

visitor experience. Importantly, in 2003, NARA completed a two year renovation of the Rotunda and constructed additional exhibit space at the same time. Since the rededication of the Rotunda six years ago, visitors are no longer forced to shuffle past the documents at a regimented pace as the commenter states. Rather, visitors are permitted to enter the Rotunda in small groups to view the documents in any order they wish for as long as they wish. This system permits individuals and families to study the documents and discuss their meaning while also permitting visitors with limited time to satisfy their curiosity with a quick glance.

For the past five years, the staff has monitored the NAE's informal visitor comment log as well as letters received from visitors requesting and demanding that NARA eliminate all photography. Comments such as these vastly outnumber those requesting permission for flash photography usage. The requests from visitors to eliminate photography usually ask us to do so for three reasons: the ultraviolet light is detrimental to the documents; visitors using cameras do not bother to look at or read the documents; and those taking photographs keep other visitors from viewing the exhibits as they use excessive amounts of time lining up and blocking people from intruding into their camera shot.

The National Archives serves roughly a million visitors every year. During peak tourist season, the NAE can accommodate up to 4,500 each day. Over the past five years, the agency has monitored visitor traffic flow in the Rotunda of the NAE on a continual basis in an effort to improve the visitor experience. It has long been noted that visitors with cameras disrupt and dramatically slow down the flow of visitors and frustrate many of the eager visitors who are forced to wait to view our country's founding documents. By eliminating all filming, photographing and videotaping by the public in the exhibit areas, NARA expects to eliminate delays, and provide its visitors with a more rewarding experience. For those visitors who wish to take home an image of the documents, the National Archives Shop has facsimiles of various sizes and price ranges available for purchase. NARA also provides visitors with the ability to access and print digital images of the documents from the Boeing Learning Center free of charge. Finally, NARA has posted high quality images of documents on display at the NAE on its Web site <http://www.archives.gov>; visitors can download or print these

images from their personal computers at no cost.

One final comment dealing with enforcement of the proposed rule suggested that any visitor with a photographic device on their person would be turned away and that overzealous security guards might subject visitors to harassment or bodily harm. NARA can assure this commenter that those hypothetical behaviors and policies will not happen. Visitors with photographic devices will be allowed to enter the building with their cameras, cell phones, and other photographic equipment. However, they will be met by appropriate signage and security personnel throughout the NAE to explain the "no photography" rule. In the event that a visitor makes the mistake of displaying or attempting to use a photographic device, they would first be warned that such behavior is not allowed. If, after they have received a warning, they continue to ignore the "no photography" rule they will be politely escorted from the building.

#### List of Subjects in 36 CFR Part 1280

Archives and records, Federal buildings and facilities.

■ For the reasons set forth in the preamble, NARA amends part 1280 of title 36, Code of Federal Regulations, as follows:

#### PART 1280—USE OF NARA FACILITIES

■ 1. The authority citation for part 1280 continues to read as follows:

**Authority:** 44 U.S.C. 2102 notes, 2104(a), 2112, 2903

■ 2. Amend § 1280.46 by:

■ a. Adding "and" to the end of paragraph (b)(1);

■ b. Removing "; and" from the end of paragraph (b)(2) and adding a period in its place; and

■ c. Redesignating paragraph (b)(3) as paragraph (c) and revising it to read as follows:

**§ 1280.46 What are the rules for filming, photographing, or videotaping on NARA property for personal use?**

\* \* \* \* \*

(c) You may not film, photograph, or videotape in any of the exhibit areas of the National Archives Building in Washington, DC, including the Rotunda where the Declaration of Independence, the Constitution, and the Bill of Rights are displayed.

Dated: January 14, 2010.

**David S. Ferriero,**

*Archivist of the United States.*

[FR Doc. 2010-1331 Filed 1-22-10; 8:45 am]

**BILLING CODE 7515-01-P**

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 202

[Docket No. RM 2009-3]

#### Mandatory Deposit of Published Electronic Works Available Only Online

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Interim Rule.

**SUMMARY:** The Copyright Office of the Library of Congress is adopting an interim regulation governing mandatory deposit of electronic works published in the United States and available only online. The regulation establishes that online-only works are exempt from mandatory deposit until a demand for deposit of copies or phonorecords of such works is issued by the Copyright Office. It also states that categories of online-only works subject to demand will first be identified in the regulations, and names electronic serials as the first such category for which demands will issue. In addition, the regulation sets forth the process for issuing and responding to a demand for deposit, amends the definition of a "complete copy" of a work for purposes of mandatory deposit of online-only works, and establishes new best edition criteria for electronic serials available only online.

**EFFECTIVE DATE:** February 24, 2010.

**FOR FURTHER INFORMATION CONTACT:** Tanya M. Sandros, Deputy General Counsel, or Christopher Weston, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202)-707-8366.

