October 9, 2015

Maria Pallante
Register of Copyrights
United States Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559

RE: Request for Comment—Mass Digitization Pilot Program

To the Register of Copyrights:

Pursuant to the Notice of Inquiry ("NOI") published in the Federal Register on June 9, 2015 (80 Fed.Reg. 32,614), I submit these Comments on behalf of the Association of American Publishers ("AAP") regarding the Copyright Office's proposal to create a pilot program for extended collective licensing ("ECL") of literary and other works to facilitate certain mass digitization projects. In particular, AAP provides comments and poses additional questions to support the Copyright Office's goal of striking "an appropriate balance between facilitating those aspects of mass digitization that serve the public interest and safeguarding the rights of copyright owners." [1]

AAP's core mission is to support publishers as both copyright owners and users of the copyrighted works of others. As the principal national trade association of the U.S. book and journal publishing industry, AAP represents more than 400 member companies and organizations that include most of the major commercial book and journal publishers in the U.S., as well as many small and non-profit publishers, university presses and scholarly societies.

Publishers continue to believe that many of the goals of mass digitization projects undertaken by libraries, universities, and commercial entities are laudable, and we appreciate the Copyright Office's decision to open a separate inquiry into mass digitization to explore its unique risks and benefits. Importantly, the Copyright Office's 2015 Report on Orphan Works and Mass Digitization ("2015 Report") recognizes that public benefit alone cannot justify mass digitization and

[1] U.S. COPYRIGHT OFFICE, REPORT ON MASS DIGITIZATION AND ORPHAN WORKS, 75 (2015), *available at* http://copyright.gov/orphan/reports/orphan-works2015.pdf ("2015 REPORT").

that legislation is necessary to support more robust projects,[2] such as those that provide full-text access.[3]

AAP's member publishers are in the business of disseminating and promoting access to knowledge, literature, and culture – supported by sound principles of copyright protection. These protections stimulate publisher investments in new authors, cultivation of authoritative research, and development of new ways to use and access content.

However, as explained in our previous comments on mass digitization, the public will not benefit from these investments if fair use becomes a *per se* exception to copyright protections used to justify mass digitization.[4] Such over-reliance on fair use would undermine the incentives for publishing high quality works. A legislative framework for mass digitization, as suggested by the Copyright Office, has the potential to provide greater legal certainty, and greater permission, than fair use for those who conduct and use mass digitization projects.[5] The legislative option is therefore more likely to stimulate a wider array of uses promoting the progress of science than piecemeal court cases—affordable only to the wealthiest funders of mass digitization projects.

As explained in the comments below, AAP and its member publishers support the Copyright Office's experimental effort to test its proposed legislative approach by establishing a well-balanced pilot ECL program, provided that the program (1) allows copyright owners (including, with respect to any one of the exclusive rights comprised in a copyright, the owner of that particular right) to opt-out at any time; (2) has a sunset date that incentivizes participation and allows for a thorough assessment of the program's efficacy; and (3) is followed by a careful evaluation of whether ECL effectively and efficiently stimulates the beneficial uses that many hope to achieve through mass digitization.

1. Examples of Projects

a) Qualifying Collections

Should the pilot be limited to collections involving a minimum number of copyrighted works? If so, what should that threshold number be?

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[2] *Id.*, *supra* note 1, at 75 (concluding that legislation is needed because current law, voluntary licensing, fair use and best practices documents "cannot fully address the legal uncertainty [of mass digitization], nor can they authorize the full spectrum of uses that the market may desire.").

[3] *Id.* at 78. AAP agrees with the Copyright Office's interpretation of the recent *Google* and *HathiTrust* decisions, i.e., that both "cases strongly support" the conclusion that fair use is not a sufficient basis for mass digitization projects that involve "large scale scanning and dissemination of entire books."

[4] Association of American Publishers, Initial Comments Submitted in Response to U.S. Copyright Office's Oct. 22, 2012 Notice of Inquiry, 3-4 (Feb. 4, 2013); Association of American Publishers, Reply Comments Submitted in Response to U.S. Copyright Office's Oct. 22, 2012 Notice of Inquiry, 5 (Mar. 6, 2013).

[5] The goal is to allow full-text access for which there is no colorable fair use defense under today's jurisprudence. *See* 2015 REPORT at 101 (stating that "[the Copyright Office's] proposed ECL solution is intended in large part to enable activity for which there is broad agreement that no colorable fair use claim exists: providing digital access to copyrighted works in their entirety.").

