Before the

COPYRIGHT OFFICE,
LIBRARY OF CONGRESS

Washington, DC

Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online; Notice of Inquiry (FR Doc. 2016–11613 and 2016-13814; Copyright Office Docket Number 2016-3)	**COMMENTS OF THE NATIONAL WRITERS UNION , WESTERN WRITERS OF AMERICA, AND AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS**

National Writers Union

(UAW Local 1981, AFL-CIO)

<http://www.nwu.org>

Western Writers of America

<http://www.westernwriters.org>

American Society of Journalists and Authors

<http://asja.org>

August 18, 2016

1. About the commenters and our interest in this inquiry

The National Writers Union (NWU), the Western Writers of America (WWA), and the American Society of Journalists and Authors (ASJA) submit these comments in response to the Notice of Inquiry by the U.S. Copyright Office, "Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online," FR Doc. 2016-11613, Copyright Office Docket Number 2016-3, 81 *Federal Register* 30505-30509 (May 17, 2016).

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

The Western Writers of America (WWA) was incorporated in 1953 to promote the literature of the American West. WWA includes historians, nonfiction authors, writers for young adults, romance writers, songwriters, poets, and screenwriters for film and television. WWA members have one thing in common -- their work in every medium is set in the ever-changing American West.

Founded in 1948 as the "Society of Magazine Writers," today's American Society of Journalists and Authors (ASJA) is the nation's professional organization of independent nonfiction writers: "freelancers." Membership standards are rigorous. To qualify, a writer must have written two books, six full-length articles in a publication with audited national circulation,

or an equivalent combination. Members earn their livings from magazine articles, online content, trade books, research papers and many other forms of non-fiction writing.

2. Introduction and overview

Through this proceeding, the Copyright Office is seeking comments regarding the current "interim" rule (37 C.F.R. 202) requiring deposit, on demand of the Register of Copyright, of copies of certain "electronic serials," and possible expansion of this rule to "online-only books."

The signatories to these comments – national organizations of working writers – oppose both the current interim rule and any expansion of it to "e-books", for the reasons discussed below. While we applaud the intent to safeguard writers' works and to preserve them for the ages, after their terms of copyright protection expire and we are no longer exploiting them commercially, there are currently far too many missing pieces of information for us to consider supporting the mandatory deposit of "e-books." Notable among such missing pieces is any definition of what constitutes an e-book. Using the transmission method alone to define such works would be highly confusing, as we point out in detail below.

Instead of adding a deposit requirement for works distributed only electronically, we ask the Copyright Office and Congress to simplify the procedures and reduce the fees for registration of electronic works. In particular, we urge the creation of a mechanism for group registration of multiple works distributed electronically on multiple dates, for a single fee with a single form.

Under current procedures and fee schedules, copyright registration for most work distributed online is prohibitively costly and time-intensive. The current registration requirement and procedures deprive writers of meaningful copyright protection for most online-only works.

Until registering multiple electronically-distributed works is fast, easy, and inexpensive, adding any additional requirements would be a step in the wrong direction.

Writers now make a significant and growing fraction of our income from self-publishing and other distribution channels and sources of revenue that are invisible to either legacy publishers or librarians. Before imposing new requirements or creating new exceptions to copyright, we encourage the Copyright Office to start with a foundational inquiry into the ways writers and other creators make our living. That requires direct engagement with, and listening to, writers and other types of creators.

We also ask the Library of Congress to lead by example in collaborating with writers. Based on an understanding of the new and emerging modes of commercial exploitation of written work in digital forms, we would like to see the Library of Congress work *with* writers to facilitate the voluntary, opt-in, cataloging of works in new media. This could include the growing percentage of written work that is self-published in electronic formats and for which cataloging information – including which works are available and in what formats – could be obtained only by crowdsourcing directly from writers. Works distributed electronically could be cataloged and made available to library patrons through the cooperation of writer/self-publishers, without the need for coercive mandatory deposit, access, and copying that could unfairly undermine our livelihoods and deprive us of our fair share of the revenues from new distribution and monetization channels.

3. New norms and business models for electronic distribution of written works.

As a party to the Berne Convention, the U.S. government may "permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This means that an understanding of the normal modes of exploitation of particular types of copyrighted work is an essential prerequisite to being able to apply the Berne test.