**SUPPLEMENTARY INFORMATION:** The fundamental goal of this rulemaking proceeding is to establish a qualified exemption from the mandatory deposit requirement of 17 U.S.C. 407 for works available only online. In July 2009, the Copyright Office published a Notice of Proposed Rulemaking in the **Federal Register**, 74 FR 34286 (July 15, 2009), seeking public comment on proposed amendments to its mandatory deposit regulations at 37 CFR 202.19 and 202.24, and Appendix B of Chapter 37. The notice proposed an exemption from

mandatory deposit for all published online-only works until the Library identifies a particular category of such works as being subject to a deposit demand by the Copyright Office. Once a category of online-only works is identified, the Copyright Office may issue demands upon the publisher that a single electronic copy be deposited within three months. The Office identified "electronic serials," a term that the notice also proposed to define, as the initial category subject to the qualified exemption. The notice also proposed a demand issuance and response procedure, a definition of the term "complete copy" specific to online-only works, and a new best edition statement for electronic serials. Finally, the Notice sought public comment on the practical and legal concerns associated with the adoption of a requirement for publishers of online-only works to notify the Library upon the publication of a new online-only work in the United States.

The Office received seven initial comments and, after an extension of the reply deadline, three reply comments. The initial comments were from Bose McKinney & Evans LLP, the American Society of Media Photographers (ASMP), the Association of American Publishers, Inc. (AAP), the American Library Association with the Association of Research Libraries (ALA-ARL), the Software & Information Industry Association (SIIA), the Professional Photographers of America (PPA), and the Newspaper Association of America (NAA). Reply comments were received from Patrice Lyons, an attorney; West, a publisher of works for the legal industry; and the ALA-ARL. All comments are available for viewing at <http://www.copyright.gov/docs/online-only/>.

Of the comments that directly addressed issues presented by the notice, most were generally favorable toward the Office's proposal. However, the commenters did raise questions regarding the method of deposit, definitions of certain terms, user access to deposited works, and the proposed publisher notification requirement, among others.

The Copyright Office, in consultation with the Library of Congress, has thoroughly considered these comments, and determined that the amendments will be adopted as an interim rule largely as proposed, with some changes as described in the Discussion section below. In addition, the Office and the Library have determined that it is unnecessary at this interim phase of the rulemaking process to impose a requirement for publishers of online-

only works to notify the Library upon publication of a new work, although the Office may again consider the question when expanding the categories of online-only works subject to a mandatory deposit demand.

The rule is interim, and not final, because the Office anticipates that the experience of issuing and responding to demands for online-only works will raise additional issues that should be considered before the regulation becomes final, e.g., the technical details of how an online-only work should be transmitted to the Copyright Office. Thus, the Office will provide an opportunity for additional comment later in 2010 in order to consider amendments to address problems or issues yet to be identified.

### I. Background

Under section 407 of the Copyright Act of 1976, Title 17 of the United States Code, the owner of copyright, or of the exclusive right of publication, in a work published in the United States is required to deposit two complete copies (or, in the case of sound recordings, two phonorecords) of the best edition of the work with the Copyright Office for the use or disposition of the Library of Congress. The deposit is to be made within three months after such publication. Failure to make the required deposit does not affect copyright in the work, but it may subject the copyright owner to fines and other monetary liability if the owner fails to comply after a demand for deposit is made by the Register of Copyrights. These general provisions, however, are subject to limitations. Section 407 provides that the Register of Copyrights "may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories." 17 U.S.C. 407(c).

Accordingly, in 1978 the Copyright Office, with the approval of the Librarian of Congress, established regulations governing mandatory deposit, which are set forth in Chapter II, Part 202 of Title 37 of the Code of Federal Regulations. Section 202.19 establishes the standards governing mandatory deposit of copies and phonorecords published in the United States for the Library of Congress, and section 202.21 allows for a deposit of identifying material in lieu of copies or phonorecords in certain cases, for both mandatory deposit and registration deposit. In addition, the Library of Congress's Best Edition Statement in Appendix B of Part 202 specifies the required deposit in instances where

"two or more editions of the same version of a work have been published."

At that time, the Copyright Office also adopted a regulation exempting machine-readable literary works from mandatory deposit. Copies of machine-readable works were not widely marketed to the public and the Library had no interest in collecting these works, so it decided not to require their deposit. However, in 1989, in response to the increased use of databases and computer programs distributed in CD-ROM and other formats and an increased demand by Library users for these works, the Copyright Office amended the machine-readable copies exemption so that machine-readable works *published in physical* form were subject to mandatory deposit, and only "automated databases available only online in the United States" were exempted. 54 FR 42295 (Oct. 16, 1989).

The Copyright Office identified the exempted category of works as such to refer to all online-only publications since, for all practical purposes, the only works being published online in 1989 were automated databases, e.g., Westlaw and Nexis. As other categories of works, such as articles and serial titles, began to be published only online, the Copyright Office included them in the exempted category because the Library in the early 1990s had neither the intention nor the technology to collect such works, and it also continued to use the term "automated databases available only on-line in the United States" as a matter of convenience. Hence, Copyright Office practice to date has been to interpret "automated databases available only online in the United States" broadly as encompassing *all* electronic works published only online.

Much has changed in the twenty years that have passed since the adoption of the regulation used to exclude electronic works published in the United States and available only online from mandatory deposit. In that time, the Internet has grown to become a fundamental tool for the publication and dissemination of millions of works of authorship. To cite just one pertinent example, the Library has determined that there are now more than five thousand scholarly electronic serials available exclusively online, with no print counterparts. In some cases the Library has purchased subscriptions to these periodicals, but such subscriptions are typically "access only," and rarely allow the Library to acquire a "best edition" copy for its collections. However, the current inability of the Library to acquire online-only works through mandatory

deposit places the long-term preservation of the works at risk.

