SUMMARY OF PUBLIC COMMENTS SUBMITTED TO THE U.S. COPYRIGHT OFFICE ON MASS DIGITIZATION PILOT PROGRAM

All comments available at:

http://copyright.gov/policy/massdigitization/comments/

Prepared by The Copyright Alliance

October 9, 2015
# TABLE OF CONTENTS

Comments on the Mass Digitization Pilot Program

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Archivists: Internet Archive and Society of American Archivists</td>
<td>3</td>
</tr>
<tr>
<td>Libraries &amp; Online Encyclopedias: Library Copyright Alliance; Lancaster Theological Seminary; Triangle Research Libraries Network; University of Michigan Copyright Office; University of Nevada; State Historical Society of Missouri; Wake Forest University; Creative Commons; and Princeton Theological Seminary; Wikimedia</td>
<td>4</td>
</tr>
<tr>
<td>Public Interest Groups: Public Knowledge and Electronic Frontier Foundation</td>
<td>5</td>
</tr>
<tr>
<td>Trade Associations:</td>
<td>5</td>
</tr>
<tr>
<td>American Society for Collective Rights Licensing</td>
<td>5</td>
</tr>
<tr>
<td>Association of American Publishers</td>
<td>6</td>
</tr>
<tr>
<td>Authors Guild</td>
<td>6</td>
</tr>
<tr>
<td>Digital Media Licensing Association; National Press Photographers Association; American Society of Media Photographers; Graphic Artists Guild; and Professional Photographers of America</td>
<td>6</td>
</tr>
<tr>
<td>Businesses: Getty Images</td>
<td>6</td>
</tr>
</tbody>
</table>
Introduction
Docket No. 2015–3

On June 9, 2015, the US Copyright Office requested comments on the development of a limited pilot program that would provide a legal extended collective licensing framework for 1) literary works; 2) pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works; and 3) photographs.

Specifically, the Copyright Office sought commentary on the scope of the project:
1. Examples of large digitization projects that would benefit from a ECL framework;
2. Whether commercially available works should be included;
3. Limitations on the types of end-users eligible to access the project;
4. Any suggestions for security precautions to safeguard copyrightable content;
5. The types of dispute resolution processes available;
6. Royalty distribution; and
7. The degree of diligent searching that should be required of a CMO to locate copyright holders.

Finally, many comments made reference to the ECL program being an alternative to expanding the fair use doctrine through decisions like the (then pending) Google Books decision.

Summary
Those opposed to the ECL project feel the program is either redundant of existing projects, too limited in scope (so as to challenge fair use developments), or the opposite, too broad to the point of hindering a copyright owner’s exclusive rights.

Please note that comments were merged into categories, and while many of the sentiments articulated are universal to that group, there are instances of disunity. To fully understand an organization’s stance on mass digitization, we recommend turning to their individual comment.

All comments available at: http://copyright.gov/policy/massdigitization/comments/

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Archivists: Internet Archive and Society of American Archivists
- Stance: Archivists support mass digitization for providing universal access to knowledge, but are opposed to the proposed ECL project for being counter to fair use developments.
- Scope of the Project
  o ECL fails to include important cultural materials such as sound recordings, audiovisual materials, and unpublished works, which are already being digitized under current conditions by archivists.
  o A diligent search for copyright holders should simply be looking to a search registry, placing the burden on copyright holders to register their works. (SAA) If a simple safe harbor were created to provide authors a notice takedown protocol, libraries could more efficiently operate without infringing on copyrights. (IA)
- General Comments
  o Half of archivists surveyed would remove material from consideration for
digitization if the material required locating copyright holders. (SAA)
  o If copyright holders are to be paid for these educational purposes, it is Library of
Congress, not individual archivists, that should pay rates determined by Congress.
(SAA). Archivists have already purchased works in print form, and are unable to
purchase additional digital rights.
  o “The ECL proposal seems to limit digital access to those who largely already
have [access] (i.e., to institutions with members who can pay), rather than
expanding access to underserved communities without large institutional libraries
nearby.” To accomplish true access, copyright laws should extend to remote
access by users, not just through onsite computers.

