



Copyright Advisory

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Mandatory Copyright Deposits: What You Don't Know You Don't Know

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What Is a Mandatory Deposit?

With a few notable exceptions, in the United States it is mandatory for a copyright owner¹ to deposit with the Library of Congress two copies of each and every work protected by copyright, whether registered or not, and “published” in the United States. These “deposit copies” are, by law, to be filed within three months of the first U.S. publication date. The failure to file these copies can result in receipt of a deposit demand from the Library of Congress to the copyright owner demanding copies, and the imposition of fines and additional expenses for not complying. These fines range from \$250 plus the retail cost to purchase two copies of the work to \$2,500 in the case of a copyright owner willfully refusing or failing to comply with a deposit demand.²

What Constitutes a “Work Protected by Copyright”?

Copyright protects any original work of authorship that has been fixed in a tangible form. It does not protect intangible ideas, concepts, methods or the like; and it exists from the moment a work is created. It is not necessary to obtain a registration for or to use a copyright notice on a work in order for it to be protected by copyright. Copyright protects, for example, audiovisual works (e.g., movies and websites), musical works, literary works (e.g., novels, news articles, marketing or advertising materials, product instruction manuals, etc.), software code, artistic works, and architectural works.

When Is a Work Considered “Published”?

While defined by statute, a work is generally considered to be “published” in the United States under copyright law for the purposes of triggering the deposit requirement when it is first offered for sale (or rent, lease, or lending) in the United States.³

Why Do You Have to Do This?

The reason for the mandatory deposit law is to ensure that the Library of Congress has two copies of every published work in the United States in its collection. The goal is to help the Library maintain its prominence as the most complete repository of knowledge in the world. By requiring mandatory copies, it can continue to build (at a relatively low cost) this body of knowledge and preserve it for scholars and future generations. This is why the mandatory deposit requirement applies not only to works created and published in the United States, but also to works created overseas and then subsequently published in the United States.

What Version of the Work Should Be Submitted?

The mandatory deposit rule requires a copyright owner to submit two copies of the “best edition” of the work. Essentially this means that the highest quality version of the work should be submitted. For example, if there are hard cover and soft cover versions of a book, the hard cover would be considered the “best edition.” The term “best edition” varies from medium to medium. Following are a few of the more popular media as examples:

- Sound Recordings – Two complete copies of the published phonorecord including any accompanying text or pictures
- Motion Pictures – A complete copy of the best edition of the movie plus a separate description of its contents such as a continuity, press book, or synopsis
- Software – If the software is copy protected then two copies must be submitted along with any user guides or other documentation. If the work is not copy protected then one machine readable copy can be submitted along with any user guides or other documentation.

What Is the Difference Between Mandatory Deposit Copies and Registration Copies?

There is sometimes confusion between the mandatory deposit requirement and the registration copy requirement. When a copyright application is filed, it must be accompanied by one or two “registration copies” (the number of copies depends on the type of work being registered). These copies are requested for the purposes of having a clear reference for what the copyright registration protects in the event of a future dispute. Anyone who files a copyright application and includes the required registration copy is then exempted from having to additionally file two mandatory deposit copies with the Library of Congress. However, if the copyright owner files mandatory deposit copies with the Library of Congress first, and then subsequently files a copyright application, the owner must still include an additional registration copy of the work with the application.

Despite the similarities, there are some important distinctions between the mandatory deposit requirements and the registration copy requirements:

- Mandatory deposit only requires two copies of works published in the United States. Registration copies filed with a copyright application must include a copy of the published or unpublished work to be registered.
- Mandatory deposit requires two copies of all works (with limited exceptions discussed below), whereas two copies are required with a copyright application only for works published in the U.S. Applications for unpublished works or works first published outside the United States must only include one copy.
- Works only published outside of the United States are exempt from the mandatory deposit requirements. However, if a copyright application is filed in the U.S. for such works, deposit copies must be included.

Are There Any Works Exempted from the Mandatory Deposit Requirement?

Since there are many types of works that simply, because of their medium or ephemeral nature, don't lend themselves to being stored for long periods of time, there are certain exemptions from the mandatory deposit requirement.

The first exemption is for works that are published only electronically and that have no physical counterparts.⁴ An example of this type of work would be web sites. We note this exemption is not permanent; the law will change at some point in the future, requiring copies of these items to be deposited.

The second exemption, which is much more limited but can result in significant savings, applies if copies of a published work would be unduly burdensome or too expensive for the copyright owner to provide. Examples of such works would be a sculpture, or paintings made in limited numbers. In these cases, the copyright owner should file a request for an exemption with the Copyright Office, which will then assess the burden of not having a copy of that work in the Library of Congress against the hardship on and expense to the copyright owner if forced to submit copies. If on balance the hardship falls more on the copyright owner, the request may be granted and the mandatory deposit requirement will be waived.

As with all copyright issues, this advisory is meant to highlight a topic of interest to our clients and should not be interpreted as legal advice or used as a substitute for consulting with a Mintz Levin copyright specialist. Since copyright issues are fact intensive by nature, please contact your Mintz Levin representative or one of the Mintz Levin copyright specialists listed on the linked page if you have any questions, or if we can be of assistance.

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Endnotes

- 1 This includes the owner of the exclusive right of publication in the United States that is not the copyright owner. See, 17 U.S.C. § 407(a).
 - 2 See, 17 U.S.C. § 407(d)(3).
 - 3 See, 17 U.S.C. § 101 ("Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. 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.").
 - 4 <http://www.copyright.gov/newsnet/2010/384.html>.
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