Thus, to fulfill its mission to sustain and preserve a universal collection of knowledge, and to inform Congress, the Library is currently developing technological systems that will allow it to ingest electronic works, including those available exclusively online, and maintain them in formats suitable for long-term preservation. In addition, the Copyright Office is amending the mandatory deposit regulations to enable the on-demand mandatory deposit of electronic works published in the United States and available only online (i.e., not published in physical form).

To date, mandatory deposit of works in physical formats has been one of the most important methods for building the Library's collections and making it the world's largest repository of knowledge and creativity. With the adoption of this amendment, mandatory deposit will apply in a measured and balanced way to works offered only in the digital environment as well.

## II. Discussion

In its July 15 notice, the Copyright Office proposed that the current § 202.19(c)(5) exemption be amended so that all electronic works published in the United States and available only online enjoy a qualified exemption from mandatory deposit, which means that any work in this class would be exempt *until* the Copyright Office issues a demand for its deposit. This revised exemption would apply to all published electronic works available only online. The exemption would apply to serials, monographs, sound recordings, automated databases, cartography, and all other categories of electronic works. Furthermore, because the revised exemption would apply exclusively to published online-only works, there would be no need to retain the current list of machine-readable works in physical formats to which the exemption did not apply. Finally, the notice emphasized that the revised exemption would not apply to those works published in both physical and online formats. These works, because they are not published "only" online, were never exempted from mandatory deposit by § 202.19(c)(5).<sup>1</sup> The interim

regulation promulgated by this notice is consistent with all of the above aspects of the notice of proposed rulemaking.

The rule establishing a qualified mandatory deposit exemption for online-only works seeks to balance the current needs of the Library of Congress against the imposition of a mandatory requirement on all copyright owners of works published exclusively online to deposit one complete copy of the best edition. By exempting published electronic works available only online until a demand is made, the qualified exemption addresses the practical difficulties of acquiring works published in non-physical formats, ensures that the Library will only receive those works that it needs for its collections, and reduces the burden on copyright owners, who will only have to deposit those works demanded by the Copyright Office.

Commenters were generally supportive of the Office's goal of a qualified exemption for online-only works, with one stating that it appeared to be "sensible and non-controversial." AAP Comment at 2. However, they also raised a number of questions concerning the scope of the term "electronic serials," the process for responding to deposit demands, the inclusion of metadata and formatting codes in deposit copies, user access to deposit copies of online-only works, and the nature of publication on the Internet. Commenters also responded to the Office's request for reactions to the concept of requiring publishers of online-only works to provide notice to the Library upon publication of a new work as a mechanism for identification of the works that exist in this format. These issues, along with the related changes incorporated into the interim rule, are discussed in the sections that follow.

### *Category-by-Category Demands, Beginning with Electronic Serials*

As explained in the July 15 notice, the initial category of online-only works that will be subject to demand deposit is "electronic serials." ("This class includes periodicals; newspapers; annuals; and the journals, proceedings, transactions, etc. of societies.")

In its comments, West supported the decision to begin with electronic serials because they "appear to be analogous to print serials which are printed in separate, successive discrete editions." West comment at 2. This is, in fact, the

same rationale applied by the Library. While serials encompass everything from scholarly journals to daily newspapers to semiweekly newsletters, the Library's demands for electronic serials initially will be restricted to journals that publish no more often than weekly, and have the same, or similar, appearance, formatting, and regular issue schedule as print journals.

However, West did request that the electronic serials definition be revised so that it cannot be read to cover databases or blogs. In response, the Office notes that the definition in the interim rule has been revised to say that an electronic serial must be "issued or intended to be issued on an established schedule, in successive parts bearing numerical or chronological designations, without subsequent alterations." This limitation, the Office believes, does in fact exclude works like databases and blogs that are constantly updated with no demarcations between particular, discrete issues of the publication.

SIIA also commented on the definition of electronic serials. It opined that the use of "etc." in the last sentence of the definition of electronic serials may cause it to be read too broadly. See SIIA comment at 6–7. The Office disagrees. The Office notes that "etc." only extends the list of publications issued by societies, and not the larger list of electronic serials. However, there is no harm in replacing it with "and other publications," which is how the interim rule now reads.

Commenters also requested additional definitions to clarify the category of electronic serials or questioned the use of other terms in the context of this rule. Specifically, Patrice Lyons commented that the exempted category "electronic works," (of which "electronic serials" is a subset), is problematic because it implies a lack of the "fixation in a tangible medium of expression" required for copyright protection. Lyons comment at 1–2. She suggests instead the term "digital object." *Id.*, at 2.<sup>2</sup> The Office does not agree that introducing new terminology is necessary. The interim regulation must be understood

<sup>1</sup> Note that the Library's current Best Edition Statement for "Works Existing in More Than One Medium" does not currently list electronic formats. See, e.g., 37 CFR 202.20(b)(1) ("For purposes of this section, if a work is first published in both hard copy, i.e., in a physically tangible format, and also in an electronic format, the current Library of Congress Best Edition Statement requirements pertaining to the hard copy format apply.") Nevertheless, the Library of Congress retains the authority to determine what constitutes "best

edition" and it may decide at a future time that, when a particular work is published in both print and electronic editions, the electronic edition is the "best edition" for purposes of mandatory deposit.