The necessary understanding of norms of exploitation of copyrighted textual work can be obtained only from those who are actually engaged in that exploitation – working writers.

Many of the ways that writers exploit our work, especially the new business models and revenue streams that we are developing for the exploitation of rights to electronic distribution of our work, are largely invisible to either traditional publishers (who are focused on their own publishing of new works in hardcopy (printed) formats, and have no involvement in or reason to be aware of new self-published digital editions and revenue streams from backlist works to which the publishers of previous hardcopy editions no longer hold any rights) or librarians (since most self-published digital "editions" and formats for digital revenue generation have no ISBNs and cannot be accommodated by current publisher-centric library cataloging schemes).

We welcome the opportunity to help provide the Copyright Office with the necessary factual background to assess whether, and if so how, exceptions to copyright such as those proposed for archival and deposit copies of our work would conflict with our new norms of commercial exploitation of our work.

Several themes characterize this "new normal" and underpin our assessment of the specific proposals in this and other related current Copyright Office policy studies:

First, as should be obvious, revenue from written work is increasingly derived from electronic rather than hardcopy distribution.

Second, a growing percentage of writers' revenues comes from "self-publishing" or self-exploitation of our work to directly generate revenue and directly distribute our work to readers, rather than through reproduction by, or licensing to, intermediaries such as traditional publishers.

This is, as should be equally obvious, a direct corollary of the shift to electronic distribution. In the hardcopy world, "freedom of the press belongs to she who owns the presses". Writers without the deep pockets to buy their own typesetting, printing, and distribution equipment and facilities used to depend on traditional publishers and distributors to get our work to readers. While writers may have valued the services of editors and designers, most of the role of publishers was simply to reproduce, warehouse, transport, publicize, and process payments for copies of our work.

In the digital world, publication and distribution through third-party intermediaries are now a business choice for writers, rather than a technological necessity. The dramatically lower costs of digital formatting and distribution, ease of online self-promotion and marketing, and dramatically lower transaction costs for online payments, even micro-payments, have rendered publishers unnecessary for *electronic* distribution.

That's a good thing, and we would like to see it encouraged by the Copyright Office. Direct peer-to-peer distribution from writers to readers can be faster, cheaper, and more efficient. It can allow writers to be more responsive to, and better serve the desires of, our readership.

Much attention is paid to peer-to-peer distribution of public domain works and bootleg copies of copyrighted works, but there is also an often overlooked *commercial* peer-to-peer

ecosystem, of growing importance to writers' incomes, for distribution of licensed copies of copyrighted work directly by writers to readers. "Peer-to-peer" does not necessarily mean free.

Third, exploitation by freelance writers of rights to electronic distribution of our work is increasingly focused on the "long tail" of our personal backlists. While publishers remain focused on the next bestseller, freelance writers who have no pension are able to retire, if they are able to retire at all, only if they are able to monetize their personal backlists.

Typically, most backlist works have previously been published, often by traditional publishers and in hardcopy formats. But the rights to those works, and particularly the rights to digital uses of those works, are typically held by writers ourselves. Backlist rights and rights to digital exploitation of works previously published in hardcopy format by traditional publishers can no longer be considered "secondary" rights, but in many cases are now the primary source of writers' revenues. A writer may well receive more for each self-published electronic copy of an *older* book – or even of a single story, article, poem, or other excerpt or adaptation of a portion of such a book – downloaded from the author's own website than the dollar amount they receive as their royalty from a traditional publisher for each sale of a printed copy of their *latest* book.

Many of these new "editions" are in completely different formats from those in which these works were originally published or included, and have no obvious link to those earlier editions. There is no necessary commercial reason for them to include such links. Someone reading a recipe in a smartphone app doesn't care, and doesn't want their time or the space on the screen of their device wasted, by a block of text reporting that this recipe was once published in some defunct magazine or out-of-print cookbook.

Text distributed electronically may be titled, structured, and sequenced completely differently than it was for hardcopy distribution. A fictional story, novella, or novel may be licensed for use as the plot line or script of an electronic game, while nonfiction travel advice may be licensed for use as part of the content of a travel app for smartphones. Each player of the game or user of the travel app may read different parts of the work, and in a different sequence.

