
Before the Copyright Office

Library of Congress

In the Matter of)
)
Mandatory Deposit of Electronic Books
And Sound Recordings Available Only) Docket No. 2016-3
Online)

Comments of the Authors Guild, Inc.
Submitted by Mary Rasenberger, Executive Director

The Authors Guild—the nation’s largest and oldest society of published authors—submits this statement on behalf of its 8,500 members in response to the Copyright Office’s Request for Public Comment on mandatory deposit of online-only books and sound recordings. The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors’ copyright and contractual interests since the League's founding in 1912. Among our current members are historians, biographers, poets, novelists and freelance journalists.

At the outset, note that in these comments we address mandatory deposit requirements only for “online-only”¹ books and, specifically, e-books whose authors act also as publisher. We refer to these books as “independently published” or “author-published” books, as compared to books published by traditional publishing houses, which we refer to as “traditionally published” books. Most traditionally published books, though not all, are published in hard-copy as well as in e-book format, so the proposed regulations would not apply to them.

In principle, the Authors Guild is not completely opposed to the application of the interim rules to online-only books, because, as our national library, we believe that the Library of Congress should include online-only books in its collections. The percentage of culturally and historically important texts published only online has increased dramatically in recent years, and is likely to increase even more significantly in the coming years. It will soon

¹ For a discussion of the term “online-only,” see section 2 below.

become a gaping hole in the Library's collections if the Library does not acquire these texts. Our cultural heritage may suffer as a result, and the authors of these works would be treated in a discriminatory manner: their works would not necessarily be preserved for future generations in any comprehensive way—at least not in our nation's library. There are, however, several major complications in applying the interim rule to online only books that would have to be worked out. In this submission, we address only a few of those issues.

Specifically, we focus on: 1) the need to define what a “book” is; 2) the massive breadth and volume of author-published online-only books, and, because of that volume, the crucial importance of applying the demand-based system that exists under the current interim rule; 3) the need to define “online-only” to include works published “originally online” or otherwise address the fact that most online-only books are also available as print-on-demand (“POD”) copies; 4) the need to retain flexibility in the formats allowed as “best edition” copies; and 5) the importance of retaining the security and access restrictions for online-only books that apply to online-only serials, with the caveat that allowing researchers to print out copies of books could serve as a substitute for the purchase of these works (even with the fair use restrictions).

1. Definition of Online “Book”

As a preliminary matter, the term “book” would need to be defined in a way that limits the scope of what works are subject to deposit. A vast amount of text is “published”² online today that might qualify as a “book,” depending how “book” is defined. Miriam Webster, for instance, defines an electronic book as “a long written work that can be read on a computer.”³ This could include something like a series of blog posts and a great deal of website content, PowerPoint presentations, and the like. Or, is online text a book merely because it has a cover and is called a “book?” Today, anyone can take miscellaneous text from various sources, including e-mail chains, website content, and other written documents, and slap a cover on the collection and call it a “book.”

² We are using the term “published” as it is defined in Section 101 of the Copyright Act: “Publication’ is 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.” 17 U.S.C. § 101. While we believe this definition is outdated and in need of amendment, it is the statutory definition at present.

³ See <http://www.merriam-webster.com/dictionary/book>.

2. The Growing Online-Only Book Market

Author-published books are a rapidly growing sector of the retail book market. It has been estimated that the number of author-published books is well over half a million. The most recent report on self-publishing by Bowker, published in October 2014, noted that the number of self-published titles in 2013 increased to more than 458,564.⁴ Forbes has estimated that between 600,000 and 1,000,000 books are published in the United States annually, and that half or more of these books are author-published.⁵

