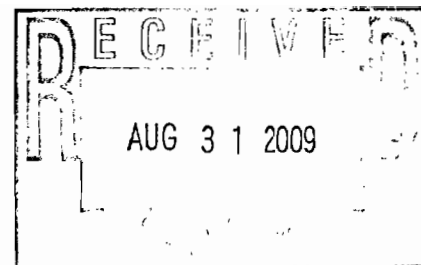


DOCKET NO.  
RM 2009-3  
COMMENT NO. 7

Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.



In the Matter of Mandatory Deposit  
of Published Electronic Works  
Available Only Online

Docket No. RM 2009-3

#### COMMENTS OF NEWSPAPER ASSOCIATION OF AMERICA

Newspaper Association of America hereby submits its comments in response to the Copyright Office's Notice of Proposed Rulemaking in the above-captioned proceeding. *In the Matter of Mandatory Deposit of Published Electronic Works Available Only Online*, Notice of Proposed Rulemaking, 74 Fed. Reg. 34,286 (July 15, 2009).

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of daily newspaper circulation in the United States and a wide range of non-daily newspapers. NAA's key strategic priorities include representing the interests of newspapers before the Federal government, and highlighting issues that impact newspapers' digital businesses and customers. This

includes protecting newspapers' intellectual property interests by providing input to the U.S. Copyright Office on registration practices concerning newspapers, newspaper websites, and other works available only or partially online.

Print remains a valuable and vital part of the newspaper business for the foreseeable future.<sup>1</sup> Nevertheless, some newspapers have already chosen or found it necessary to publish only online, including the *Christian Science Monitor*, *Seattle Post-Intelligencer*, and the *Clovis Independent* among others, or to home deliver print copies only certain days of the week, such as the *Detroit News*. The *Ann Arbor News* closed and *Ann Arbor.com*, a new online newspaper with a twice-weekly print edition, was created in its place. NAA's own longtime trade publication, *Presstime*, recently began publishing only online.

Other newspapers publish vibrant websites that are one facet of "the newspaper" today, including a vast amount of material that does not appear in the print edition. Online-only material in the newspaper may include weblogs, web-only entertainment and sports features, photographs, videos, comics, guides to events and attractions in a city, reviews, and article updates and revisions. It also may include continual feeds of electronic news services, news alerts, Really Simple Syndication (RSS) feeds that publish updated content, and filtered content distributed by third-party vendors. Newspapers and

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<sup>1</sup> According to one industry analysis, advertising expenditures in newspapers for 2010 are forecast to be \$21 billion for print newspapers and \$2.8 billion for online newspapers (newspaper websites). Glennco Consulting Group, Inc., (*NAA*) *Newspaper Advertising 2009-10 Forecast* (July 18, 2009). Another predicts newspapers advertising revenues for 2010 to be \$22.3 billion for local newspapers (print only) and \$3.6 billion for locally owned digital media, including newspapers. Brian Wieser, Magna Global, *Media Supplier Advertising Revenues* (2009).

their websites today are dynamic, updated frequently throughout the day and night.

Many newspapers today publish much of their content only online, and the proportion of online-only content relative to print is likely to increase. The newspaper website is by no means an electronic facsimile of the print edition, but a separate collective work that, in many respects, could itself be considered an "online-only work" notwithstanding that the print edition will continue for many years to come.

### **Summary**

NAA requests that the Copyright Office, in reviewing its practices to ensure that electronic serials published online are reflected in the national collection, also consider how the related registration deposit practices can be clarified to meet industry changes to better accomplish registration of newspapers in the digital era. NAA asks the Copyright Office to consider permitting group registration of newspaper website content, similar to the registration practice allowed for print daily newspapers or for updates and revisions published over a period of up to three months for automated databases. NAA respectfully asks that the Office include newspapers as active participants in helping to identify the form that electronic deposit copies should take and the means by which they should be submitted to the Copyright Office and Library of Congress, both for online-only newspapers and for online-only contents of a daily newspaper. With respect to submission of a "complete copy" of the work, NAA does not oppose in principle submission of formatting codes and some types of metadata to allow preservation of and limited on-site access to deposit copies, under appropriate security measures that protect

the integrity of online works by the Newspaper Section of the Serials and Government Publications Division of the Library of Congress. In the case of newspaper websites or online-only content of print-and-online newspapers, however, the feasibility of providing “the complete work as published” including metadata and formatting codes and without access and copy controls raises technological as well as legal questions that require an opportunity to comment on a more detailed proposal. Newspapers would welcome the opportunity to help identify means of providing mandatory and registration deposit copies to the Copyright Office and Library of Congress in a way that both “ensures that the Library will only receive those works that it needs for its collections” and “reduces the burdens on copyright owners.”