<sup>2</sup> The Copyright Act states that "a work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. 101. A fixed work may be perceived, reproduced, or otherwise communicated "either directly or with the aid of a machine or device." 17 U.S.C. 102(a).

in the context of the overall body of copyright regulations, where works embodied in digital files are described as “electronic” in contrast to works fixed in materials that are “physically tangible.” See 37 CFR 202.20(b)(1). In this context, “electronic” clearly does not mean “unfixed.” While online-only digital files may not be visible or perceptible to touch they are still fixed in a tangible medium of expression by virtue of their embodiment on a computer’s hard drive, on a server, or on any other device that allows them to be communicated.<sup>3</sup> However, the Office agrees that the term “electronic works” presents some ambiguity as to fixation in tangible medium, in that it suggests that the nature of the work itself is electronic, as opposed to the intended meaning that the work is merely fixed and published in an electronic format. Thus, the interim rule defines the term in the mandatory deposit context as “works fixed and published solely in an electronic format.”

ASMP commented that “electronic,” along with the words “digital” and “online” must be “clearly defined” in the regulation. ASMP comment at 3. While the Copyright Office agrees that definitions of terms are useful in some cases, it believes that definitions also have the potential to unintentionally obfuscate or limit common understandings. The three terms ASMP cites appear throughout Title 17 and the Office’s regulations without definition, and this state of affairs has not caused confusion or controversy. The Copyright Office is concerned that defining them solely for the purpose of the present interim rule would have unintended consequences. Furthermore, the terms “electronic” and “digital” appear in the statute and the current regulations exclusively as modifiers (e.g., “electronic transmission,” “digital networks”), making their definition as stand-alone terms potentially confusing. Moreover, there is no need to define the term “digital” because it in fact does not appear in the present interim rule at all.

#### Best Edition Statement

Regarding the proposed Best Edition Statement for electronic serials, the Office received one approving comment (from SIIA) and no criticisms. See SIIA

comment at 7. However, in order to correct a minor technical error, the reference to “OpenXML” in section IX.A.1.c.ii of Appendix B has been changed to “Office OpenXML.” As stated in the July 15 notice, best edition criteria for other categories of electronic works published in the United States and available only online will follow as new categories become subject to demand deposit.

The Copyright Act states that the “best edition” of a work “is 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.” 17 U.S.C. 101. In other words, an edition of a work, no matter its quality, is not the “best edition” unless it has been published. Thus, if the published format of a demanded electronic serial does not meet any of the best edition criteria, the publisher is still obligated to send a copy of the serial in whatever form it is published. Furthermore, the Copyright Office may not require that a rights-holder deposit an edition of the work that has not been published.

#### Demand Deposit Process

The process by which the Copyright Office will demand electronic serials is similar to that used to demand other published works under 17 U.S.C. 407(d). Once a category of works is identified as being subject to demand under the qualified exemption of § 202.19(c)(5), the Copyright Office may make a demand on the owner of copyright or of the exclusive right of publication for a single complete copy of a work in that category, for any such work published on or after the date that this proposed regulation goes into effect.

The owner of copyright or of the exclusive right of publication will have three months from the date of receipt of the notice in which to make the deposit, in keeping with the time period allotted by statute for deposit of the best edition of a published work not subject to an exemption. See 17 U.S.C. 407(a). The regulation also includes a provision allowing special relief to accommodate, for example, situations where a publisher may need more time to make the deposit or wishes to arrange for alternative means of making a deposit. Special relief, however, is granted at the discretion of the Library.

The mandatory deposit provision in the copyright law grants the Copyright Office authority to reduce the required number of deposit copies from two to one. See 17 U.S.C. 407(c)(1). Pursuant to this authority, the interim rule states that only a single copy or phonorecord of a demanded work is required. The

Office has determined that transmitting duplicate electronic files presents a risk of slowing down the electronic ingest system of the Library, particularly in the case of a work consisting of a single large file or of many small files. Nevertheless, the Library may allow two on-site users to simultaneously access the single copy of an online-only work. This achieves, in an efficient and flexible manner, the statute’s goal of providing two copies of a published work to the Library of Congress. As the only commenter to opine on the single copy requirement, the SIIA indicated its agreement with it. See SIIA comment at 7.

On the other hand, commenters did raise questions and express concerns about the method, form, version, frequency, and format of depositing copies of online-only works with the Copyright Office in response to a demand. The Office believes, at least for the purposes of this interim rule that these issues will require a flexible approach and are not currently suited to resolution via this rulemaking. The present interim rule is an early step in the Library’s program of acquiring online-only works, and the Library requires more information and experience with electronic publications before considering specific regulations to govern the demand deposit process.

