

August 1, 2024

Via email to Brandy Karl bkarl@copyright.gov

Suzanne Wilson
General Counsel
U.S. Copyright Office
101 Independence Ave. SE
Washington, DC 20559

Re: Summary of July 19, 2024, Ex Parte Meeting Regarding Docket 2023-3

Dear Ms. Wilson:

This letter summarizes the July 19, 2024, *ex parte* meeting that occurred between representatives of the Association of American Publishers, Authors Guild, and Recording Industry Association of America (“the Parties”), the U.S. Copyright Office, and the Library of Congress in connection with the Rulemaking on Access to Electronic Works (2023-3).

The following individuals attended the meeting:

- Terry Hart, General Counsel, Association of American Publishers
- Kevin Amer, Chief Legal Officer, Authors Guild
- Susan Chertkof, SVP, Legal and Regulatory Affairs, Recording Industry Association of America

From the U.S. Copyright Office:

- Suzy Wilson, General Counsel and Associate Register of Copyrights
- Brandy Karl, Assistant General Counsel
- Laurie Ann Taylor, Attorney Advisor
- Rob Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice
- Erik Bertin, Deputy Director of Registration Policy and Practice

From the Library of Congress:

- Robin Dale, Deputy Librarian for Library Collections and Services
- Hannah Sommers, Associate Librarian for Researcher & Collections Services
- David Brunton, Director of Digital Services
- Hope O’Keeffe, Associate General Counsel

Although the substance of the meeting focused on the Library of Congress’s policies and practices regarding the use of electronic deposits, the Parties began by reiterating the position taken in their

written comments¹ that the U.S. Copyright Office lacks the statutory authority to promulgate its proposed rule on access to electronic works because Congress has not authorized it or the Library of Congress to make reproductions of copyrighted works received through the deposit provisions of section 408 and selected for addition to the collections of the Library of Congress.² The Parties explained that their position is not a reflection of current Library of Congress practices or policies, and they expressed support for working with the Copyright Office and Library to secure the necessary statutory authority. Many of their members appreciate the option to deposit digital copies of works and support the mission of the Library. But the Office can only operate within the clear bounds of authority delegated to it by Congress. There are fundamental differences between physical and digital copies of works,³ differences which result in significantly different treatment under the Copyright Act—in short, one cannot simply analogize transmission of digital copies to circulation of physical copies.⁴ In addition, a clear statutory basis for accepting electronic works is necessary to ensure that all future decisions regarding access to those works will be subject to meaningful accountability and transparency mechanisms, such as notice and comment rulemaking and the stakeholder input that goes along with such rulemakings.

The Parties then turned to the primary focus of the meeting and discussed with the Library of Congress their questions and concerns regarding the following:

- The Library’s Stacks terminals, including current policies and practices regarding public access to rights restricted materials available through Stacks.
- IT security for Library Stacks terminals and the data center where digital rights-restricted materials are stored. The Parties encouraged the Library to implement industry-standard IT protections for its collections and offered to make their members available to consult with the Library regarding those standards.
- The Parties noted that the Library’s digital collections may become an increasingly attractive target as the demand for content to train AI models skyrockets. The Parties also noted that in other countries national libraries have expressed interest in using their collections to help build AI datasets.
- The Library’s digital collections strategy

The Parties concluded the meeting by expressing their appreciation to the Copyright Office and Library of Congress for the opportunity to discuss these issues and reiterating their willingness to work with both to secure the statutory authority needed to permit the Library to provide access to electronic deposits it acquires through the Copyright Office.

¹ AAP, Authors Guild, RIAA, Comments Submitted in Response to Offices’ Sep. 1, 2023, Notice of Inquiry (Oct. 2, 2023).

² See H.R. 94-1476 at 171 (1976) (“Government ownership of deposited articles under section 704(a) carries with it no privileges under the copyright itself; use of a deposited article in violation of the copyright owner’s exclusive rights would be infringement.”). Congress created one exception to this general rule in 17 U.S.C. § 407(e), which provides that “With respect to transmission programs that have been fixed and transmitted to the public in the United States but have not been published... The Librarian of Congress shall be permitted... to make a fixation of a transmission program directly from a transmission to the public, **and to reproduce one copy or phonorecord from such fixation for archival purposes.**” (Emphasis added).

Sincerely,

Terry Hart

Kevin Amer

Susan Chertkof