In light of the broad scope of the formulation of an “online only work,” the potential administrative burden the requirement could impose on newspaper publishers and others, and the significant burdens on speech and the press such a proposal could entail, NAA urges the Copyright Office not to impose a requirement to notify the Library upon publication of a new online-only work in the United States.

#### **1. Deposit of Online Electronic Serials including Newspapers**

The Copyright Office is proposing to amend its regulations to establish that electronic works published in the United States and available only online -- beginning with “electronic serials” defined to include newspapers that are available only online -- are subject to “on-demand deposit.” Because the works have been deemed exempt from

mandatory deposit and now would be exempt until a demand is made by the Copyright Office, the on-demand deposit status is referred to as a revised or qualified "exemption."

Mandatory deposit requirements are related to but distinct from the deposit required to register a claim to copyright in a work. Within three months of publication, the owner of copyright in a work published in the United States is required under section 407 of the Copyright Act to deposit two "complete copies" of the "best edition" of the work with the Copyright Office for use of the Library of Congress.<sup>2</sup> The purpose is to build the national collection of the Library of Congress, while the registration deposit copy is meant to provide a record of the work in which copyright is claimed. Failure to make the mandatory deposit upon publication does not affect copyright in the work but, if the owner fails to comply after a demand is made by the Register of Copyrights, may subject the copyright owner to monetary liability.<sup>3</sup> Registering a copyright claim is optional in the United States, but depositing the registration copy or copies in accord with Copyright Office regulations will fulfill the mandatory deposit requirements.<sup>4</sup> The

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<sup>2</sup> 17 U.S.C. § 407.

<sup>3</sup> Section 407 (d) provides in part:

...Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable —

- (1) to a fine of not more than \$250 for each work; and
- (2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them; and
- (3) to pay a fine of \$2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.

<sup>4</sup> U.S. Copyright Office, Circular 7d, *Mandatory Deposit of Copies or Phonorecords for the Library of Congress*, at 3.

Register may exempt categories of material from the mandatory deposit requirement or may require only a single copy for certain categories.<sup>5</sup>

Print newspapers are already subject to mandatory deposit. The “revised exemption” also would not apply to works published in *both* physical and online formats, because works published also in print were never exempt from and remain subject to mandatory deposit.<sup>6</sup> The Library of Congress “Best Edition” Statement for “Works Existing in more than one Medium” states that “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.”<sup>7</sup> Print is still the edition the Library determines most suitable for its purposes and that is therefore required as the deposit copy by the U.S. Copyright Office, including for registration purposes.<sup>8</sup>

Collection of online-only works will be “phased in” by category, with electronic serials including online-only newspapers being the first category of online-only works

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<sup>5</sup> 17 U.S.C. § 407 (c). The regulations on mandatory deposit of copies of works published in the U.S. under section 407 of the Copyright Act are contained in 37 C.F.R. § 202.19. The regulations on required deposits for registration of a copyright claim under section 408 of the Copyright Act are in 37 C.F.R. § 202.20 and § 202.3. Section 202.21 allows deposit of “identifying material” in lieu of copies in certain cases. The Library of Congress Best Edition Statement in Appendix B to 37 C.F.R., Chapter II, Part 202, specifies the required deposit where “two or more editions of the same version of a work have been published.”

<sup>6</sup> The proposed regulation states that the exemption (deposit on-demand status) does not apply to works published in *both* online electronic and physical formats, because such works are subject to full mandatory deposit requirements.

<sup>7</sup> 37 C.F.R. 202.20(b)(1), *cited in* 74 Fed. Reg. 34,287 n. 3,

<sup>8</sup> Under section 408(b), the material deposited for registration shall include, in the case of a published work, two complete copies of the best edition.

that the Library intends to collect. The rule defines electronic serials to include newspapers.<sup>9</sup> Electronic serials are works “intended to be continued indefinitely” and the deposit obligation is ongoing: the Copyright Office states that “A demand for a copy of an online-only periodical or other serial would cover *not only the issue or issues specified in the demand, but also all subsequent issues of the serial title.*”<sup>10</sup>

The rule does not define “online-only works.” It is not entirely clear whether or at what point, for example, a newspaper website that may be substantially different from the newspaper print edition would constitute an “online-only work” for mandatory deposit purposes, or for purposes of group registration practices such as group registration of serials or online-only newspapers. The Library of Congress Best Edition Statement, which requires the print edition, states that “Where differences between editions represent variations in copyrightable content, each edition is a separate version and “best edition” standards based on such differences do not apply. Each such version is a separate work for the purpose of the copyright law.”<sup>11</sup> The Copyright Office is working, NAA recognizes, to develop technological capabilities to accept electronic deposits and registrations of online works. As well, it would be helpful for the Copyright Office to clarify the status of these online works through the related registration practices.