That said, rights-holders should note that the Best Edition Statement for electronic serials contains detailed technical standards for the preferred deposit formats, and should be consulted in the event an online-only work exists in more than one version. Regarding the possibility raised by SIIA and NAA of a rights-holder providing a direct feed to the Copyright Office, this is one option that may be explored once the demand deposit system is operational and adjustments are made. However, the Copyright Office is unprepared at this time to implement a regulation allowing rights-holders to meet their mandatory deposit obligations by providing a website link to the Office so that the Office may download an electronic serial itself. The Library recognizes that this approach represents an attractive alternative to publishers of works made available online, but it needs to examine the issue in more depth before considering including a link-and-download option in the regulations. Thus, for the immediate future, such an arrangement should be a matter of special relief.

The question of frequency of deposits was also raised by SIIA in the context of publishers who might want to delay depositing issues of their serials for business reasons. See SIIA comment at

<sup>3</sup> The proposition that electronic works are sufficiently “fixed” on the computers where they originate so as to be copyrightable has been ratified, albeit tacitly, by numerous courts. See, e.g., *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 170–71 (D. Mass., 2008); *A&M v. Napster*, 239 F.3d 1004, 1014 (9th Cir., 2001); *Marobie-FL, Inc. v. National Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1177–78 (N.D. Ill., E. Div., 1997).

4. Unless a publisher decides to deposit its online-only serials via group registration,<sup>4</sup> it must deposit the work with the Library within three months of receipt of the demand notice, and it is expected that each issue of a demanded serial will be deposited with the Copyright Office thereafter as is the current practice, without the need for additional demand notices. The mandatory deposit requirement does not vary by business model, and the Library's need for timely deposits of serials does not change depending upon the format in which a serial is published.

Standards regarding the specific method of transmission of online-only works will be developed by the appropriate divisions of the Library and the Copyright Office, in consultation with rights-holders as warranted. These standards will be posted on the Copyright Office website ([www.copyright.gov](http://www.copyright.gov)) and depositors will be able to contact the Office by telephone with any questions.

#### *Complete Copy*

The interim rule clarifies that a "complete copy" of a published electronic work available only online includes the associated metadata and formatting codes that make up the unit of publication. Section 407 of Title 17 requires the deposit of a complete copy of the best edition of a work published in the United States. Section 202.19(b)(2) of the Copyright Office regulations defines a "complete copy" of a work for purposes of mandatory deposit as one that "includes all elements comprising the unit of publication of the best edition of the work, including elements that, if considered separately, would not be copyrightable subject matter or would otherwise be exempt from mandatory deposit requirements under paragraph (c) of this section." Published electronic works often contain elements such as metadata and formatting codes that, while they are not perceptible to the naked eye or ear, are part of the unit of publication. These elements are also critical for continued access to and preservation of a work once it is deposited.

Neither NAA, ASMP, nor SIIA opposed including metadata and formatting codes in the definition of "complete copy." See NAA comment at 20, ASMP comment at 2-3, SIIA comment at 7. However, AAP expressed concern that these elements may be

difficult to assemble and transmit to the Copyright Office as part of a single work, particularly for interactive works where elements exist on multiple servers for short periods of time and are regulated with digital management technology. AAP comment at 3. Patrice Lyons also noted the problem of dispersed elements of a work, and suggested adding "information management system used to structure and identify" to the definition of "complete copy." Lyons comment at 3.

As has been stressed in this notice, the Library and Copyright Office will be focusing their initial demands on the subset of electronic serials that are analogous to print journals. This means that the works will be self-contained documents with no ability for the user to affect the content. The Office recognizes that future demands for online-only newspapers, web sites, and other categories may require adjustments to what constitutes a "complete copy." This is one of the reasons that, as the Library expands its collection of online-only works to other categories, the Office will seek public comment before adding a new category to § 202.19(c)(5) as being subject to demand.

On the related question of what constitutes an online-only work, the NAA argues that, without a definition of "online-only," the term creates uncertainty as to whether a newspaper's website is sufficiently different from the print version so as to constitute a separate, online-only work. NAA comment at 7. In response, the Office notes that the interim regulation does exclude works published in both physical and online editions from the definition of "online-only" in the last sentence of section 202.19(c)(5) ("This exemption does not apply to works that are published in both online, electronic formats and in physical formats, which remain subject to the appropriate mandatory deposit requirements.") In addition, the NAA itself points to the Library's Best Edition Statement guidance that if two editions of a work have "variations in copyrightable content, then each edition is a separate work." 37 CFR Ch. II, Part 202, App. B. In other words simply publishing the same content in both print and electronic formats does not create two separate copyrightable works. This guidance can, the Office believes, be profitably applied to print and online versions of a newspaper, but recognizes the possibility of the need to revisit this issue at a later date. The Library, however, will not initially be demanding online-only newspapers, or the online-only content of newspapers

published both electronically and in print.

#### *Access to Deposit Copies*

As the AAP points out, online-only works may be regulated with digital management technology. The Copyright Office acknowledges that many publishers rely on such technology to prevent unauthorized access to or use of their works. However, copies of works submitted to the Copyright Office under this interim rule must be accessible to the Office, the Library, and the Library's users. Thus, the following provision has been added to the regulation's demand deposit conditions in § 202.24: "Copies or phonorecords deposited in response to a demand must be able to be accessed and reviewed by the Copyright Office, Library of Congress, and the Library's authorized users on an ongoing basis." In addition, the Best Edition Statement for electronic serials has been revised so that the final criterion now reads, "Technological measures that control access to or use of the work should be removed."