Fourth, exploitation of written work through electronic distribution is increasingly "granular" and focused on the exploitation of shorter content elements that can either be exploited on their own or aggregated into larger constructions.

The cost of binding a book is similar through a wide range of page counts, but too expensive to warrant binding shorter works. The transaction costs of distributing, selling, and collecting payment for a work distributed in hardcopy format are high, and are similar for a book-length work or a chapbook or offprint of a single story, article, poem, etc.

In the world of electronic distribution, the elimination of most production and distribution costs, and dramatically lower transaction and micro-payment processing costs, has made the licensing of shorter-than-book-length works and smaller content elements commercially viable.

Once again, this is a good thing for both writers and readers. It has made it possible for readers to license copies of, and for writers to earn money from, works that were previously difficult or impossible to distribute effectively and profitably. Instead of having to buy an entire anthology, a reader can purchase a license for an electronic copy of a single article, story, poem, recipe, etc. Instead of being limited to the market for inclusion of their shorter works in larger published anthologies, writers can generate revenue directly from individual works.

The shortest works now have revenue generating potential. A writer can syndicate an "aphorism of the day," a specialized news summary feed from an independent journalist with a focused beat, or a "poem of the week," by licensing the inclusion of these content elements on pages of other websites for a monthly or per-page-view or advertising revenue share or other licensing fee (and often on condition that the content may no longer be distributed if the syndication subscription ends).

Fifth, electronic distribution is significantly and increasingly dynamic and personalized. "Fixing" a work in a specific "edition" used to be a technical and economic necessity. In the hardcopy world, it was (and to some extent still is, although that is changing with lowered costs of custom printing on demand) much cheaper to reproduce multiple identical copies than to personalize each copy or typeset, print, and bind a custom book. And economies of scale made it cheaper to print many copies of the same "edition" than to print smaller numbers of copies of more frequently revised editions. In the new world of electronic distribution, none of that is true any longer. That may frustrate archivists who want to preserve a copy of each "edition" or each distinct "work," but it's a good thing for readers who can be provided with a copy of an e-book that incorporates the latest daily updates, or that can be customized to suit their tastes and needs.

Each licensee of a storybook for children can receive a copy personalized with their child's name as the protagonist. Each licensee of a travel guidebook can receive a copy personalized to their choice and sequence of destinations. Although many of the copies of these books may contain common content elements that are themselves individually copyrightable, as discussed above, no two licensees of such an electronic "book" may receive identical copies. It is routine for each licensed copy of an e-book to be a distinct "work" for purposes of copyright.

This is true of "e-books," but it is even more true – and to a growing extent – of other forms of Web content. A decade ago, the default for the then-leading blogging software, Movable Type, was to generate a static HTML page for each blog post. Today, blogging is overwhelmingly dominated by WordPress and other content management systems that store no static HTML pages. Instead, they generate each page served up to an individual visitor dynamically, at the moment that visitor requests the page. Web pages are customized in many ways, and it is routine that no two visitors to the same URL actually receive the identical page.

This is even more true of content pulled from different servers, such as (personalized) advertisements served by third-party ad brokers. In addition, many content management systems automatically generate multiple "views" of each URL, with different content: a desktop view, a mobile device view, and a print view, for example. Each of these is a different "work" served at the same time at the same URL, depending on your browser, preferences, etc.

Access controls, which are a form of license limitation, can also be personalized. If visitors to a Web page are shown nothing unless they are logged in as registered users, that's obvious. But it may not be obvious at all if, as is common, unregistered users are shown different and more limited content than registered users.

Many access controls on Web content operate at the server level, and are difficult or impossible for visitors to detect. For example, certain content may be provided only to visitors from IP addresses associated with a certain geographic region. Visitors typically won't know about this restriction unless and until they try to access this content from a different location while traveling. Access can also be restricted to visitors from IP-address ranges of organizations that have purchased or subscribed to site licenses. If you are a visitor from an authorized IP

address, there's not necessarily anything to tell you that the content you viewed would not have been served to a visitor from a different, non-subscriber IP address. Similarly, if your IP address isn't on a blocklist, you have no way to know that a blocklist is in use. Archivists cannot respect license restrictions, such as these or time limits on licenses, of which they are typically unaware.

Sixth, licenses for electronic distribution of written work are routinely time-limited, and the enforcement of these license time limits is crucial to licensing revenues.

