would have an adverse impact on the Library, which would experience increased costs from not being able to rely on copyright deposits, resulting in a diminishment of its future collections. The Office nevertheless stresses that we share the desire of stakeholders to make registration faster and simpler. We will continue our coordination with the Library to minimize burdens on, and improve flexibility for, registrants as part of the implementation of the *Strategy*. See *supra* at 7–8.

### C. Changing Section 407 to a Demand-Based System

Certain commenters proposed that section 407 deposits be converted to a “wholly on-demand” system in which the Library affirmatively requests copies of any works it wants to collect.<sup>65</sup> Under this model, copyright applicants could submit digital deposits for the purpose of registration, which the Library could then use to identify which works to demand best edition copies of for its collections.<sup>66</sup> The Association of American Publishers (“AAP”) suggested that the Library demand only those works it identifies as being “special, rare, or ephemeral.”<sup>67</sup> In AAP’s view, the Library should have the burden of identifying the works it needs based on public collections policies and priorities and justify why it needs to acquire such works through the deposit requirement rather than donation or purchase.<sup>68</sup> Other commenters proposed that the Library provide more information to the public about its collection needs to demonstrate the necessity for publishers to provide best edition copies.<sup>69</sup>

These proposals, however, would undermine the statute’s goals and have a negative effect on the Library’s collections, operations, and staff. Currently, section 407 places the obligation on copyright owners or publishers to deposit published works within three months, with the Register only making written demands for deposits that have not been received by that deadline.<sup>70</sup> If copyright claimants could submit no deposits, partial deposits, or deposits in a format unacceptable to the Library, the Office’s Acquisitions and Deposits division would have to issue significantly more mandatory deposit demands. The Library would have to develop new workflows to ensure it was notified of new registrations and to review the deposits for such registrations to decide whether to demand deposit of the best edition. This evaluation and demand work would require significant additional resources. The resulting burden would detract from the Library’s core work of preserving and providing access to a rich, diverse, and enduring source of knowledge to inform, inspire, and engage the American people in their intellectual and creative endeavors. Some commenters recognized this fact, acknowledging that requiring the

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<sup>65</sup> The Authors Guild Comments at 7; MPA Comments at 3; Shaftel & Schmelzer Comments at 5.

<sup>66</sup> Shaftel & Schmelzer Comments at 5.

<sup>67</sup> AAP Comments at 2.

<sup>68</sup> *Id.*

<sup>69</sup> See Copyright Alliance Comments at 8 (proposing Library publicize the specific types of works for which it affirmatively needs best edition copies); The Authors Guild Comments at 2–3 (suggesting that the Library announce what categories or subcategories of works it does *not* wish to collect and exclude those works from the requirement to submit best edition copies).

<sup>70</sup> 17 U.S.C. § 407(b).

Library to affirmatively demand best edition copies would require tremendous resources and lead to a less robust collection.<sup>71</sup>

Nonetheless, the Library and the Copyright Office are sympathetic to commenters' concerns that copyright owners are at times obligated to deposit material the Library does not need or want for its collections. Commenter Oliver Maor provided the example of the Library's Cataloging-in-Publication ("CIP") Program, in which the Library provides cataloging data for a pre-publication book and, in exchange, publishers provide a copy of the published book to the Library.<sup>72</sup> Under its current policies, books deposited through CIP are not treated as satisfying the mandatory deposit requirement in section 407,<sup>73</sup> and the Office's registration process requires deposits for examination independent of CIP. This has created confusion among publishers regarding whether they must deposit best edition copies of a book already deposited through CIP. The Library and Office are currently exploring how to minimize duplicate deposits, such as by permitting best edition deposits submitted for copyright registration purposes to also satisfy the CIP obligation.<sup>74</sup> This exploration will be part of an ongoing effort by the Library and the Office to ensure that copyright owners are not asked to provide deposits in a form or quantity exceeding the government's needs.