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<sup>9</sup> 74 Fed. Reg. at 34,288. Because electronic serials are the first category of online-only electronic works published in the United States for which the Library is proposing best edition criteria, the Copyright Office proposes to define the term “electronic serials” in this rule. For purposes of mandatory on-demand deposit, the proposed regulation would define an “electronic serial” as:

an electronic work published in the United States and available only online, issued or intended to be issued in successive parts bearing numerical or chronological designations, and intended to be continued indefinitely. This class includes periodicals; newspapers; annuals; and the journals, proceedings, transactions, etc., of societies.

37 C.F.R. § 202.19 (b)(4) [Proposed] (emphasis added).

<sup>10</sup> 74 Fed. Reg. at 34,288.

<sup>11</sup> 37 C.F.R., Chapter II, Part 202, App. B.

Newspapers are often referred to as the “first draft of history.” As such, they have always been a key part of the national collection of the Library of Congress. Newspapers are defined for classification and cataloging purposes by the Newspaper Section of the Serials and Government Publications Division of the Library of Congress, as:

serials mainly designed to be a primary source of written information on current events, either local, national, or international in scope. Newspapers contain a broad range of news on all subjects and activities and are not limited to any specific subject matter. Newspapers are intended either for the general public or for a particular group.

This definition is referenced in Copyright Office regulations and publications to distinguish newspapers from newsletters and other forms of serials.<sup>12</sup> The archival designation as a “primary source” on a “broad range” of “all subjects” highlights the importance of protecting newspaper copyright, whether online or in print, for both publishers and their readers.

As newspapers transition to online publication, in full or in part, they are reviewing their own copyright registration practices to facilitate protection of their content in the digital era. In most cases, newspapers would like to register their online works and thereby fulfill their mandatory deposit requirements. In *principle*, NAA does not oppose “on-demand” deposit of electronic serials published in the United States and available only online. As detailed further below, however, NAA and its members request an opportunity to comment on a more detailed and precise description of proposed deposit requirements and procedures so that costs and burdens may be more fully

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<sup>12</sup> See 37 C.F.R. § 202.3(b)(7)(ii); U.S. Copyright Office, Circular 62a, *Group Registration of Newspapers and Newsletters on Form G/DN*.



assessed, and to work directly with the Copyright Office and the Library of Congress in formulating the requirements.

NAA respectfully requests that the Copyright Office, in reviewing its practices to ensure that electronic serials published online are reflected in the national collection, also consider how the related registration deposit practices can be clarified and modified to meet industry changes as newspapers transition in full or in part to online publication, to better accomplish registration of newspapers in the digital age. As the Copyright Office develops technological capability to accept electronic deposits of online works, NAA asks the Office to permit group registration of newspaper website content, similar to registration practice allowed for updates and revisions published over a period of up to three months for automated databases or for print daily newspapers.<sup>13</sup> NAA asks that the Office include newspapers as active participants in helping to identify the form that deposit copies should take and the means by which they should be submitted to the Copyright Office and Library of Congress, both for online-only newspapers and for online-only content of a daily newspaper.

It is helpful to review the history of these related mandatory and registration practices, as partially outlined in the NPRM, and the ways in which they do or do not apply to newspapers. Looking first at the mandatory deposit requirements, machine-readable works largely were exempt from mandatory deposit since 1978, but the Office amended the exemption in 1989 so that machine-readable works were subject to

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<sup>13</sup> A serial published twice a week or more often may qualify for group registration as a "daily" newsletter. 37 C.F.R. § 202.3(b)(9)(i); U.S. Copyright Office, Circular 62b, *Copyright Registration for a Group of Serial Issues*, at 3.

mandatory deposit if published in physical form (CD-ROM, for example), and only “automated databases available online in the United States” were exempt.<sup>14</sup> An “automated database” is “a body of facts, data, or other information assembled into an organized format suitable for use in a computer and comprising one or more files.”<sup>15</sup> As the Copyright Office has interpreted this term, a “database usually would *not* include works like journals, *newspapers* or encyclopedia.”<sup>16</sup>

Added in 1989 to the works not exempted from mandatory deposit were “computerized information works in the nature of statistical compendia, *serials*, and reference works.”<sup>17</sup> Machine-readable serials thus became subject to mandatory deposit requirements while online automated databases were not; however, as the Office notes, because only automated databases such as Westlaw® and Nexis® were published online at the time, the Office practice for mandatory deposit purposes was to interpret *automated databases* to include *all* electronic works that were published *only online*.<sup>18</sup> As articles and serials came to be published online, the Office continued to treat these works as in the exempt category of “automated databases available only on-line in the United States.” The Copyright Office now proposes on-demand deposit of all “electronic works published in the United States and available only online,” not only to more accurately describe the works but to help the Library acquire online-only works through mandatory

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<sup>14</sup> 54 Fed. Reg. 42,295 (Oct. 16, 1989).