Once a work is sold in hardcopy format, "first sale" rights mean that the work may be available for resale on the secondary market in perpetuity. Electronic "books," on the other hand, are invariably licensed, not sold, and e-book licenses do not include "first sale" resale rights.

In the hardcopy world, a writer could generate additional revenue by granting multiple *geographically limited* licenses to reproduce and distribute her work in different places. The same article could be licensed for publication in multiple regional newspapers or magazines, while book rights could be licensed separately in different countries.

The counterpart of this practice in the world of electronic distribution is the grant of multiple *time-limited* licenses at different times. Indeed, one reason some publishers and self-publishers choose to distribute works only in electronic format, and may even expressly forbid printing of hardcopies in their license terms, is to be able to enforce time limits on licensing.

A work or collection of works may be syndicated or otherwise licensed for distribution on the Web for a monthly fee. If the licensee terminates their subscription, the writer can seek a new licensee. Contracts between magazines and freelance writers routinely include licensing of the right to print the article in an issue of the hardcopy magazine, and to distribute the article in electronic form on the magazine's website for a specified period of time.

The ability to enforce these time limitations on access to the article through the magazine's website is critical to the writer's ability to obtain additional revenue. Once one Web distribution license expires, a writer may license the article or story to a different website, or provide access to downloads for a per-copy fee, or provide access to a library of her stories or articles from her personal website for a monthly or annual subscription fee, or post the work on pages of her website that generate advertising revenue. But if the article is still available on another website, or through an archived copy of another website, or in the form of a printed copy after the license for that website to distribute the article has expired, there will be little or no market for new licenses to the work. Enforcement of time limits on licensing is one of many reasons some licenses prohibit or limit printing of works distributed electronically. If you can keep a printed copy even after your license expires, why keep paying a monthly or annual subscription fee for continued access to a content library?

On her own website, a writer may make her most recent articles or stories available for free, and charge per copy or on a subscription basis for archived articles – just as many magazines and newspapers make current articles available free on their websites, but charge for access to their archives or make archives available only to subscribers. Or, depending on the nature of her writing and its audience, she may do the reverse: Someone who gives financial or sports betting or other time-sensitive advice may allow free access to older articles, but charge for access to recent articles with more valuable, currently actionable, recommendations.

Major traditional publishers do the same thing. The University of Chicago Press, for example, offers a different free e-book download each month[1], as an incentive for readers to sign up for its e-mail newsletter and visit its website regularly (where they will view ads and, the

1 http://www.press.uchicago.edu/ebooks/freeEbook.html

press hopes, buy more hardcopy books and/or licenses for more e-books). But at the end of the month, the per-copy licensing fee for the formerly "free" e-book reverts to its former price. It would be a copyright-infringing license violation for someone who downloaded a copy during the month when the license for that download was free to later make a copy for someone else.

Unless a library or archive has paid an agreed-upon fee for a license in perpetuity, it should respect the time limits in the licenses for works it acquires in electronic formats, at least for the duration of the term of copyright protection for those works. Noting and keeping track of the duration of time-limited licenses, and then following through and deleting such materials after the licenses expire (or prohibiting access to preservation copies until the expiration of copyright), may seem to be a time-consuming, even onerous task for libraries and archives. But it is essential in order to respect the principle of copyright in the digital world.

All of these factors need to be taken into account as part of the basis for assessing how burdensome the proposed rules and other exceptions to copyright would be in the digital age, how they would conflict with the normal exploitation by writers of our copyrights, and how they would tend to discourage the development of creative new modes of electronic distribution of written work that allow readers to obtain the works they want, more easily and cheaply, while also allowing writers to earn more revenue from those works. That is a win-win outcome for readers and writers that the government should encourage, even if disintermediated legacy publishers lose out. The Constitutional purpose of copyright is to incentivize authors and inventors, not publishers or other intermediaries.

4. The scope of the proposed deposit requirement is too broad.

The Notice of Inquiry refers to "online-only books." But, remarkably, the Notice of Inquiry includes no definition of "book."

In assessing the implications of the proposed rule, it's critical to understand that no definitional bright line separates an electronic "book" from a shorter-form "digital offprint" of a story or article, a PDF file of any length, a "print view" of a Web page, an HTML "page," the text content of an electronic game, or an app for a mobile device. Each of these is a body of text delivered to a licensee in electronic format, and equally an "e-book."