Commenters requested more information on what the Library does *not* wish to collect. Two main sources for this information already exist. First, based on input from the Library, the Office has promulgated regulations that exempt certain types of works from the mandatory deposit requirement altogether, such as three-dimensional sculptural works; greeting cards; postcards; architectural blueprints; mechanical drawings; individually published speeches and sermons; literary, dramatic and musical works published only in phonorecords; and certain advertising materials.<sup>75</sup> Second, the Library makes publicly available the Collections Policy Statements that govern its collection development and acquisitions efforts.<sup>76</sup> These policy statements outline in detail the Library's plan for developing its collections, including the scope and level of collecting intensity for various types of works. The Register only issues written demands pursuant to section 407 for materials that are within the scope of the Collections Policy Statements. The Library has also embraced various ongoing special relief agreements to allow electronic deposits instead of physical best edition copies. Going forward, the Library is willing

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<sup>71</sup> Library Copyright Alliance/Software Preservation Network Comments at 18; RIAA Comments at 5.

<sup>72</sup> Maor Comments at 4–5 (positing that some works provided to the Library “at great expense” through the CIP program will not be needed and thus be destroyed); *see also About CIP*, LIBRARY OF CONGRESS, <https://www.loc.gov/publish/cip/about/process.html> (discussing CIP Program).

<sup>73</sup> *See Mandatory Deposit*, U.S. COPYRIGHT OFFICE, [https://www.copyright.gov/help/faq/mandatory\\_deposit.html](https://www.copyright.gov/help/faq/mandatory_deposit.html) (stating that CIP is “a separate program within the Library” and CIP deposits do not fulfill the mandatory deposit obligation).

<sup>74</sup> As another example of this work, in 2017 the Office exercised its regulatory authority to require the deposit of only a single copy of literary monographs (such as books) in connection with registration. *See Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions*, 83 Fed. Reg. 2,371 (Jan. 17, 2017) (promulgating 37 C.F.R. § 202.20(c)(2)(i)(L) and requiring “the deposit of one complete copy or phonorecord will suffice in lieu of two copies or phonorecords” for registration).

<sup>75</sup> 37 C.F.R. § 202.19(c).

<sup>76</sup> *See Introduction to Collections Policy Statements*, LIBRARY OF CONGRESS, <https://www.loc.gov/acq/devpol/>.

to join meetings between the Copyright Office and copyright stakeholders to take questions on these issues and provide public responses to clarify areas of concern.

We also note that the Library goes to great lengths to put the materials it receives to productive use. When it does not retain materials, whether they were received through mandatory deposit, copyright registration, or other sources, they are made available to be used in either the Duplicate Materials Exchange Program, through which they are offered to foreign libraries and educational institutions,<sup>77</sup> or the Surplus Books Program, which makes them available to domestic nonprofits, libraries, or government entities.<sup>78</sup>

#### **D. Security Concerns**

Finally, some commenters raised questions and concerns regarding the security of electronic deposits. They sought additional information and assurances about the Library's actions to safeguard digital works and questioned whether the Library was adequately prepared to ingest higher volumes of such works securely. For example, AAP stated it had "significant concerns" as to the Library's data security practices and expressed a desire for additional details about those practices "at a level sufficient for copyright owners to evaluate them."<sup>79</sup> MPA echoed this concern, expressing the view that it was "impossible" to determine its security concerns because "the Library has not shared the detail of its current data security or future plans."<sup>80</sup> The Authors Guild stated that digital security measures are "of course paramount to protecting any database of copyrighted content" and expressed concern that the Library's full database of electronic materials could be hacked.<sup>81</sup> And the Recording Industry Association of America ("RIAA") warned that, while it recognized that the Library has been "working diligently to upgrade the Library's IT security," the risks of a digital breach could be "economically disastrous" given the importance of digital streaming revenue to the music industry.<sup>82</sup>

Others raised a variety of additional security-related questions. Several commenters, including AAP and the Copyright Alliance, questioned whether the Library made digital deposits available for donation through the Library's Surplus Books Program.<sup>83</sup> Another common concern was whether the Library would make digital deposits available to offsite users, such as through digital lending or interlibrary loan.<sup>84</sup> Many commenters suggested that the Library work

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<sup>77</sup> See *Duplicate Materials Exchange Program*, LIBRARY OF CONGRESS, [https://webdmep.loc.gov/dmepII/DMEP\\_program\\_info.htm](https://webdmep.loc.gov/dmepII/DMEP_program_info.htm).

<sup>78</sup> See *Surplus Books Program*, LIBRARY OF CONGRESS, <https://www.loc.gov/acq/surplus.html>.

<sup>79</sup> AAP Comment at 3.

<sup>80</sup> MPA Comment at 8.