In its July 15th notice, the Office stated that "the Library will . . . establish policies and practices to insure the security and integrity of its electronic collections, and to provide appropriate, limited access as allowed by law." AAP, West, and SIIA asked for more detailed information regarding user access restrictions, specifically regarding downloading, distribution, and interlibrary loan functionality. See AAP comment at 2-3, West comment at 2-3, SIIA comment at 6. The Library and the Copyright Office recognize that electronic works, because of their ease of reproduction and distribution, present special security concerns. For this reason, access to these works will be available only to authorized users at the Library of Congress (including its Packard Campus for Audio-Visual Conservation in Culpeper, VA and its National Library Service for the Blind and Physically Handicapped at the Taylor Street Annex in Washington, DC) and Capitol Hill facilities in accordance with the policies listed below.

- Access to electronic works received through mandatory deposit will be as similar as possible to the access provided to analog works.

- Access to electronic works received through mandatory deposit will be limited, at any one time, to two Library of Congress authorized users.

- Library of Congress authorized users will access the electronic works via a secure server over a secure network that serves Capitol Hill facilities and remote Library of Congress locations. The term "Library of Congress

<sup>4</sup> The regulations for group registration of serial titles are at 37 CFR 202.3(b)(6)(v) and 37 CFR 202.20(c)(xvii).

authorized users” includes Library staff, contractors, and registered researchers, and Members, staff and officers of the U.S. House of Representatives and the U.S. Senate. The Library will not make the copyrighted works available to the public over the Internet without rights holders’ permissions.

- Authorized users may print from electronic works to the extent allowed by the fair use provisions of the copyright law (17 U.S.C. 107 and 108(f)), as is the case with traditional publications. However, users may not reproduce or distribute (i.e., download or email) copies of deposited electronic works until the Library has explored the advisability of permitting these options and the security and feasibility of the implementing technologies. As part of this process, the Library will seek comment from the public, including copyright owners and publishers, before adopting additional policies governing electronic copying or distribution by electronic transmission.

#### Notice of Publication

The interim rule does not include a requirement that rights-holders notify the Library of Congress upon the publication of a new electronic serial, or any online-only work, in the United States. The Copyright Office requested comments on whether such a requirement would be necessary, prudent, or consistent with the Office’s authority as granted by 17 U.S.C. 407. All commenters who addressed this question did so in the context of whether it would be necessary or prudent. These commenters opposed the requirement on the grounds that it would be too burdensome to rights-holders, particularly those who publish new works on a frequent basis. Some also asserted that the Library alone should bear the responsibility of researching electronic serials, particularly given the numbers of small publishers who would likely remain ignorant of the rule. AAP objected that there was not enough detail about how the requirement would be administered for it to address the issue. AAP comment at 3. ASMP suggested that registration applications could contain a field indicating whether a work is online-only, and that the Library could generate a list from these applications of works to demand. ASMP comment at 2.

The Copyright Office believes that the question of a notice requirement need not be addressed in the present rulemaking. As indicated in the July 15th notice, there currently exists an adequate level of bibliographic control over electronic serials. However, as the Copyright Office and the Library gain

experience with electronic serials, and other categories of online-only work are removed from the exemption and become subject to demand, the issue of the most efficient and comprehensive way to make the Library aware of what online-only works are available will likely be raised again.

On the subject of publication, Patrice Lyons also queried whether works available only online are truly “published” within the meaning of the Copyright Act. Section 101 of title 17 defines “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 offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” It defines “copies” as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.” 17 U.S.C. 101.<sup>5</sup> These definitions led Ms. Lyons to challenge the assumption that a publication takes place when “a work represented in digital form is made available, publicly and/or privately in an internet environment, but no physical copy changes hands.” Lyons comment at 2. Ms. Lyons also expressed concern that treating online-only works as publications might “have implications on other sections of the U.S. Copyright Law, in particular, what rights are implicated when a copyrighted work is made available in an Internet environment, but no physical object, i.e., copy, changes hands.” *Id.* As an alternative, she suggested that the public performance right may “play an important role in this context.” *Id.*

As a threshold matter, it appears well-settled electronic files are “fixed” in the sense that they reside on server

<sup>5</sup> “Phonorecords” are similarly defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.” 17 U.S.C. 101. For convenience, this notice uses “copies” to refer to both copies and phonorecords.

hard drives which are, as discussed above, material objects, and thus the files meet the “copies” requirement of publication and distribution. To the extent that Ms. Lyons is questioning whether publication can take place by means of electronic transmission, that issue has also been settled. In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the Supreme Court concluded that online databases that made copies of articles available electronically “reproduce and distribute” copies of those articles. Cases involving peer-to-peer file-sharing on the Internet have also recognized that online transmission constitutes distribution. See *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005) (noting that “peer-to-peer networks are employed to store and distribute electronic files” and that peer-to-peer software “enabled users to reproduce and distribute the copyrighted works in violation of the Copyright Act.”); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 170–172 (D. Mass. 2008) (stating that “an electronic file transfer is plainly within the sort of transaction that § 106(3) [the distribution right] was intended to reach.”). Because “[u]nder the definition in section 101, a work is ‘published’ if one or more copies or phonorecords embodying it are distributed to the public,” H.R. Rep. No. 96–1976, at 138 (1976), it follows that the electronic transmission of copies of a work to the public, as addressed in the distribution context in *Tasini* and *Grokster*, constitutes publication of that work.