As discussed above, one of the best things about electronic distribution is that it makes it possible to distribute (and for a writer to earn a living from) works of arbitrary length. There are one-page PDF files that can be licensed for download for $0.99, 500-page reports by independent consultants licensed in PDF format for $500 or $5,000 per copy, and everything in between.

Since the Copyright Office has not provided any definitional limits on what it means by "books," we have to interpret the proposed rule as potentially applying to all such "books" – that is, to essentially all electronic copies of written work, including Web content, apps, and games. And since each personalized "version" of such a work is, in terms of copyright, a distinct work, the proposed rule would require the deposit, on demand, of a copy of each such unique work.

We are not aware of any existing Web content management system that saves a copy of each unique Web page it serves. Since no such system exists, it's hard to say what it would cost. But any system with this capability would place hugely greater demands on server processor and memory, multiplying server costs for publishers (including self-publishers) many-fold.[2]

2 This issue was raised by the publisher of the Westlaw online legal information service in the 2009 Copyright Office rulemaking: "Capacity issues will be of great concern for databases, such as Westlaw and other large collective works that are updated on a regular basis.... If the required deposit includes a copy at each update

The Copyright Office may argue that it doesn't intend to demand the deposit of *all* "online-only books." We presume that this is true, and that the Copyright Office neither wants nor has the capability to handle deposit of all such "books." But we don't know which electronic "books" the Copyright Office intends to demand be deposited.

Writers and other copyright holders should not have to depend on the "discretion" of the Copyright Office not to exercise grossly overbroad and prohibitively burdensome authority. If it would not be appropriate for the Copyright Office to exercise the sweeping authority proposed in the Notice of Inquiry, that authority should not be granted. If the Copyright Office in fact seeks authority to require deposit only of some well-defined subset of e-books, and believes that that subset can be unambiguously defined, we ask that it publish a new proposed rule for comment. As of now, we are confused and troubled by the absence any unambiguous definitional limits.

5. The scope of the interim rule for deposit of "electronic serials" is too broad.

We thank the Copyright Office for its restraint in exercising its authority under the interim rule to demand deposit of "electronic serials." At the same time, we are concerned by the scope of the authority granted by the interim rule, and the potential for its use to impose widespread and burdensome deposit requirements on many self-published writers.

For purposes of the interim rule, "an electronic serial is an electronic work published in the United States and available only online, issued or intended to be issued on an established

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interval, the amount of storage capacity needed would be extreme as would the amount of duplication. For instance, depositing every update of a collective database such as Westlaw, which updates by the moment, would most certainly create unworkable capacity demands on the Library's systems, as well as place an unnecessary and tremendous burden on West. Indeed, requiring even daily or weekly updates may make compliance difficult or impossible."(Comments of West, a Thomson Reuters business, October 12, 2009, <http://www.copyright.gov/rulemaking/online-only/comments/west.pdf>). What has changed as the technology for dynamic publishing of Web content has gone mainstream is that many individual writers now self-publish the sorts of dynamic and frequently revised websites that were once feasible only for large publishers.

schedule in successive parts bearing numerical or chronological designations, without subsequent alterations, and intended to be continued indefinitely. This class includes periodicals, newspapers, annuals, and the journals, proceedings, transactions, and other publications of societies."[3]

The final sentence of this definition is merely exemplary and not limiting. By its plain language, this definition of an "electronic serial" includes many blogs and email newsletters, including both free personal newsletters distributed by writers to their readers and fans and paid-subscription or controlled-circulation trade journals, organizational newsletters, and specialty publications. For all of these types of "serials," the norm is now online-only distribution. Growing numbers of them are now self-published by freelance writers.

Licensing or subscription fees for some of these specialized electronic serials are high, and each license lost because a subscriber chooses to read the Library of Congress deposit copy instead of subscribing could be significant. Some are available only to qualified subscribers, such as members of a specific organization whose internal affairs are not public. Others contain confidential information or trade secrets, and are distributed only to subscribers privy to those secrets and subject to non-disclosure agreements. For these reasons, some of them could not be published if they were going to be made publicly available by the Library of Congress.