Amazon's Kindle Direct Publishing (KDP) service is perhaps the most prominent example of an online-only publishing platform that attracts large numbers of independent authors. Because Amazon charges no upfront fees to publish on the KDP platform (but instead retains a percentage of the book's earnings after paying the author a royalty), the platform has attracted a wide variety of writers. Launched in 2007 at the same time Amazon released its first Kindle device, KDP published only in an e-book format exclusive to Kindle e-reader devices and applications. The platform allows any author with a "book" in the recommended Word (DOC / DOCX), HTML, MOBI, or EPUB formats—or in Rich Text Format (RTF), Plain Text (TXT), Adobe PDF (PDF) or Kindle Package Format (KPF)—to convert their document into an e-book and sell it on the Kindle Store. Once a manuscript is formatted, authors merely enter the requisite title information, design a cover, set their price, and publish their book, which becomes available on the Kindle store within 24 to 48 hours of upload. Amazon then pays the authors for sales (i.e., downloads of the book) from its store and for "reads" from its Kindle Unlimited subscription service, which pays authors royalties based on the number of pages an individual customer reads in an author's book.⁶

As of mid-January 2016, Amazon saw 1,064,000 paid downloads a day on its e-book store in the U.S. A February 2016 Author Earnings report estimates that 155,000 or 14% of these paid daily downloads were from Amazon's Kindle Unlimited self-published indie authors, and another 293,000 were from sales of e-books from other indie self-publishing platforms.⁷

⁴ Bowker, SELF-PUBLISHING IN THE UNITED STATES, 2008-2013, http://media.bowker.com/documents/bowker_selfpublishing_report2013.pdf.

⁴ Nick Morgan, "Thinking of Self-Publishing Your Book in 2013? Here's What You Need to Know," FORBES, <http://www.forbes.com/sites/nickmorgan/2013/01/08/thinking-of-self-publishing-your-book-in-2013-heres-what-you-need-to-know/#3f329d7029f4> (Jan. 8, 2013).

⁶ "Royalties in Kindle Unlimited and Kindle Owners' Lending Library," <https://kdp.amazon.com/help?topicId=A13QMVN4FMTXJ>.

⁷ "February 2016 Author Earnings Report," <http://authorearnings.com/report/february-2016-author-earnings-report/>.

While KDP is currently the biggest author-publishing platform, other major platforms include Barnes & Noble’s Nook Press, Apple iBooks, Kobo Writing Life, and Google Play. Smaller independent publishing platforms like Smashwords, Lulu, Draft2Digital, and BookTango also make up a smaller percentage of the e-book publishing market. In addition, there are a number of hybrid service providers—such as Open Road, Ingram Spark, and BookBaby—that distribute books online on behalf of authors and allow authors to publish online only if they wish.

To catalog the list of books that exist today as online-only titles would already be a nearly Sisyphean task for the Copyright Office, and the number of author-published works is expected to grow exponentially in the coming years. Moreover, many author-published works are not of a nature that the Library generally has collected to date. Many are works of genre fiction; and many others are written by hobbyists and not widely distributed.⁸ Indeed, many hobbyists make no effort to market their titles and in some cases have no real inclination to publish broadly. Under the current definitions of publication and the term “distribution” contained in that definition, as interpreted by the Copyright Office,⁹ these books nevertheless would be deemed published.

Accordingly, it is important that the extension of the interim rule to online books preserve the demand-based system so that online-only works would be subject to mandatory deposit only upon request from the Register of Copyrights. If mandatory deposit were instead to include all online-only books, it would place an undue burden on independently published authors—who generally have low distribution and lack financial support—and would also inundate the Copyright Office with titles that would take an inordinate amount of time and resources to process. And most of that effort would be for naught, as it is unlikely the Library (in light of past practices) would want to keep most of the titles so deposited.

We understand the Library’s interest in collecting and preserving a comprehensive collection of the nation’s literary output, and author-published online-only books are an increasingly important part of our cultural heritage. Still, as online-only books make up an ever-increasing segment of the U.S. book market, it would be counterproductive to demand that all online-only published books be deposited. In sum, a system under which

⁸ In total, author-published books sell an average of less than 250 copies each, a figure that is skewed higher by the few author-published titles that sell particularly well. A 2015 Digital Book World and Writer’s Digest author survey shows that 71.8% of independently-published authors sold fewer than 1,000 copies of their latest book and 59.7% of independently-published authors reported selling fewer than 500 copies of their latest book.