Libraries & Online Encyclopedias: Library Copyright Alliance; Lancaster Theological
Seminary; Triangle Research Libraries Network; University of Michigan Copyright Office;
University of Nevada; State Historical Society of Missouri; Wake Forest University; Creative
Commons; and Princeton Theological Seminary; Wikimedia

- Stance: The ECL pilot program is impractical and reflects inappropriate policy choices.
- Scope of the Project
  o “Mass digitization of sound recordings, video recordings, and some unpublished
works is both possible and necessary for the realization of the full range of
benefits of mass digitization to education and research.” (Wikimedia)
- Fair Use
  o “We strongly suggest that the Copyright Office move away from an ECL, with all
its impracticalities and costs, and instead study a framework for a true exception
permitting access to digitized, commercially unavailable literary works for
nonprofit educational and research purposes.” Otherwise institutions will simply
secure ECL licenses out of fear when in truth their intended uses would either be
fair or deal with public domain works.
  o Many libraries do not see the need for an ECL project because libraries are
already mass digitizing a broader range of works under the fair use doctrine. They
feel case law has made the doctrine clearer and more predictable, and in fact, the
creation of a ECL system would only muddle this development, making current
practices outlawed. (Lancaster)

- General Comments
  o Opposes any geographic restriction that would limit ECL access to affiliates
onsite computers. Access is so much more achievable with the Internet and digital
files. “In the United States, people living in rural areas do not have the same
access to print materials as their urban counterparts … [or internationally] the
Global South, where people may not have access to libraries, archives, or printed
materials and would not be able to use on-site resources at digitizing institutions.”
(Wikimedia)
  o The proposed ECL system is simply a lesser version of the Google Books
Settlement. At least with the settlement, Google would have paid for the start-up
costs, whereas this proposal requires institutional subscribers to bear the full-cost.

- In order to have the level of transparency in accounting necessary to avoid the historic mismanagement of the CMOs, there would need to be expensive government regulation.
- Efforts should be focused on: 1) Encouraging the application of fair use to digitization projects; 2) Promoting the development of better copyright ownership and status information through enhanced registries, rethinking recordation, and asking copyright owners to identify themselves and their works through an internationally-compliant formalities system; and 3) Providing better access to existing copyright ownership and status information by digitizing or encouraging others to digitize and provide free access to all of the Copyright Office’s records.

**Public Interest Groups:** Public Knowledge and Electronic Frontier Foundation

- **Stance:** Mass digitization benefits the public, but ECL falls short of providing these benefits.
- **Scope of the Project**
  - The ECL project targets nonprofit uses, but the public interest is also served by permitting access to private parties, like the Google Books project. And it harms the public to not allow even indirect commercial advantages (e.g. “private party partners with a nonprofit to digitize materials, and uses the project to enhance and develop its digitization techniques, which it then deploys in a profit-making context”).
- **Fair Use**
  - The proposed project does not address the issue of display of entire works, because the courts have already provided for the mass digitization of works for key word searches and snippet views.
- **General Comments**
  - Such a system will overpay unpopular authors, underpay popular ones, and place heavy costs on finding unknown authors for likely low value works.
  - This project faces the same problem as the Google Books settlement: can it really represent non-members?
  - Concerned about instituting a single CMO that would have monopoly control of the market.
  - Any system would need to ensure copyright holder and end-user privacy to keep personal information and reading histories away from third-parties or the government.

**Trade Associations:**

**American Society for Collective Rights Licensing**

- **Stance:** The current licensing market fails to compensate authors for their works; a proper ECL system may provide a solution.
- **Scope of the Project**
  - A ECL system should divide payments so that 25% goes to publishes, and 75% to authors. If an author is both, they ought to be provided the entire sum.
- General Comments
  - To address the growing concern of mass sharing on social media, ASCRL endorses a definition of mass digitization that “includes fragmented aggregated content” to include social media portals.

Association of American Publishers
- Stance: Supportive of an opt-out system that has a sunset date, and is followed up by a careful evaluation of whether ECL effectively and efficiently stimulates the benefits hoped for.

Authors Guild
- Stance: Favorable to an ECL for out-of-commerce works with an “opt-out” option

Digital Media Licensing Association; National Press Photographers Association; American Society of Media Photographers; Graphic Artists Guild; and Professional Photographers of America
- Stance: Supportive of a “limited and voluntary (opt-in) Pilot Program provided the licenses to the content do not replace or substitute primary licensing between parties, and are limited to large scale but small value uses that are currently unlicensed and for which content creators and their representatives would prefer to enter into a licensed transaction but for market failure.”

Businesses: Getty Images
- Stance: Opposes any “opt-out” program that is counter to a copyright owner’s exclusive rights.
- Fair Use
  - The courts already define existing mass digitization projects as fair use, so it is not clear what activities the ECL seeks to engage in.