If, as we hope is the case, the Copyright Office does not intend to use the broad authority it has been given by the interim rule to order deposit of these sorts of blogs, email newsletters, and other personal and self-published electronic serials, we ask the Copyright Office to narrow the interim rule to grant authority for demands for deposit only of those types of serials that it actually intends to acquire.

3 37 CFR 202.19 (b)(4)

6. The scope of the proposed deposit requirement is too vague.

Both the current interim rule for on-demand deposit of "electronic serials" and the proposed rule for on-demand deposit of "online-only books" are limited to "published" works. But the ambiguity of the qualifier "published" in this context only serves to further muddy the boundaries of the interim and proposed rules, and calls attention to the contradictions in the Copyright Office's own interpretations of the term "published" as applied to works distributed only electronically.

Which works distributed only online does the Copyright Office consider – or might the courts consider – to be "published?" We have no idea. The Notice of Inquiry gives no clue, and the Copyright Office has studiously avoided any expression of opinion or advice on this question. As stated in Copyright Office Circular #66, "The definition of 'publication' in the U. S. copyright law does not specifically address online transmission. As has been the long-standing practice, the Copyright Office asks the applicant, who knows the facts surrounding distribution of copies of a work, to determine whether the work is published or not."[4]

The Copyright Office currently provides no procedure for group registration (for a single fee with a single registration form) of multiple works published online on different dates, unless they are part of something which fits the definition of a "serial." According to Circular #66, "Many works transmitted online, such as websites, are revised or updated frequently. Generally, copyrightable revisions to online works that are published on separate days must each be

4 "Copyright Registration for Online Works", <www.copyright.gov/circs/circ66.pdf>

registered individually, with a separate application and filing fee." So registering copyright in the content of a blog or website with daily updates requires a separate form and at least a $35 fee for content added or revised on each date, for a total of $12,775 a year in registration fees.

In response to our objections that the absence of a group registration procedure for online works makes registration prohibitively time-consuming and expensive, effectively denying online publishers meaningful redress for copyright infringement, some Copyright Office staff have suggested that Web content could be registered in bulk as "unpublished" work. Some case law supports the possibility of that interpretation, at least for some works.

But there are two problems with trying to register Web content as "unpublished."

First, the law is unclear. If a writer registers her website as "unpublished," she risks having a court later invalidate her registration if it decides that her website was "published." Writers should not have to risk the protection of their livelihood based on ambiguity created by Congress and the Copyright Office and which writers have repeatedly urged be clarified. We implore Congress and the Copyright Office to clarify the law and regulations, preferably by eliminating any distinction between published and unpublished work in registration procedures.

Second, both the interim rule for serials "published" online and the proposed rule for books "published" online would make no sense unless the Copyright Office believed that these works were, in fact, "published." There's a clear contradiction between the claim in relation to the registration procedures that these works are "unpublished," and the claim implicit in the interim and proposed deposit rules that these same works are, in fact, "published."

If even the Copyright Office can't consistently determine with certainty whether the same works is properly categorized as "published" or "unpublished," it is obviously unfair to expect

writers, who are not legal experts, to make such determinations. Writers should not have to gamble our future ability to enforce our copyrights on guesses, at the time of registration (timely registration being required for some remedies for copyright infringement) as to whether a court will later decide that our work was, at the time of registration, published or unpublished.

Under the current regulations and procedures, those works subject to mandatory deposit on demand would be those deemed "published." By definition, those same works would be ineligible for the group registration procedures and fees for multiple "unpublished" works. This is unfair to writers, who would potentially be subject to burdensome deposit requirements for the same works for which the registration requirements are prohibitively burdensome.

If the Copyright Office and Congress want to provide incentives for *voluntary* deposit and registration, we ask that they simplify registration to reduce its burden and provide registrants with certainty as to whether they have obtained the protection of registration. Key changes would include (1) eliminating the distinction between unpublished and published work, and (2) establishing a simple procedure for group registration of multiple works distributed online on multiple dates, regardless of whether they are considered published or unpublished.[5]

