



copyright alliance

Connecting creators · Protecting creative work

**BEFORE THE
U.S. COPYRIGHT OFFICE**

Mass Digitization Pilot Program

Docket No. 2015-3

COMMENTS OF THE COPYRIGHT ALLIANCE

INTRODUCTION AND BACKGROUND

The Copyright Alliance welcomes the opportunity to provide the U.S. Copyright Office with comments on its proposed extended collective licensing (ECL) pilot program.

The Copyright Alliance is a non-profit public interest and educational organization that represents over forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. In addition to these institutional members, we represent more than 15,000 individual “One Voice Artist Advocates” who give their personal time and creativity to support our work.

Among the myriad types of copyright owner and creator groups represented by the Copyright Alliance, we represent many of the organizations directly affected by the proposed pilot program, including some of the most vibrant visual arts organizations in the United States, as well as author and publisher organizations at the forefront of the literary industry.

At the outset, we commend the U.S. Copyright Office for separating mass digitization solutions from orphan works issues. We previously voiced our concern with this in the context of the 2008 legislative framework for orphan works.¹ Digitization and indexing of works provides tremendous public benefit, which can be realized without eroding the rights of authors.

Additionally, we applaud proposals that recognize the intended limits of fair use as a case-by-case limitation on the rights of copyright owners and the privileges of users. An ECL

¹ Comment from Copyright Alliance on Orphan Works and Mass Digitization to the Copyright Office 5–6 (Feb. 4, 2013) (“To the extent the Copyright Office seeks to address issues beyond those concerned with orphan works in the context of preservation and archival use of copyrighted works, such an inquiry would raise myriad issues well beyond the scope of those considered in the context of the 2008 legislative framework on orphan works.”).

model is a far better approach than further extending the fair use doctrine for the mass digitization of copyrighted works for two reasons. First, a licensing-based approach, as proposed by the Office, is sufficiently flexible to effectively balance the rights of creators to be compensated for the use of their copyrighted works with the interests of the public in accessing these works. Second, the ECL model contributes to increasing legal certainty with respect to the mass digitization of copyrighted works.

GENERAL POINTS

We are writing primarily to call attention to the potential issues that may arise and the importance of ensuring that any system must be affordable and easy to understand and navigate for individual creators and small businesses. Many of the issues discussed are specific to the categories of subject matter explicitly identified in the Federal Register Notice which describes the pilot program. Importantly, the mass digitization of other types of works that are not covered by the pilot program will have their own distinct and complex issues that may make extended collective licensing entirely inappropriate. Therefore, our comments below should be construed narrowly to apply only to the works identified in the pilot program.

Because copyright is an exclusive right, the ECL proposal represents a major departure from fundamental copyright principles. Normally and barring the applicability of an exception or limitation under the law, a copyright owner's work cannot be used unless that owner opts-in. However, the ECL proposal would introduce an opt-out approach, giving third parties the legal authority to engage in certain uses without first seeking permission from the copyright owner. However, to the extent that some courts have unduly expanded fair use in the context of mass digitization, the Copyright Alliance believes it is worth considering the ECL pilot program so that copyright owners are able to be compensated for their works —provided that the program allows a copyright owner to opt-out easily at any time and for any reason.

At this early stage, there are too many unanswered question for us to support the pilot program. We are interested in working with the Copyright Office as it continues to consider the myriad of complex questions and details relating to creation and implementation of the pilot program with the hope that we may eventually be in a position to support the program for the identified categories of works.

ISSUES TO ADDRESS

I. Affordability and User-Friendly

It is paramount that any system developed be affordable and easy to navigate, especially for individuals and small businesses. Like many creators of copyrighted works, many of our members face financial and other obstacles in the enforcement of their copyrights. While an ECL system may open up new income streams for these creators, such benefits will be nullified if the system is not accessible to creators, or if the risks outweigh its benefits.