⁹ United States Copyright Office, *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHTS 19-36* (February 2016), *available at* http://www.copyright.gov/docs/making_available/making-available-right.pdf.

these online-only titles would remain exempt from deposit until issued a demand by the Copyright Office would be more efficient and cost-effective for the Office and the Library and would free a host of self-published authors from a potential administrative and financial burden.

3. Definition of “Online-Only”

The notice of inquiry contemplates “online-only books,” but the current state of the independent-publishing industry renders the term “online-only” unclear. Books initially published only online often are also available as print-on-demand copies; and the number and availability of POD services for books has increased in recent years. As such, the Copyright Office would have to resolve whether a book is published only online if it is also available in POD format. And what if initially it is not available in POD format and later becomes available as POD? Does that book become subject to the general mandatory deposit requirements under Section 407 of the Copyright Act as soon as it is made available in POD?

Print-on-demand services now offered by many self-publishing companies and some brick-and-mortar bookstores allow independently-published authors to offer physical copies of their works to readers. Barnes & Noble, for example, now offers POD machines in some of its stores, giving customers the opportunity to print a physical copy of any book for which they have a properly formatted PDF. In addition, Espresso Book Machine printing stations are available in a growing number of independent bookstores. Although these machines are often used to print copies of out-of-print works or a copy of an author’s online-only work for personal use, these machines can be used to print and distribute works originally published on online-only platforms, and it is likely such uses will increase.

One of the questions raised by this state of affairs is whether an independently-published author of an originally-online work who chooses to take advantage of print-on-demand services would be subject to the provisions regulating mandatory deposit of physical works or those regulating the deposit of online-only works.

In light of the advent of POD services, the Authors Guild recommends that the Copyright Office extend the exemption for online-only works to books “initially” or “originally” published only online but also available in POD format, as the same factors described above in Section 2 above apply to most of those works as well.

4. “Best Edition” Requirements

The rise of POD services and various content formats also call into question regulations surrounding the submission of the “best edition” of an online-only book. If the interim rule is extended to online-only books, it is crucial that the Copyright Office offer a great deal of flexibility in the formats and associated metadata elements required under the “best edition” rules. The permissible best edition formats for online-only books should reflect, at a minimum, all of the current e-book formats used for the major author-publishing platforms,¹⁰ and should also allow for other new e-book formats that might arise prior to a new rulemaking. In the case of online-only books, this flexibility is especially important, given that it would largely be individual authors who would be required to make the deposits and the cost of transferring to new formats or creating new metadata solely for deposit purposes likely would prove unaffordable for most authors.

5. Security of and Access to Deposited Copies

As the notice of inquiry outlines, the Copyright Office has taken precautions to protect the intellectual property of authors of the online-only serials it has received under the interim rule for mandatory deposit of online-only works. But the Guild remains concerned about the ability of authorized users to print from electronic works to the extent allowed by fair use because there seem to exist no assurances that authorized users are familiar with or will abide by the fair use when accessing or printing works. In many cases, these works will be readily available, at affordable prices, for purchase or license as e-books, or for lending from libraries. Allowing researchers to print out e-books at Library of Congress terminals, potentially in POD formats, or to download them, in such cases could substitute for purchases and potentially harm the value of the work.

Regarding the transmission of files, the Guild fully understands that some digital rights management software will likely need to be removed in the transmission of online-only book files to Copyright Office servers. Still, the Guild recommends that, to the extent possible, authors be allowed to keep standard e-book security measures in place in order to protect their intellectual property.

Last, any extension of mandatory deposit to e-books necessitates the creation of a secure e-book repository to protect against hacking and illegal access to the books. The Guild recommends that the Copyright Office and Library consult with appropriate industry representatives in creating such a repository to ensure that it meets industry standards.

¹⁰ Such as KF8 (Amazon), LIT (Microsoft), INF (IBM), iBook (Apple), BBeB (Sony), and EPUB.

We thank the Copyright Office for the opportunity to submit these comments, and we are available for consultation.