5 A detailed proposal for such a procedure was made by the Newspaper Association of America during the 2009 Copyright Office rulemaking: "[T]he Copyright Office does not receive many registrations for claims to copyright in websites, because the registration of a website covers only the content on that particular publication date, not the periodic updates and new material that a group registration for revisions published over a three-month period would allow. In the case of newspaper websites... this practice is becoming obsolete. The burden of requiring a separate registration for each publication date of a newspaper website... is a powerful disincentive, if not a virtual bar, to registration.... NAA respectfully asks the [Copyright] Office to consider permitting the group registration of newspaper website content similar to the registrations allowed for updates and revisions published over a period of up to three months for automated databases, or for print daily newspapers or other electronic serials." (Comments of the Newspaper Association of America, August 31, 2009, <http://www.copyright.gov/rulemaking/online-only/comments/naa.pdf>. Since then, the need for this change has grown as the number of writers self-publishing works online that can't feasibly and with certainty of protection be registered through the current procedures has grown exponentially. Writers would be eager to work with the Copyright Office to develop a group registration procedure for works distributed online on multiple dates that don't currently qualify for group registration as either serials or databases.

7. The interim and proposed deposit rules would discourage publication in the U.S.

Because the Berne Convention prohibits formalities for copyright protection of works first published in other countries that are parties to the treaty, the current and proposed deposit requirements apply only to works first published in the U.S. As a result, the only way for a self-publisher to avoid the risk of a catastrophically burdensome demand for deposit of every "work" they have published online is to ensure that none of their work is first published in the U.S.

It's difficult to move physical publishing abroad, but trivial to move Web publishing or other electronic publishing to servers located outside the U.S. Visitors to a website typically neither know nor care from what country or countries its content is being served.

The proposed rules will give risk-averse publishers (especially self-publishers who don't have as deep pockets as traditional publishers) a compelling financial incentive to host their Web publishing and electronic distribution anywhere else but in the U.S.

Providing such an incentive is clearly bad public policy, and we ask that it be reconsidered. Web publishing is currently a U.S.-centered industry. Writers around the world self-publish their work from servers in the U.S. We want the U.S. to provide a favorable regulatory environment for Web publishing, and not to provide incentives for U.S.-based writers and self-publishers to take our Web hosting and other electronic content distribution business to other countries.

8. Printing and access to deposit copies would interfere with normal exploitation and undercut writers' revenues for licensed access and use of electronic copies.

The Notice of Inquiry proposes that access to copies of e-books deposited with the Library of Congress be provided on the same basis as the access provided to a limited number of "electronic serials" under the current interim rule. Users including "registered researchers" (not a particularly useful restriction, regardless of how it is defined, since the principal commercial market for many works is for research) can read these works for free at terminals at the Library of Congress at "Capital Hill facilities and remote Library of Congress locations."

This appears to leave open the possibility of access at an unlimited number of remote facilities nationwide. Indeed, researchers around the country would properly complain if researchers in the D.C. area were given privileged access to these national government resources.

Under the interim and proposed rules, "The software allows users to print the entire article to a color printer attached to the terminals, without charge."

Users would be on the honor system to limit their copying to "fair use." As a result, there would be no meaningful restriction or possibility of enforcement to prevent unlimited copying.

Our members, including academic writers and others who earn their living by writing commercially licensed works marketed to researchers, are outraged at these proposals.

Users will inevitably print and redistribute works they would otherwise have paid to license, directly cannibalizing writers' revenues from legitimate copies. If you can get a free printed copy of any deposited e-book by visiting the Library of Congress, why would any reader in the D.C. area (or in the vicinity of any other remote Library of Congress location) pay more than a nominal price to license access to, or to otherwise obtain a copy of, any such work?

A manual of "fair use" stored next to each terminal will not be sufficient to significantly deter, much less prevent, copying that exceeds fair use.

Nor will the putative restrictions on digital copying or the limitations on hardcopy printouts to a single (free) copy per user meaningfully restrict or deter infringement. Without strict rules and enforcement provisions – or a prohibition on access until the expiration of copyright – access to deposit copies and unsupervised printing of them would totally interfere with and seriously endanger writers' normal exploitation of our work and our revenue streams.

"Format shifting" such as converting works distributed electronically to paper printouts can, in and of itself, interfere with normal monetization. For example, someone who manually types in a URL or searches for the name of a product or service from a printout won't include the (nonprinting) affiliate or advertiser code appended to the URL in the digital version, so the publisher won't get affiliate credit, commission, or ad revenue for the sale. Many e-books, electronic games, apps, and of course Web pages are monetized primarily through embedded text ad links – which is a major reason why the licenses for these works may forbid the making of paper copies. One purchase made through an embedded affiliate link may generate more revenue for the publisher than the typical per-copy retail license price of an e-book or app.