<sup>81</sup> The Authors Guild Comment at 6.

<sup>82</sup> RIAA Comment at 5.

<sup>83</sup> AAP Comment at 3–4; Copyright Alliance Comment at 12.

<sup>84</sup> See AAP Comment at 4 (expressing concern about Library strategy mentioning "interlibrary loan of digital content"); MPA Comment at 8 (noting that Library does not current "operate a digital deposit and lending system" but anticipating the possibility of a future system that permits lending); RIAA Comment at 6 ("We support the current in-person-only access policy and would strenuously oppose any change to that policy absent an in-depth, on-



with industry groups to collaborate on security practices, with the MPA and RIAA offering their expertise in that process,<sup>85</sup> and AAP and Copyright Alliance suggesting that the Library should have its security protocols approved by industry before it begins accepting more digital deposits.<sup>86</sup>

### *1. Information Technology Security Protections*

The Copyright Office and the Library appreciate commenters' concerns about the security of digital deposits, and both are taking all appropriate steps to ensure that copyright owners' deposits will not be misused. The Library is fully aware of the security challenges facing any large organization, including all federal agencies, and has established information technology ("IT") security as a top priority for the agency.<sup>87</sup> Since 2017, the Library has invested substantially in IT security to mitigate risks and enhance protections for its IT systems and data, including copyright deposits.<sup>88</sup> The Library has centralized its IT security workforce under a Chief Information Security Officer<sup>89</sup> and implemented the federal National Institute of Standards and Technology IT security standards,<sup>90</sup> which closely align with widely used industry

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the-record discussion between representatives of our member companies and the Office and Library regarding how any contemplated off-site access to our members' sound recordings would be managed.").

<sup>85</sup> MPA Comment at 8 ("we would welcome the opportunity to collaborate on appropriate security protocols"); RIAA Comment at 6 ("We would be happy to convene a task force to work with the Office/Library in identifying and implementing appropriate encryption technology.").

<sup>86</sup> See AAP Comment at 1 (Library "must ensure the security of works in its possession, especially those in digital formats, as a condition of collecting them"); *id.* at 3 (publishers have "critical questions regarding the Library's IT security and access policies, all of which need to be addressed first in a manner that gives copyright owners confidence"); Copyright Alliance Comment at 11 ("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."), 12 ("rightsholders groups [must be given] an opportunity to review and approve these security measures").

<sup>87</sup> See *Fiscal Year 2023 Legislative Branch Appropriations Requests, Hearings before the House Comm. on Appropriations*, 117th Cong. 202 (Mar. 30, 2022), <https://www.congress.gov/117/chrg/CHRG-117hhrg48382/CHRG-117hhrg48382.pdf> ("And IT security, as we invest more in our IT throughout the Library, is a top priority for the Library") (testimony of Dr. Carla Hayden, Library of Congress).

<sup>88</sup> See, e.g., LIBRARY OF CONGRESS, FISCAL 2023 BUDGET JUSTIFICATION 67–68 (describing accomplishments of Office of the Chief Information Officer related to IT security in FY2021); LIBRARY OF CONGRESS: OFFICE OF THE INSPECTOR GENERAL, SEMI-ANNUAL REPORT TO CONGRESS 9–10 (Mar. 31, 2022), <https://www.loc.gov/static/portals/about/office-of-the-inspector-general/annual-reports/documents/March%202022-OIG-Semiannual-Report-to-Congress.pdf> (discussing implementation of Inspector General recommendations).

<sup>89</sup> See *Library of Congress Names New IT Leadership*, LIBRARY OF CONGRESS (Sept. 13, 2021), <https://www.loc.gov/item/prn-21-054/library-of-congress-names-new-it-leadership/2021-09-13/> (announcing appointment of CIO Judith Conklin, who previously worked in the U.S. Army and served as a technical consultant for private companies such as Booz Allen Hamilton and Raytheon).