Publishers agree with the Copyright Office that there must be some way to ensure that the projects are "large scale."[6] However, a specific or one-size-fits-all quantitative threshold may not work. Instead, publishers support the Copyright Office's suggestion to require those seeking to undertake mass digitization projects to demonstrate that clearance of the individual rights involved would be impracticable.[7]

Further discussion is needed about the criteria for demonstrating that rights clearance is impracticable, as this is likely to evolve as technology advances.

Should the program be limited to works published before a certain date? If so, what date would be advisable?

It depends on the type or nature of the works and other related factors. Excluding all works published after a particular date may work for some, but not all, types of works that the Copyright Office is considering including in the ECL pilot project.

For photographs, which are routinely stripped of metadata establishing the publication date, applying this type of bright-line rule may be impracticable. At a minimum, it could impose significant inefficiency by requiring searches for the date of publication of each work and could undermine the laudable objectives of mass digitization.

For most literary works, however, the publication date is usually included and retained in the associated metadata and in the text of the work itself. Furthermore, regardless of whether the ECL pilot program is limited to out-of-commerce works or also includes commercially available works, it will be necessary to differentiate between the two. Thus, it may be useful to include a presumption of commercial availability for recently published literary works.

Among literary works, an appropriate publishing date after which works should be presumed commercially available may vary. For instance, it may be appropriate to presume that textbooks (any edition) published within the last 15 years are commercially available, whereas the period of commercial availability of scholarly monographs and trade books varies depending on a number of factors, including the cost of storing inventory and the use of technologies such as print on demand and short run digital printing.[8]

Lastly, it is important to bear in mind that, although "publication" is a defined term in statutory copyright law, the "date of publication" for a specific work or edition of a work can be complicated to determine for various types of works.[9] Moreover, once a date of publication is determined, it can

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[6] *Id.* at 89.
[7] *Id.*
[8] *See* Sanford Thatcher, *The Hidden Digital Revolution in Scholarly Publishing: POD, SRDP, the "Long Tail," and Open Access*, 21 AGAINST THE GRAIN 60 (2009), https://scholarsphere.psu.edu/downloads/9880vr597
[9] U.S. Copyright Act, 17 U.S.C. § 101 (defining "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."); *see* American Society of Media Photographers, *Copyright Tutorial: Defining*

affect uses and rights in other contexts. Before adopting this approach, further discussion is needed of the practical application and potential spillover effects of determining a date of publication in the ECL context, and whether such effects can be appropriately limited.

Should collections that include commercially available works be eligible for ECL, or should the program cover only out-of-commerce works?

The scope of works eligible for inclusion in the ECL pilot program depends upon the scope of uses permitted.

Publishers agree with the Authors Guild that, if ECL permits full-text access, such licenses should be limited to out-of-commerce works to avoid interfering with existing digital licensing markets for commercially available works.[10]

However, publishers recognize that the Copyright Office intends for copyright holders to be able to opt-out particular works or bulk collections at any time in order to mitigate any risk of interference with commercial markets. Therefore, publishers are open to further discussion of the Copyright Office's suggestion to include commercially available works under more restrictive licenses, such as search-only or small excerpt display, on a project-by-project basis.

Discussions for including commercially available works should address, at a minimum, the following questions:

1. What types of uses should be allowed?
2. How would the CMO determine which works within a given class are "commercially available" or "out-of-commerce"? Will there be a way for a rightsholder to appeal such decisions? Would the Copyright Office or another entity review such appeals?
3. Under what circumstances can the CMO change its initial determination of the commercial status of a work?
4. Can a rightsholder seek to exclude a work that was initially determined to be out-of-commerce, if it subsequently becomes commercially available?
5. Should definitions of "commercially available" and "out-of-commerce" be included in the authorizing statute, Copyright Office regulations, or developed for individual ECL agreements to reflect nuances of different types of works?
6. For literary works, how will the CMO determine whether a publisher or author has the necessary rights to control whether a work is included or excluded from some or all of the uses authorized under an ECL project?

Published or Unpublished? http://asmp.org/tutorials/published-or-unpublished.html#.VbJumPlViko (last visited Jul. 27, 2015).

[10] 2015 REPORT at 86.

b) Eligibility and Access

Please describe any appropriate limitations on the end-users who should be eligible to access a digital collection under a qualifying mass digitization project. For instance, "should access be limited to students, affiliates, and employees of the digitizing institution, or should ECL licensees be permitted to provide access to the general public?"