Printed copies also persist and allow continued access and viewing even after the original, possibly time-limited, license for access and viewing has expired.

Widespread availability of cheap photocopying has eliminated any meaningful distinction between allowing a library user to print one copy and allowing a user to print a hundred or a thousand copies. In the same way, widespread availability of inexpensive but high-resolution scanners and inexpensive but reliable optical character recognition (OCR) software that runs on

inexpensive personal computers has eliminated much of the distinction between making a printed copy available and making a work available in digital form.

But removing the printers from these terminals would not solve the problem. Ubiquitous high-resolution cellphone cameras, which take photos that can be processed into text by OCR software, are breaking down any remaining distinction between what can be viewed by library users and what can be clandestinely but easily copied, converted to text, and redistributed online.

To be clear, we don't want librarians to surveil library patrons, log what they read, or strip-search them for camera-phones or hidden cameras before allowing them into archival reading rooms. Rather, we would prefer to have the Copyright Office limit deposit of works distributed electronically to a voluntary "opt-in" basis instead of making it mandatory "on demand," and/or to limit access to deposit copies, and especially printing, to an "opt-in" basis, until the expiration of the term of copyright protection for each deposited work.

The interference with normal commercial exploitation would be greatest for works with per-copy licensing fees sufficiently high to justify a trip to the Library of Congress or one of its remote facilities by a would-be user who would otherwise pay for a license.

Unfortunately, many of the "books" with the highest per copy licensing prices are, in fact, distributed exclusively in electronic form. These include specialized technical, consulting, investment, and survey research reports. Many of these works are distributed exclusively as PDF files and in other electronic formats for fees of hundreds or thousands of dollars per copy or per organizational or site license. Licenses for these materials may limit access to paid subscribers to a consulting or research contract, with the license for access to expire and the copies required to be expunged if the annual or monthly consulting retainer or subscription to a report series is

terminated. These works are increasingly self-published by professional experts, sole-practitioner consultants, independent journalists, and other freelance researchers and writers.

The worst-case scenario would be a report prepared for businesses in a particular niche. Such a report might be commissioned by one company but offered to anyone willing to pay the licensing fee of $500 or $5,000 per site license, with expected sales of only a handful of licenses. All the major competitors in the niche might license the report, lest one of their competitors gain some advantage from it. But if any of them are located in the D.C. area, they could avoid that expense by reading the report (and perhaps printing a copy for circulation within their organization) at the Library of Congress. Even a single lost sale of a license to such a work – for example, selling only three licenses rather than four – could make the difference between profit and loss for the researcher who prepared and self-published the report.

9. Conclusion

Archivists' desire to "acquire" the Internet – whether through "crawling" and "capture" or through mandatory deposit of all its contents – is understandable but misguided.

Trying to archive the contents of the World Wide Web is as futile as trying to archive the weather. At most, one can archive snapshots of observations made by specific observers at specific places and times. But the Internet is both diverse and constantly changing. Different text, images, etc., can be served to a visitor to a particular URL depending on when they make their request, where they are located (as inferred from their IP address), the parameters sent by their browser (such as their preferred language, device type, and screen resolution), who they are, and

their preferences (as determined from cookies, user logins, etc.). Do two people ever see exactly the same Facebook home page? Unlikely.

The Web and other electronic content distribution channels have enabled new media and new distribution modes that are, characteristically, personalized and dynamic, making them ill-suited to archiving and making demands for their "deposit" especially burdensome. Mandatory deposit could also enable new business models and revenue streams associated with those new media to be significantly undermined by free access to deposited copies.

Trying to constrain Internet media to those formats that are static and subject to archiving would straitjacket both technology and business models, harming both writers and readers.

Archivists need to find ways to accommodate their methods and expectations to new media, not try to confine new media within old-media archival formats. The National Writers Union, the Western Writers of America, and the American Society of Journalists and Authors all remain eager to work with librarians, especially the Library of Congress, to develop best practices for archiving that will nurture rather than undermine writers' livelihoods.

Respectfully submitted,

_____/s/_____

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