<sup>15</sup> U.S. Copyright Office, Circular 65, *Copyright Registration for Automated Databases*, at 1.

<sup>16</sup> See 74 Fed. Reg. at 34,287 (emphasis added).

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> 74 Fed. Reg. at 34,287.

deposit.<sup>19</sup> The new “on-demand” status would apply to *all* published electronic works available only online, including serials such as newspapers.<sup>20</sup>

Turning next to the related registration requirements, in 1990, NAA asked the Copyright Office to consider implementing the group registration of print daily newspapers. At the time, due to expense of registering individual issues, most daily newspapers were not registered in the Copyright Office. As the Office noted in its Final Rule, “While the lack of registration does not invalidate copyright, it does limit the availability of certain remedies should infringement occur.”<sup>21</sup> The resulting group registration procedure allowed daily newspapers to register three months of issues with a single application and fee, using Form G/DN and a microfilm deposit copy of all issues within the three calendar months.<sup>22</sup> The registration protects each collective work within the group, that is, “the authorship of compiling and editing the work as a whole, as well as the content of any contributions (for example, text or photos) done by employees of the claimant as works made for hire. In addition, it includes any independently authored

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<sup>19</sup> The NPRM notes that there are now more than 5,000 “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.”

<sup>20</sup> 74 Fed. Reg. at 34,287.

<sup>21</sup> 57 Fed. Reg. 39,615 (Sept. 1, 1992).

<sup>22</sup> See 37 C.F.R. § 202.3(b)(7); U.S. Copyright Office, Circular 62a, *Group Registration of Daily Newspapers and Newsletters*. A serial published twice a week or more often may qualify for group registration as a “daily” newsletter. 37 C.F.R. § 202.3(b)(9)(i); U.S. Copyright Office, Circular 62b, *Copyright Registration for a Group of Serial Issues*, at 3.

contributions (not done by employees) in which all rights have been transferred to the claimant by the contributors.”<sup>23</sup>

In contrast to group registration of daily newspapers, where each issue is an all new collective work previously unpublished, works transmitted online such as newspapers and newspaper websites are *revised or updated frequently*. As noted in Circular 66, *Copyright Registration for Online Works*, revisions to online works that are published on separate days generally “*must each be registered individually*, with a separate application and filing fee....The version of the work that is deposited should be the same version described on the application; thus, the title and dates on the application should correspond with those on the deposit copy.” For published works, the registration for online works is “*limited to the content of the work asserted to be published on the date given on the application.*”<sup>24</sup>

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<sup>23</sup> U.S. Copyright Office, Circular 62a, *Group Registration of Daily Newspapers and Newsletters*, at 3.

<sup>24</sup> Emphasis in original. See also 17 U.S.C. § 101 (definition of “created”) (“A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.”).

Under the copyright law, “A work is ‘fixed’ in a tangible medium of expression when its embodiment...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration...” 17 U.S.C. § 101 (definition of “fixed”). See also *The Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (agreeing with Ninth Circuit that fixation was satisfied where work was embodied “for at least several minutes”), citing *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). See also U.S. Copyright Office, *DMCA Section 104 Report* (Aug. 2001), at 110-12 (because permanence is not required for fixation, transitory denotes something less than temporary and work is fixed for reproduction purposes where it exists for sufficient period of time to be capable of being perceived, reproduced or otherwise communicated).

As a result, the 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, which are increasingly the electronic newspaper and distinguishable from many other types of websites, this practice is becoming obsolete. The burden of requiring a separate registration for each publication date of a newspaper website, with a print-out or other physical copy, is a powerful disincentive, if not a virtual bar, to registration.

Current copyright regulations *do* permit a group of revisions to an automated database created or published within a three-month period in the same calendar year to be combined in a single registration, with a single application and filing fee.<sup>25</sup> As noted above and in the Notice of Proposed Rulemaking, however, newspapers and newspaper websites are not considered automated databases and may not register three months of content in their electronic versions in a single application.

Group registration is also available “for serials (published *weekly or less often*) and daily newsletters (published *more often than weekly*), including those published online.”<sup>26</sup> Group registration for serials, including online serials, is made using Form

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<sup>25</sup> See 37 C.F.R. § 202.3(b)(5); U.S. Copyright Office, Circular 65, *Copyright Registration for Automated Databases*.

<sup>26</sup> U.S. Copyright Office, Circular 66, *Copyright Registration for Online Works* at 2 (emphasis in original). See also 37 C.F.R. § 202.3(b)(6).