<sup>90</sup> See National Institute of Standards and Technology, Framework for Improving Critical Infrastructure Cybersecurity (Apr. 16, 2018), <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf> (identifying numerous IT security standards).

standards like the Cloud Security Alliance Cloud Controls Matrix.<sup>91</sup> It has also strengthened its IT security policies and procedures and implemented advanced cybersecurity tools to “heighten the detection of threats, thwart denial of service attacks, protect against malware and enable continuous monitoring so that issues are prevented, and if they occur, quickly identified and resolved.”<sup>92</sup>

As part of its work to strengthen IT security, the Library requires all staff and contractors to use multi-factor authentication to access Library IT systems,<sup>93</sup> has upgraded its IT infrastructure, and is implementing a “Zero Trust” network architecture to protect High Value Assets (“HVA”), including Copyright Office data. To protect against external and internal threats, Copyright Office data is encrypted at rest and in transit using Federal Information Processing Standards certified methods, and the Library has implemented data loss prevention tools to safeguard copyright deposits and other HVA. The Library also actively participates in the Legislative Branch Cyber Security Working Group,<sup>94</sup> which facilitates the exchange of expertise and coordination in response to IT security threats, and works with the broader IT security community to ensure it has the latest threat assessments and protections.

As a testament to the effectiveness of the Library’s security measures, to date it has suffered no known security breaches of its systems.

## 2. *Protection and Disposition of Electronic Deposits*

Beyond the security efforts taken by the Library across all of its systems, it takes specific steps to protect the electronic deposits in its collections from security breaches. Over the last decade, the Library has received tens of millions of digital files from copyright owners, including 236 million electronic serials and 1.2 million e-books. These files are secured in a “dark archive”<sup>95</sup> that is not connected to the internet and cannot be accessed from outside the Library premises. As one commenter explained, despite the specter of security concerns, there is no evidence “that there has been any ‘leakage’ from libraries’ digital collection.”<sup>96</sup>

Moreover, the Library does not transfer electronic deposits of published works outside of the Library. With respect to commenters’ inquiries as to whether digital deposits are included in

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<sup>91</sup> See *Cloud Control Matrix (CCM)*, CLOUD SECURITY ALLIANCE, <https://cloudsecurityalliance.org/research/cloud-controls-matrix/>.

<sup>92</sup> *Library of Congress Modernization Oversight*, Hearing before the Senate Comm. on Rules and Admin., 116th Cong. 23–24 (Nov. 7, 2019), <https://www.govinfo.gov/content/pkg/CHRG-116shrg38506/pdf/CHRG-116shrg38506.pdf> (prepared statement of Carla Hayden, Librarian of Congress).

<sup>93</sup> *Id.* at 23 (“We have implemented multi-factor authentication for all users, enhancing security protections for access to sensitive Library resources.”).

<sup>94</sup> *Id.* at 21.

<sup>95</sup> A dark archive is “a repository that stores archival resources but is accessible only to its custodian.” *Dictionary of Archives Terminology*, SOCIETY OF AMERICAN ARCHIVISTS, <http://www.dictionary.archivists.org/entry/dark-archives.html>.

<sup>96</sup> Library Copyright Alliance/Software Preservation Network Comments at 19.

the Surplus Books Program<sup>97</sup> for donation to other institutions, the answer is no: digital files are **not** part of the Surplus Books Program. The Surplus Books Program only includes physical materials acquired by the Library, including gifts and donations. The Library does not, and has no plans to, share digital files of copyright deposits that are not added to its collections. If a digital deposit does not meet the requirements to be added to the collections, it will remain in the records maintained by the Copyright Office.

The Library can confirm that it has no plans to offer offsite access to digital deposits to the public. Offering remote public access to copyrighted material would be inconsistent with the Library's current practices. The Library is a closed-stack library and does not circulate books to the general public.<sup>98</sup> Rather, such materials may only be taken off-site by eligible borrowers—members of Congress, their staff, Library employees, institutional interlibrary loan patrons, the federal judiciary, and other limited categories specified in Library's internal rules.<sup>99</sup>

### 3. *Public Information Regarding Security*

Finally, the Library understands that copyright owners have expressed an interest in ongoing communication about its IT security practices. As the Library has stressed in the past, stakeholder engagement around IT development is important.<sup>100</sup> In addition to the Office's ongoing public events focused on technology modernization, the Librarian has established a Copyright Public Modernization Committee, which includes representatives from across the copyright stakeholder community and meets publicly twice a year to discuss issues of interest,

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<sup>97</sup> See *Surplus Books Program*, LIBRARY OF CONGRESS, <https://www.loc.gov/acq/surplus.html>.