#### Comments Outside of the Scope of the Rulemaking

A number of commenters raised issues related to but outside of the scope of mandatory deposit for online-only works. Specifically, comments from BME, NAA, ASMP, and PPA regarding copyright registration cannot properly be addressed in a mandatory deposit rulemaking. Comments seeking a permanent exemption for mandatory deposit for photographs and databases are more appropriately raised when and if the Copyright Office proposes making those categories subject to demand. See PPA comment at 3; West comment at 4–5. Similarly, ASMP’s request for a reevaluation of the best edition requirement regarding works published in both print and electronic formats goes beyond the immediate questions raised in the notice. See ASMP comment at 2. Indeed, the notice specifically stated that the proposed regulation would not apply “to those works published in both physical and online formats.” 74 FR, at 34287. ASMP also proposed that the regulation set standards for the medium,

security devices, and metadata for a copy of a deposited online-only work to be provided by the Library to a litigant. See *id.* at 3. This topic is out-of-scope as well.

Finally, SIIA and West comment that fines for noncompliance with a demand should be imposed on a per-serial, rather than a per-work basis, is actually a question of statutory change beyond the purview of this or any rulemaking. While section 407 does grant the Register of Copyrights the discretion whether to impose a fine at all, it does not grant her the discretion to determine on what basis a fine may be imposed.

#### List of Subjects in 37 CFR Part 202

Copyright, Registration of claims to copyright.

#### Interim Regulation

■ In consideration of the foregoing, the Copyright Office amends part 202 of 37 CFR as follows:

#### PART 202 – PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

■ 1. The authority citation for part 202 continues to read as follows:

**Authority:** 17 U.S.C. 702.

■ 2. Amend § 202.19 as follows:

■ a. By adding a new sentence at the end of the undesignated paragraph following paragraph (b)(2)(ii);

■ b. By adding a new paragraph (b)(4); and

■ c. By revising paragraph (c)(5).

The additions and revisions to § 202.19 read as follows:

#### § 202.19 Deposit of published copies or phonorecords for the Library of Congress.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* In the case of an electronic work published in the United States and available only online, a copy is “complete” if it includes all elements constituting the work in its published form, *i.e.*, the complete work as published, including metadata and formatting codes otherwise exempt from mandatory deposit.

\* \* \* \* \*

(4) For purposes of § 202.19(c)(5) of this regulation, 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 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.

(c) \* \* \*

(5) Electronic works published in the United States and available only online. This exemption includes electronic serials available only online only until such time as a demand is issued by the Copyright Office under the regulations set forth in § 202.24 of these regulations. This exemption does not apply to works that are published in both online, electronic formats and in physical formats, which remain subject to the appropriate mandatory deposit requirements.

\* \* \* \* \*

■ 3. Add a new § 202.24, as follows:

#### § 202.24 Deposit of published electronic works available only online.

(a) Pursuant to authority under 17 U.S.C. 407(d), the Register of Copyrights may make written demand to deposit one complete copy or a phonorecord of an electronic work published in the United States and available only online upon the owner of copyright or of the exclusive right of publication in the work, under the following conditions:

(1) Demands may be made only for works in those categories identified in § 202.19(c)(5) of these regulations as being subject to demand.

(2) Demands may be made only for works published on or after February 24, 2010.

(3) The owner of copyright or of the exclusive right of publication must deposit the demanded work within three months of the date the demand notice is received.

(4) Copies or phonorecords deposited in response to a demand must be able to be accessed and reviewed by the Copyright Office, Library of Congress, and the Library’s authorized users on an ongoing basis.

(b) *Technical standards.* Technical standards for the transmission of copies of online-only works to the Copyright Office in response to a demand will be available on the Copyright Office website ([www.copyright.gov](http://www.copyright.gov)).

(c) *Definitions.* (1) “Best edition” has the meaning set forth in § 202.19(b)(1) of these regulations.

(2) “Complete copy” has the meaning set forth in § 202.19(b)(2) of these regulations.

(3) “Electronic works” are works fixed and published solely in an electronic format.

(d) *Special relief.* (1) In the case of any demand made under paragraph (a) of this section, the Register of Copyrights may, after consultation with other

appropriate officials of the Library of Congress and upon such conditions as the Register may determine after such consultation,

(i) Extend the time period provided in section 407(d) of Title 17;

(ii) Permit the deposit of incomplete copies or phonorecords; or

(iii) Permit the deposit of copies or phonorecords other than those normally comprising the best edition.

(2) Any decision as to whether to grant such special relief, and the conditions under which special relief is to be granted, shall be made by the Register of Copyrights after consultation with other appropriate officials of the Library of Congress, and shall be based upon the acquisition policies of the Library of Congress then in force.