SE/Group, and a physical print-out or other physical deposit copy; the Copyright Office does not yet have in place the technological capability to accept electronic online registration for a group of serials.<sup>27</sup> Group registration for serials is not used for newspapers, however; the Office does receive some group registrations for online daily newspapers using Form G/DN and a physical deposit copy such as CD-ROM, but this practice is available for *online-only newspapers only*, and *not* for newspapers that exist in both print and online format.<sup>28</sup>

At present, the Library's Best Edition Statement for "Works Existing in more than one Medium" states that "if a work is first published in both hard copy, i.e., in a physically tangible format, and also in an electronic format, the ... requirements pertaining to the hard copy format apply."<sup>29</sup> The Copyright Office interprets this requirement to mean that "If a work is published *both* online and by the distribution of physical copies in any format, the requirement of the deposit regulations *for the copies* applies, *not* the options for online works ... For example, if a work is published in the form of hardbound books and is also transmitted online, the deposit requirement is two copies of the hardbound book."<sup>30</sup> For a newspaper existing both in print and online, therefore, the required registration deposit copy would appear to be the print edition. This appears to be the practice even where the online content may be sufficiently

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<sup>27</sup> Telephone Interview with Susan H. Todd, Chief, Literary Division, U.S. Copyright Office (Aug. 28, 2009).

<sup>28</sup> *Id.*

<sup>29</sup> 37 C.F.R. 202.20(b)(1), *cited in* 74 Fed. Reg. 34,287.

<sup>30</sup> U.S. Copyright Office, Circular 66, *Copyright Registration for Online Works*.

different to constitute a separate work. However, any material contained in the online version (the newspaper website) that is not in the print edition *is not covered by the print registration*, and is not collected for the Library of Congress repository. Further, as noted above, the Library of Congress Best Edition Statement provides that “Where differences between editions represent variations in copyrightable content, each edition is a separate version and “best edition” standards based on such differences do not apply. Each such version is a separate work for the purpose of the copyright law.”<sup>31</sup> Yet there is no meaningful way for newspapers to register online-only content and it is similarly not clear whether or when newspaper websites would be considered “online-only works” subject to on-demand deposit under the new proposed rule. The web edition, as newspapers report breaking news and engage their readers with features throughout the publication day, increasingly contains the first draft of history. The Office notes in its rulemaking that 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>32</sup> Regardless of which the Library considers the best edition, or how identical the editions must be for best edition standards to apply, it is essential that newspapers have a viable means to register their online-only work.

Because newspapers may be available online and in print in substantially different form and content, NAA respectfully asks the Office to consider permitting the group

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<sup>31</sup> 37 C.F.R., Chapter II, Part 202, App. B. *See also id.* IX.A.

<sup>32</sup> 74 Fed. Reg. 34,287 n. 3.

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. Newspapers would like to work with the Copyright Office to help develop an electronic deposit system that would satisfy mandatory and registration requirements by depositing online material sought by the Office and Library, and that would allow newspapers to register online material in three-month increments. As described below, the process could be automated to take advantage of developing technologies that provide filtered content or access to a web crawler robot, with registration every three months of a copyright claim on the public record that identifies new matter and excludes previously registered material.<sup>33</sup> The process could be designed to avoid burdening either the publishers or the electronic intake system of the Library of Congress.

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<sup>33</sup> The statement in Space 6 of the registration form identifying previously registered and new material typically need not be detailed. For example, Instructions to Complete Form TX for Group Registration of Database Updates provide:

*Preexisting Material (space 6a):* For a new database that has not been previously registered or published, but that contains some previously published, previously registered, or public domain material, space 6a should describe such material, for example “previously published material” or “public domain data” or the like. For a previously published or registered database that has been revised or periodically updated, space 6a should describe the preexisting material as “previously published database” or “previously registered database” or “database prior to (earliest date represented in the present group of updates)”.

*Material Added to This Work (space 6b):* This space should describe the updates or revisions or new compilation being registered for the first time and should specify the frequency of these updates or revisions, e.g., “weekly updates,” or “daily revisions,” or “revised compilation updated monthly.” Where all or a portion of the text represents new copyrightable expression, and it is being published or registered for the first time, the statement should also include “new text,” “updated and revised text,” or the like. Space 2 should name the author(s) of the material listed at space 6b and should describe the nature of authorship to agree with space 6b.

*See also infra* text accompanying notes 41-42 (not necessary to identify all revisions and updates).