Limitations on the types of authorized end-users and scope of use permitted should depend upon the particular circumstances of each mass digitization project.

Some projects may need to restrict access to a particular group of institutional patrons for non-consumptive uses (e.g. search) only, yet other projects may be able to display full-texts to the general public. Attempting to apply a one-size-fits-all standard is likely to be too restrictive to gain the benefits that are possible under a legislative framework that authorizes more nuanced guidance through Copyright Office regulations.

AAP suggests that, once the Copyright Office receives examples for potential mass digitization projects through this NOI, it should schedule a fuller public discussion of this question.

Should licensees be permitted to offer access to a collection remotely, or only through onsite computer terminals?

Same answer as above.

c) Security Requirements

What "specific security requirements should be set forth by statute or defined through Copyright Office regulations?"

Publishers agree with the Copyright Office that: (1) "preventing unauthorized access to the databases subject to ECL is a critical aspect of any potential mass digitization solution" and (2) that CMOs and users should be required tp, as part of any ECL license, "implement and reasonably maintain adequate digital security measures to control access to the collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works."[11]

As a general matter, Copyright Office regulations should not require implementation of specific technologies in order to ensure security of digitized collections. Avoiding technological mandates will help ensure that innovative ways to protect content, yet promote access, can continue to evolve efficiently. However, it is appropriate for the Copyright Office to conduct a public rulemaking proceeding to establish minimum criteria for providing adequate and effective security of digitized collections. Such rules would set benchmarks for essential security, but provide critical flexibility for defining appropriate and up-to-date security procedures in specific ECL agreements.

[11] 2015 REPORT at 98.

For example, these criteria could require password protection or login authentication mechanisms to access collections that are meant to be available only to researchers at a particular institution. In addition, where appropriate, digitizers could also be required to embed watermarks or other methods of identifying the source of any leaked content. These are but a few examples of the comprehensive system of database, network, administrative and end-user security mechanisms that will need to work together to ensure the security of any mass digitization project.

As with the other aspects of defining the scope of the ECL pilot, the Copyright Office should hold further public discussions about how best to establish security benchmarks.

2. **Dispute Resolution**

Should the legislation authorize informal mediation, with the CRB's role limited to that of a facilitator of negotiations? Or should the statute provide for binding arbitration?

Legislation should authorize the CRB to help facilitate negotiations, in the event that the CMO and the prospective licensee do not reach an initial agreement.

Publishers are also open to further discussion about the Copyright Office's suggestion to authorize the CRB to conduct binding arbitration, on the essential condition that both parties must consent to the arbitration. As recognized by the Copyright Office in its Report, allowing arbitration based on the request of a single party could encourage parties to negotiate in bad faith to force arbitration.[12] Thus, publishers do not support arbitration based upon the request of a single party.

3. **Distribution of Royalties**

What would be an appropriate timeframe for required distributions under a U.S. ECL program?

Publishers support codifying a maximum timeframe for distributing royalty payments in the authorizing legislation. Recognizing that quarterly distributions may not be the most cost-effective or efficient manner of distributing royalties for out-of-commerce works, publishers have no objection to requiring payments to identified and located copyright holders "no later than nine months from the end of the financial year in which the rights revenue was collected."[13] Setting this maximum allowed timeframe, however, should not preclude parties from setting faster royalty distribution schedules in individual ECL agreements, if appropriate.

4. **Diligent Search**

The Office has recommended that a CMO be required to conduct diligent searches for nonmember rightsholders for whom it has collected royalties. The Office believes that this obligation should include, but not be limited to, maintaining a publicly available list of information on all licensed

[12] *Id.* at 96-97.
[13] *Id.* at 99.

works for which one or more rightsholders have not been identified or located. What additional actions should be required as part of a CMO's diligent search obligation?

Publishers support obligating CMOs to (a) conduct reasonable searches and (b) maintain lists of publicly available information to help identify nonmember rightsholders. Such searches and efforts to contact nonmember rightsholders should be conducted on an expedited basis where usage statistics indicate that their work is of particularly high demand (*i.e.*, frequent search, display, download, etc., depending on the uses permitted within the given ECL project).