<sup>98</sup> *Researchers and Reference Services: Frequently Asked Questions*, LIBRARY OF CONGRESS, <https://www.loc.gov/rr/res-faq.html#21> (“The Library of Congress does not loan materials to individuals, who must use Library materials on site”); see also *Interlibrary Loan: Loans to U.S. Library*, LIBRARY OF CONGRESS (Mar. 17, 2022), <https://www.loc.gov/rr/loan/loan-us.html> (The Library lends materials through interlibrary loan only when the requesting library cannot obtain the material through local, state, or regional libraries).

Even when Library materials are loaned to other libraries, those materials can only be used on the physical premises of the institution they have been entrusted to. See *Interlibrary Loan: Circulation Policies*, LIBRARY OF CONGRESS (Mar. 17, 2022), <https://www.loc.gov/rr/loan/loanweb1.html> (“The Library of Congress lends books to other libraries with the stipulation that they be used only inside the borrowing library. This is consistent with [the Library]'s own policy which prohibits readers from removing books from the LC reading rooms (except for Congressional use). The policy is also intended to protect borrowing libraries from the negligence of one patron, since one overdue book will suspend all loans to a particular institution.”).

<sup>99</sup> LCR 3-211, “Eligible Borrowers.” Additional categories of borrowers include, *inter alia*, borrowers authorized by the statutes and regulations governing the Library, three officials per accredited embassy, and former Members of Congress.

<sup>100</sup> See *Oversight of Modernization of the United States Copyright Office*, Hearing Before the Senate Subcomm. on Intellectual Property, 116th Cong. 1 (Dec. 10, 2019) (prepared statement of Bernard A. Barton, Jr., Chief Information Officer, Library of Congress, <https://www.judiciary.senate.gov/imo/media/doc/Barton%20Testimony.pdf> (thanking leaders of subcommittee “for facilitating the opportunity for . . . me to speak with copyright stakeholders last month about modernization,” as such dialogue “goes a long way to increase transparency and clarify OCIO’s role in the copyright modernization process”); LIBRARY OF CONGRESS, LIBRARY OF CONGRESS FISCAL 2020 BUDGET JUSTIFICATION 121, <https://www.loc.gov/static/portals/about/reports-and-budgets/documents/budgets/fy2020.pdf> (“the USCO and Library’s OCIO will provide opportunities for broad involvement” through “[o]ngoing stakeholder outreach” in modernizing Copyright Office systems).

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including IT security.<sup>101</sup> Following industry best practices, the Library has also adopted an IT security vulnerability disclosure program, welcoming reports from the public about “any vulnerabilities they discover in Library web applications.”<sup>102</sup>

The Library takes seriously its responsibilities as a steward of the cultural works in its collections, including safeguarding deposits received from the Office. Copyright owners are important partners in that process, as the Library exercises its authority to set its collections policies and security practices.<sup>103</sup>

## VI. CONCLUSION

The Office believes that the careful implementation of the Library’s move towards an “e-preferred” system—beginning with textual works like books and serials—as well as other modernization work, will serve to make copyright registration more efficient and easier without negatively impacting the Library’s collections. Proposals to decouple mandatory deposit from registration deposit or to implement a solely demand-based mandatory deposit system would likely harm the Library’s collection development, with little benefit to copyright owners. The ability of copyright owners to satisfy their section 407 mandatory deposit obligation through their section 408 registration deposits has proven to be beneficial both to them and to the Library. Because the current best edition definition is sufficiently flexible to encompass digital deposits, we are confident that the relationship between sections 407 and 408 will continue to serve this purpose.

Please do not hesitate to contact me should you require any further information.

Respectfully,



Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office

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<sup>101</sup> See *Library of Congress Announces Copyright Public Modernization Committee*, LIBRARY OF CONGRESS (June 22, 2021), <https://www.loc.gov/item/prn-21-034/library-of-congress-announces-copyright-public-modernization-committee/2021-06-22/>.

<sup>102</sup> See *Library of Congress Vulnerability Disclosure Program*, LIBRARY OF CONGRESS <https://www.loc.gov/legal/vulnerability-disclosure-program/>.

<sup>103</sup> *Contra* AAP Comment at 2 (stating Library’s collections practices should require the Library to have “publicly vetted collections policies” and articulate “why it needs to acquire such works”); Copyright Alliance Comment at 12 (suggesting that “rightsholders groups” should be permitted to “review and approve” security measures before being required to deposit electronic material).