(3) Requests for special relief under this section shall be made in writing to the Copyright Acquisitions Division, shall be signed by or on behalf of the owner of copyright or of the exclusive right of publication in the work, and shall set forth specific reasons why the request should be granted.

\* \* \* \* \*

■ 4. Amend Part 202, Appendix B as follows:

■ a. By redesignating section IX as section X; and

■ b. By adding a new section IX.

The revision to Part 202, Appendix B reads as follows:

#### Appendix B to Part 202 – “Best Edition” of Published Copyrighted Works for the Collections of the Library of Congress

\* \* \* \* \*

##### IX. Electronic Works Published in the United States and Available Only Online

For all deposits, UTF-8 encoding is preferred to ASCII encoding and other non UTF-8 encodings for non-Latin character sets in all categories below.

##### A. Electronic Serials

##### 1. Content Format

a. Level 1: Serials-specific structured/markup format:

(i) Content compliant with the NLM Journal Archiving (XML) Document Type Definition (DTD), with presentation stylesheet(s), rather than without.

(ii) Other widely used serials or journal XML DTDs/schemas, with presentation stylesheet(s), rather than without.

(iii) Proprietary XML format for serials or journals (with documentation), with DTD/schema and presentation stylesheet(s), rather than without.

##### b. Level 2: Page-oriented rendition:

(i) PDF/A (Portable Document Format/Archival; compliant with ISO 19005).

(ii) PDF (Portable Document Format, with searchable text, rather than without).

##### c. Level 3: Other formats:

(i) XHTML/HTML, as made available online, with presentation stylesheets(s), rather than without.



(ii) XML (widely used, publicly documented XML-based word-processing formats, e.g., ODF/OpenDocument Format, Office OpenXML), with presentation stylesheets(s), if appropriate, rather than without.

(iii) Plain text.

(iv) Other formats (e.g., proprietary word processing or page layout formats).

2. Metadata Elements:

If it has already been gathered and is available, descriptive data (metadata) as described below should accompany the deposited material.

a. Title level metadata: serial or journal title, ISSN, publisher, frequency, place of publication.

b. Article level metadata, as relevant/applicable: volume(s), number(s), issue dates(s), article title(s), article author(s), article identifier (DOI, etc.).

c. With other descriptive metadata (e.g., subject heading(s), descriptor(s), abstract(s)), rather than without.

3. Technological measures that control access to or use of the work should be removed.

Dated: January 13, 2010.

**Marybeth Peters,**

*Register of Copyrights.*

Approved by:

**James H. Billington,**

*Librarian of Congress.*

[FR Doc. 2010-1202 Filed 1-22-10; 8:45 am]

BILLING CODE 1410-30-S

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2008-0797-200824(c); FRL-9099-9]

#### Approval and Promulgation of Implementation Plans; South Carolina; Approval of Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for Cherokee County; Correcting Amendment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; Correcting amendment.

**SUMMARY:** On June 1, 2009, EPA published a direct final rule approving the Clean Air Act (CAA) Section 110(a)(1) Maintenance Plan for the 1997 8-hour ozone standard for Cherokee County as a revision to the South Carolina State Implementation Plan (SIP). In EPA's direct final rule, there was an inadvertent error in the format of the Cherokee County entry in table (e) which contains South Carolina's Non-Regulatory Provision in the Code of Federal Regulations. This action corrects that formatting error.

**DATES:** This action is effective January 25, 2010.

**ADDRESSES:** Copies of the documentation used in the action being corrected are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Mr. Farngalo's telephone number is 404-562-9152. He can also be reached via electronic mail at [farngalo.zuri@epa.gov](mailto:farngalo.zuri@epa.gov).

**SUPPLEMENTARY INFORMATION:** EPA is making a correction to the Cherokee County CAA 110(a)(1) Maintenance Plan entry that appears in table (e), of the South Carolina Non-Regulatory provisions section at 40 CFR 52.2120(e). This revision to South Carolina's SIP was published in the **Federal Register** on June 1, 2009 (74 FR 26099), effective August 1, 2009. However, when the direct final rule approving this SIP revision was published, table (e) did not include the correct table format. EPA is correcting this inadvertent error by inserting the correctly formatted table (e) into South Carolina's Identification of Plan section of the Code of Federal Regulations at 40 CFR 52.2120(e).

EPA has determined that today's action falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Public notice and comment for this action are unnecessary because today's action to correct a formatting error in the Code of Federal Regulations has no substantive impact on EPA's June 1, 2009, approval of this regulation. The incorrectly formatted text in table (e) in EPA's final rule published on June 1, 2009, makes no substantive difference to EPA's analysis as set out in that rule. In addition, EPA can identify no particular reason why the public would be interested in being notified of the correction of this revision, or in having the opportunity to comment on the formatting correction prior to this action being finalized, since

this formatting correction action does not change the meaning of the regulation at issue or otherwise change EPA's analysis of South Carolina's submittal (74 FR 26099). EPA also finds that there is good cause under APA section 553(d)(3) for this formatting correction to become effective on the date of publication of this action. Section 553(d)(3) of the APA allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule merely corrects an inadvertent error of omission in the regulatory text of a prior rule by adding a correctly formatted table (e) for the South Carolina regulation which EPA approved on June 1, 2009. For these reasons, EPA finds good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

### Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);