In addition, the Copyright Office should link to, or otherwise provide centralized access to, the CMO's list of nonmembers owed royalties in order to help facilitate identification of rightsholders. CMO lists should also include relevant contact information to enable a nonmember rightsholder (or their agent) to opt-out or confirm participation in ECL agreements at any time.

5. **Other Issues**

Does the Copyright Office ECL pilot program proposal meet U.S. international obligations under the three-step test?

Summary of Proposal: Congress would pass legislation to "allow the Register of Copyrights to authorize CMOs to license the use of copyrighted works on behalf of members and non-members in connection with the creation or operation of a digital collection" for only three categories of eligible works (literary, embedded pictorial and graphic works, and photographs) for "only nonprofit educational or research purposes... without any purpose of direct or indirect commercial advantage."[14]

The three-step test requires members of the World Trade Organization to confine limitations and exceptions to copyright to "certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[15]

The Copyright Office proposal may be too broad in certain respects, e.g., there must be limits on the types of literary works, educational and research purposes, and types of uses permitted in order for this ECL program to comply with the three-step test. Certainly, if commercial works are eligible, the types of uses must be refined to avoid conflict with existing licensing structures, such as those operated by the Copyright Clearance Center.

At the same time, publishers believe that the most innovative and beneficial uses for mass digitization may exist beyond nonprofit educational and research purposes. As the Copyright Office itself and the UK system recognize, "ECL schemes will only be possible *where the market wants them.*"[16] Publishers are acutely aware of the importance of commercial incentives to ensure dissemination, curation, and cultivation of creative works. Thus, publishers encourage the

[14] *Id.* at 104.
[15] World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 33 I.L.M. 81.
[16] 2015 REPORT at 105 (emphasis added).

Copyright Office and other stakeholders to discuss ways to ensure appropriate limitations on the types of eligible works and uses in order to potentially allow commercial and non-commercial uses.[17]

Fair use can only go so far, but Congress has an opportunity to craft carefully balanced legislation to promote the progress of science through mass digitization that attracts sustainable investment by encouraging commercial actors to efficiently pay rights holders for otherwise impracticable, but highly beneficial, uses of copyrighted works. The pilot project is the best way to test the feasibility of this opportunity.

Should there be a sunset provision for the pilot program?

Although AAP supports the Copyright Office's recommendation for a sunset provision after five years, it does not consider such a provision critical if the ECL pilot program operates under an "opt-out at any time" format. AAP is also open to discussing different time periods to ensure the pilot program is long enough to (a) incentivize maximum participation of mass digitization projects and (b) allow for the thorough assessment of the program's efficacy.

Publishers further recommend that the Copyright Office conduct a notice and comment period to help inform Congress' assessment at the end of the pilot program.

What types of uses should be permitted?

Similar to the types of limitations on end-user access to digitized collections, the types of licensed uses (rights granted through ECL) should vary according to each mass digitization project.

As noted above, the benefit of creating a statutory framework for licensing mass digitization and subsequent uses is that Congress can balance the rights of creators and the interests of the public to permit uses that go beyond what is possible under fair use. It may be appropriate to allow full-text display of out-of-commerce works in some contexts, perhaps allowing limited copying and pasting as well. In other contexts, it may be appropriate to limit the license to non-consumptive uses such as search only.

To more fully explore which types of uses should be permitted under various ECL agreements, publishers suggest that the Copyright Office include this as a topic for future public discussion.

Should users be able to bargain collectively with CMOs, for instance, library consortia and universities?

Yes, but only if there is a demonstrated need for the individual entities to work together through such combinations to successfully and efficiently undertake a proposed mass digitization project.

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[17] *See generally* Google, Copyright Alliance, and Independent Film and Television Alliance, Initial Comments Submitted in Response to U.S. Copyright Office's Oct. 22, 2012 Notice of Inquiry (Feb. 4, 2013)(noting the existence of substantial interest in pursuing mass digitization in commercial and non-commercial contexts).

6. Additional Questions

In addition to our comments, publishers suggest that future public discussion address the following questions:

- The 2015 Report notes that legislation would need to "attempt to define both the policy rationale and the universe of projects to be covered."[18] How specific would such legislation be?

- The 2015 Report stresses the fundamental importance of providing an opt-out provision to ensure that rightsholders can exclude single or groups of works from all or part of any ECL agreements at minimal cost and burden to the copyright holder.[19] What would the costs and burdens be? Could these costs be off-set by fees collected through ECL agreements?