Just as the Library and Copyright Office are reviewing practices to ensure that electronic serials published online are represented in the national collection, so are newspapers reviewing their registration practices concerning electronic works, to ensure their ability to bring an infringement action if necessary and to obtain statutory damages and attorney's fees if they should prevail in such action. To bring a copyright infringement suit, it is generally necessary for the copyright owner to have registered the claim in the infringed work with the Copyright Office.<sup>34</sup> To claim statutory damages and attorney's fees, it is necessary to have filed the registration either prior to infringement of an unpublished work, or within three months of publication for a published work.<sup>35</sup> Failures to register also may affect the efficacy of negotiated settlement agreements.<sup>36</sup> Mandatory and registration deposit requirements under sections 407 and 408 and the accompanying regulations are meant to be in concert. Much of the material in the newspaper of today may never be registered for copyright (or collected for

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<sup>34</sup> Section 411 of the Copyright Act provides in pertinent part:

§ 411. Registration and infringement actions

(a) ... no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title...

17 U.S.C. § 411.

<sup>35</sup> Section 412 provides in pertinent part:

§ 412. Registration as prerequisite to certain remedies for infringement

... no award of statutory damages or of attorney's fees... shall be made for —

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412.

<sup>36</sup> See *In re Literary Works in Electronic Databases Copyright Litig.*, Nos. 05-5943-cv, 06-0223-cv (2d Cir. Nov. 29, 2007) (district court lacked jurisdiction to approve negotiated class action settlement that required payment of damages for works that were never registered for copyright).

the Library of Congress), due in large part to the registration practices for newspapers and other online works. Without timely registration, the copyright owner's ability to bring infringement actions or to recover statutory damages and attorney's fees is compromised or lost.

## **2. Deposit of a "Complete Copy" of Online-Only Works**

For purposes of the mandatory deposit of online-only works, the Office seeks to amend the definition of a "complete copy" of a work. A "complete copy" of a work for mandatory deposit purposes is already defined 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."<sup>37</sup> In the case of an online-only electronic work published in the United States, the Office proposes to include "the complete work as published, including metadata and formatting codes" contained in an electronic work in the unit of publication because while "not perceptible to the naked eye or ear" they are "critical for continued access to and preservation of" the work.

The Library is establishing "technological systems" to allow it "to electronically ingest," maintain and preserve online-only works, and is establishing policies to insure the security of electronic collections that "provide appropriate, limited access as allowed

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<sup>37</sup> 37 C.F.R. § 202.19(b)(2).

by law.” The Office proposes to limit the demand to deposit *one* complete copy of the best edition, rather than two copies; and to ‘allow simultaneous access by two on-site users.’”<sup>38</sup> In addition, the proposed regulation states that “Editions without access and copy controls, or with controls disabled, are preferred over editions with such controls.”<sup>39</sup> Requirements are to submit the content in standard formats, such as journal archiving and interchange formats, Extensible Markup Language (XML), or Hypertext Markup Language (HTML).

Beyond these parameters, the Notice of Proposed Rulemaking is not explicit about how the deposit copy of the electronic work would be submitted, on an ongoing basis, to the Office. The Notice states that a demand will cover not only the issues specified in the demand “but also all subsequent issues of the serial title.” NAA and its members would appreciate the opportunity to comment on a more detailed and precise description of proposed deposit requirements and procedures, so that costs and burdens may be more fully assessed. The notice states that, as is reasonable, there is concern that duplicate or too numerous electronic files might present “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.” In the same manner, given the volume of electronic content, newspapers would be concerned about overly burdensome or costly requirements for deposit of online-only works or online-only content of newspapers that exist both in print and online.

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<sup>38</sup> 74 Fed. Reg. at 34,287-88.

<sup>39</sup> *Id.* at 34,290.

NAA does not oppose in principle the submission of formatting codes and some types of metadata to allow the preservation of and limited on-site access to deposit copies, under appropriate security measures that protect the integrity of online works by the Newspaper Section of the Serials and Government Publications Division of the Library of Congress. However, the feasibility of providing "the complete work as published, including metadata and formatting codes" is presently unknown. In the case of newspaper websites, or online-only content of print-and-online newspapers, these are technological as well as legal questions that require opportunity to comment on more detailed proposals. With respect to submission of editions without access and copy controls, or with controls disabled, NAA notes that the use of technological measures in the newspaper industry, such as microformats that wrap newspaper content in a digital permissions framework or that include copyright management information to allow publishers to track usage or to specify how content may be used online, is new and in its earliest phases.

NAA asks that the Copyright Office include newspapers as participants in identifying the form that deposit copies of electronic newspapers and newspaper websites should take, both for online-only newspapers and for online-only contents, updates and revisions of a daily newspaper. Newspapers would welcome the opportunity to help identify means of providing mandatory and registration deposit copies in a way that both "ensures that the Library will only receive those works that it needs for its collections" and "reduces the burdens on copyright owners, who will only have to deposit those works

demand by the Copyright Office.”<sup>40</sup> The method of depositing microfilm for the print edition, for example, while far preferable to single copy registration, remains costly. The process requires the utilization of outside vendors to provide the newspaper in microfilm format to the Library of Congress, thereby separating submission of the mandatory deposit copy from the registration of claims to copyright in the work. Similar manual methods for depositing online-only content would not, over the long term, be feasible.