II. Examples of Projects

a. Qualifying Collections

There should be a minimum threshold for qualifying collections. However, it is difficult to specify an exact number; or even whether the threshold should be defined by an arbitrary

number, when that number may vary significantly depending on the type of use and type of works involved. Rather, the goal for any minimum threshold should be to ensure that ECL is operating where there is market failure.

In no event should works that are already in digital form be available for ECL, since, by definition, mass digitization involves the transformation of works from traditional analog or print form to digital form.

The Copyright Alliance strongly agrees that the pilot should be limited to “non-profit educational and research purposes and without any purpose of direct or indirect commercial advantage.” To be effective there needs to be a clear distinction between non-profit and for-profit uses and a clear definition of direct and indirect commercial advantage. For instance, some uses, while seemingly non-profit on the surface, actually provide a commercial benefit to a licensee through indirect sources such as advertising or attracting users to a platform offering other services. Such uses should not be entitled to participate in the limited pilot program.

b. Security Requirements

Security requirements for licensees are essential for controlling access and protecting against misuse and infringement of copyrighted works in the collection. However, these requirements should be set by regulation rather than by statute, due to the rapid nature in which technology evolves and the differing needs of each licensee. In this way, security requirements can better adapt to the specific technology and situation at hand.

III. Dispute Resolution Process

Regarding the suggestion that resolutions be processed by the Copyright Royalty Board, our only present comment is to again emphasize the financial limitations of many copyright owners. The most important aspects of any effective dispute resolution process are that it is both practical and affordable for individuals and small businesses.

IV. Distribution of Royalties

There needs to be a robust oversight mechanism or ability for owners to audit to ensure proper accounting and payments, or perhaps some combination of both. The need for transparency is a must.

V. Diligent Search – What Additional Actions Should Be Required as Part of a CMO’s Diligent Search Obligation

To assist in the diligent search process, it is absolutely necessary that CMOs furnish a public list on all licensed works for non-members for whom it had collected payments so that notice is provided to copyright owners that their works are being used. An example of the efficacy of this type of mechanism came out of the HathiTrust Orphan Works Project. In 2011, HathiTrust published a list of 166 works being readied for distribution for which it was unable to locate the copyright owner. The Authors Guild was able to locate the author of one of the works after a few minutes of cursory research.²

² Authors Guild, *Found one! We Re-unite an Author with An “Orphaned Work”* (Sept. 14, 2011), <https://www.authorsguild.org/industry-advocacy/found-one-we-re-unite-an-author-with-an->

The administrative burden for diligent searches, however, should not rest solely on the CMO, as the collections created under the pilot program are a collaborative effort between the CMO and the licensee. Thus, the licensee should also have some obligation to assist the CMO with the diligent search.

VI. Other Issues – Opt-out Mechanism

It is essential that the pilot program ensure copyright owners an easy and accessible “opt-out” mechanism at no cost. This mechanism should be available to copyright owners at any time during the process and at any stage of the project. Additionally, the mechanism should be flexible, giving copyright owners the ability to opt out on a work-specific or class-specific basis if they so desire, as well as opt-out of any or all of the exclusive rights.

It may be the case that multiple CMOs may end up representing the same work, depending on how CMOs establish their jurisdiction or define the scope of the corpus. It may be unreasonable to expect a copyright owner contact multiple CMOs in order to opt-out. Accordingly, the Copyright Office should consider how to make that opt-out mechanism seamless across CMOs. This may require increased investment in IT resources if the Copyright Office itself were to play some role here.

Respectfully submitted,

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orphaned-work/. Along the same lines, SoundExchange, which collects and distributes digital performance royalties for recording artists and record labels maintains a searchable list for unclaimed royalties. Additionally, SoundExchange proactively works with other organizations to help notify artists who have unclaimed royalties. *See, e.g.,* Press Release, SoundExchange, SAG-AFTRA and SoundExchange Urge Union Members: Claim Your Digital Royalties (May 21, 2014), <http://www.soundexchange.com/pr/sag-aftra-and-soundexchange-urge-union-members-claim-your-digital-royalties>.