- The Copyright Office and many stakeholders agree that, under current jurisprudence, "no colorable fair use claim exists [for] providing digital access to copyrighted works in their entirety," *i.e.*, for full-text display.[20] Thus, would fair use claims that exceed the parameters of a mass digitization project authorized under an ECL agreement be valid, or should the fair use savings clause recognize that uses beyond those authorized under an ECL agreement are presumptively not fair use?

- AAP has a number of questions about CMO authorization and accounting requirements:

    - The Copyright Office suggests that a CMO must meet a threshold level of representation in order to qualify to negotiate and administer an ECL license. Specifically, the Copyright Office references the UK approach, which requires the CMO to show that its "representation in the type of relevant works...is significant," which is established by comparing "the number of right holders' mandates it has, relative to the (estimated) total number of mandates; and the number of works it controls relative to the (estimated) total number of works."[21] What threshold percentage is significant? Would this vary for different projects or is there a minimum floor that must be met in all instances? The UK representation test is also meant to be "flexible." How does the Copyright Office propose to achieve such flexibility while maintaining a sufficiently high threshold?

    - Publishers support requiring the CMO to obtain preliminary consent from a "substantial proportion of its voting members" for any proposed ECL agreement.[22] However, the details of this proposal need further discussion. How would voting members be determined? Would non-voting members have a review/ appeals process? Is a "substantial proportion" a majority or more of voting members? How much notice must voting and non-voting members be

[18] 2015 REPORT at 73.
[19] *Id.* at 93.
[20] *Id.* at 101.
[21] *Id.* at 90.
[22] *Id.* at 91.

given of the ECL proposal? How closely do the terms of the final ECL agreement need to reflect the terms outlined in the poll of members for preliminary consent?

- What type of oversight would the Copyright Office provide? Could rightsholders seek review of ECL agreements that did not meet original terms presented for obtaining preliminary consent?

- The 2015 Report states that, as a "prerequisite to licensing authorization, a CMO would be required to demonstrate its adherence to transparency, accounting and good-governance standards."[23] Publishers support these requirements and the Copyright Office's recommendation to codify these obligations through Copyright Office regulations that take stakeholder perspectives into account through a notice and comment process.[24] True transparency necessitates openness of information between the CMO and rightsholders, for instance, a simple, timely, mechanism for viewing accurate usage statistics. Providing this data, an important benefit for rightsholders in mass digitization projects,[25] as well as royalty formulas[26] will enable rightsholders to verify the accounting and distribution practices of the CMO.

- While the notice and comment process will more thoroughly assess the details of such regulations, a few preliminary questions to consider are:

    - In what manner and how frequently should CMOs provide rightsholders with usage statistics for works included in ECL projects?

    - Should the Copyright Office establish minimum reporting requirements to ensure transparency and accuracy of royalty distributions?

    - What mechanisms would the Copyright Office have to enforce its regulations regarding CMO adherence to transparency, accounting and good-governance standards?[27]

❖ What type of enforcement role would the Copyright Office play? If users are not providing adequate security or paying agreed licensing fees, can the CMO or a rightsholder bring this

[23] 2015 REPORT at 92.
[24] *Id.*
[25] An ECL program, by its nature, limits certain aspects of a rightsholder's bargaining power in order to promote new uses that would otherwise be impracticable due to transaction costs or legal limitations. However, in exchange for usage data, rightsholders may be more willing to keep works in various ECL agreements in order to assess the demand for a work that may otherwise have sat dormant. While it is unlikely that many out-of-commerce works will experience heavy demand, usage statistics can help authors and other rightsholders identify particular works that may have a new commercial audience; for instance, in the case of an author who has regained rights in a novel published 40 years ago which becomes particularly relevant today.
[26] 2015 REPORT at 5.
[27] *Id.* at 92.

dispute to the Copyright Office for a faster administrative adjudication or would these matters be left to the federal courts?

Conclusion

AAP looks forward to reviewing the Comments of other stakeholders and working with the Copyright Office to ensure that appropriate "legislation [to create an ECL pilot program] is developed transparently and in a way to benefit a wide array of stakeholders equally."[28]

Respectfully Submitted,

Allan Robert Adler
General Counsel
Vice President for Government Affairs
Association of American Publishers
455 Massachusetts Ave., NW, 7th Floor
Washington, D.C. 20001
(phone) 202/220-4544
(fax) 202/347-3690
(email) adler@publishers.org

[28] Id. at 83.