Various technologies are developing for capturing, delivering, and preserving newspaper content in a form that may be suitable for archival purposes. For example, several newspapers provide an e-edition or RSS feed of print daily editions and updates, and a web crawler robot can be invited or allowed to identify and pull desired or filtered content from the newspaper website. By way of illustration, the nonprofit Internet Archive founded in 1996 has sought to build a digital library of Internet sites (including some newspaper websites), and is reportedly working with the Library of Congress to preserve a permanent cache through its Wayback machine. The Internet Archive’s cache at archive.com includes periodic selections of several newspaper websites dating back to 1996. The archiving in some cases is unauthorized, and some newspapers have chosen to disallow the archive’s crawler from accessing and archiving their website using a robot.txt file.

The point is that technological advances are expanding the possibilities for mandatory and registration deposit of online newspaper content. Newspapers are reviewing registration practices relating to their print and digital businesses. As some

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<sup>40</sup> See 74 Fed. Reg. at 34,288.

newspapers begin to place some content behind a pay wall or adopt other forms of technological protections, newspapers can work with the Library of Congress and Copyright Office to provide a deposit copy that satisfies both mandatory and registration deposit purposes.

Alternatively, in instances where the online-only newspaper content is *not sought by the Library* but the newspaper still needs to register a claim in the work, the publisher may be exempted from providing the complete copy (either as a function of “on-demand status” of online-only works, or as a result of a specific notification from the Copyright Office). In such instance, electronic registration requirements for the newspaper website, or online-only content of print-and-online newspapers, could electronically mirror the analog deposit requirements for group registration of print daily newspapers that are *exempted* by the Copyright Office; or for group registration for automated databases.

The first such analogous approach is set forth in the current group registration regulation for print daily newspapers. Under that regulation, the Copyright Office notifies the publisher if a newspaper is exempted from sending the standard microfilm deposit copy of the complete months’ issues. For such an exempted newspaper, an optional deposit may accompany the registration application, consisting of either: (1) complete print copies of the first and last issues of the month; (2) print copies of the first section of the first and last issues of the month; or (3) print copies of the first page of the

first and last issues of the month.<sup>41</sup> A second such alternative is set forth in the regulation for group registration of automated databases. These registrations employ visually perceptible *identifying materials* (fifty pages or records marked to disclose, or comprised entirely of, the copyrightable revisions and updates from one representative publication date) and a brief *descriptive statement* (of title; claimant name and address; name and content of files in a multiple file database; nature, location and frequency of changes in the database; and information about the copyright notice, if used). *It is not necessary to identify all revisions and updates.* The group title to be given on the registration form indicates the earliest and latest dates for updates included in the group, for a time period of three months or less within the same calendar year; and the creation date is the *year* in which the particular version for which registration is sought was completed, “even if other versions exist or if further changes or additions are planned.”<sup>42</sup> The publication date is the last date on which updates or revisions were published during the three month time period.

In any event, while the copyright claim (even if filed electronically) is manual and in three-month increments, the deposit (whether of a “complete copy” or “identifying material” that satisfies mandatory and registration deposit) can be efficient, continuous and to some extent automated through such means as a web crawler robot that is instructed and allowed according to requirements of the copyright owner, Copyright Office and Library of Congress.

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<sup>41</sup> U.S. Copyright Office, Circular 62a, *Group Registration of Newspapers and Newsletters on Form G/DN*, at 1.

<sup>42</sup> U.S. Copyright Office, Circular 65, *Copyright Registration for Automated Databases*, at 5.

### 3. Notice of Publication Requirement for Online-Only Works

Finally, the Copyright Office is considering a “notice of publication requirement” to assist the Library of Congress in ascertaining what online-only works are available. Beginning with electronic serials including newspapers, the Office asks whether it should require owners of copyright in online-only works *to notify the Library upon the publication of a new online-only work* in the United States.<sup>43</sup> The Office seeks comment on whether such a notice requirement “as a condition of the qualified exemption from mandatory deposit” is within the Office’s authority under section 407; whether it is necessary and prudent; how *frequently* such notices should be required -- for example, “would it be preferable to require notification upon the publication of each new work or serial title, or instead to require the submission of a list of all new publications at a predetermined frequency (monthly, quarterly, etc.)”, what the content of such notice should be; and what the *consequences for noncompliance* should be.

Particularly in light of the broad scope of the formulation of an “online only work,” NAA respectfully urges the Copyright Office not to impose such a requirement upon publication online in the United States. As noted above, under the copyright law, a work is “created” when it is fixed in a copy or phonorecord for the first time, and “where a work is prepared over a period of time, the portion of it that has been fixed at any

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<sup>43</sup> 74 Fed. Reg. 34,288 (emphasis added). The Office is considering this requirement because the Library is concerned that a number of electronic serial titles are escaping its notice, and that online-only works other than electronic serials are “not subject to the same level of bibliographic control” and hence even more elusive. *Id.*



particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.”<sup>44</sup> Works transmitted online such as newspapers and newspaper websites are revised or updated frequently.<sup>45</sup> Such a requirement potentially could impose an overwhelming and unworkable administrative burden on newspaper publishers, and others. The proposal is not limited to “electronic serials,” but to all “online-only works” published in the United States. Taken literally, the rule could apply to an infinite number of literary works alone published online-only in the United States every day. Even if a notice of publication requirement were limited to electronic serials, this could apply to a wide range of works published by newspapers, from blogs to periodic online editorial supplements, inserts and features. Newspapers have suffered severe staff cuts over several years and do not have editorial or legal manpower for such a task. The constitutionality of the mandatory deposit requirement has been upheld under the First and Fifth Amendments, *Ladd v. Law & Technology Press*, 762 F.2d 809 (9<sup>th</sup> Cir. 1985), *cert denied*, 475 U.S. 1045 (1986), but the Office has never sought to require a “notice of publication” as a condition of exempt or on-demand status.<sup>46</sup> The burden on speech and the press that a notice of publication

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<sup>44</sup> 17 U.S.C. § 101 (definition of “created”).

<sup>45</sup> See U.S. Copyright Office, Circular 66, *Copyright Registration for Online Works*.

<sup>46</sup> While the copyright owner has been required to deposit two copies for the Library, copyright has not been affected by nor penalties imposed for failure to do so until a demand was made by the Register. Although *Ladd* held that the mandatory deposit requirement did not burden First Amendment concerns of expression and dissemination of ideas, the Ninth Circuit said the requirement was triggered not by publication but by statutory benefit of copyright, citing *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (news gathering and dissemination not regulated by antitrust action against newspapers). One consideration is whether a notice of publication requirement, at the risk of penalties for noncompliance upon speech, could shift this burden and alter the constitutional balance upheld in *Ladd*, where the court went on to say the act of copyrighting is not a waiver of First Amendment rights.

requirement could impose raises serious questions as to both its prudence and its constitutionality.

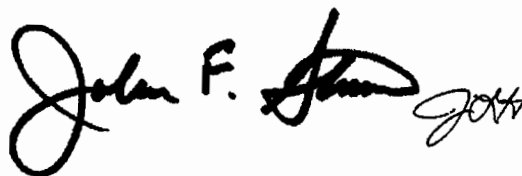
### **Conclusion**

For the foregoing reasons and as set forth above, NAA respectfully asks the Copyright Office to clarify the registration and mandatory deposit of online-only works in the case of newspapers and to permit the group registration of online newspapers and newspaper website content, similar to the registration practice allowed for updates and revisions published over a period of up to three months for automated databases or for print daily newspapers. NAA appreciates the opportunity to provide these comments and requests that the Copyright Office include newspapers as active participants in identifying the form that deposit copies of electronic newspapers should take, both for online-only newspapers and for online-only contents, updates of a daily newspaper. Newspapers would welcome the opportunity to help identify means of providing mandatory and registration deposit copies in a way that both “ensures that the Library will only receive those works that it needs for its collections” and “reduces the burdens on copyright owners, who will only have to deposit those works demanded by the Copyright Office.”

In light of the broad scope of the formulation of an “online only work,” the potentially overwhelming and unworkable administrative burden the requirement could impose on newspaper publishers and others, and the potentially significant burdens on

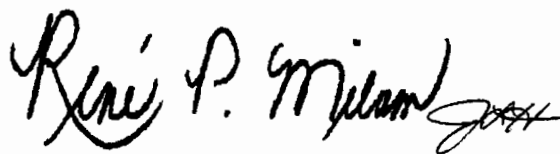
speech and the press entailed in such a proposal, NAA urges the Copyright Office not to impose a requirement to notify the Library upon publication of a new online-only work in the United States.

Respectfully submitted,

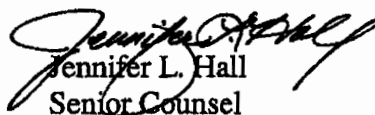
A handwritten signature in black ink, appearing to read "John F. Sturm" with a stylized flourish at the end.

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John F. Sturm  
President and Chief Executive Officer

A handwritten signature in black ink, appearing to read "René P. Milam" with a stylized flourish at the end.

René P. Milam  
Vice President and General Counsel

A handwritten signature in black ink, appearing to read "Jennifer L. Hall" with a stylized flourish at the end.

Jennifer L. Hall  
Senior Counsel

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