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<http://copyright.gov/policy/massdigitization>

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U.S. PUBLIC CONSULTATION: “MASS DIGITIZATION PILOT PROGRAM”

This submission made on behalf of IFRRO - The International Federation of Reproduction Rights Organisations – supports the US Copyright Office’s proposed approach, that ways to facilitate large-scale digitisation of copyright works be explored through a pilot program, which involves relevant stakeholders. It further shares relevant experience from other similar initiatives and, in particular on the use of the Extended Collective Licensing (ECL) to support large-scale digitisation, which is the legal technique that we understand that the Copyright Office wishes to consider in support of large-scale digitisation projects in the US.

IFRRO is the main international network of collective management organisations – the Reproduction Rights Organisations (RROs) – and authors’ and publishers’ associations in the text and image sector, with 144 member organisations in 79 countries worldwide. The US member organisations are the Copyright Clearance Center (CCC), American Photographic Artists (APA), American Society of Media Photographers (ASMP), Artists Rights Society (ARS), Association of American Publishers (AAP), Authors Coalition of America (ACA), Authors’ Guild, Graphic Artists Guild (GAG), National Press Photographers Association (NPPA), National Writers Union (NWU), and Text and Academic Authors Association (TAA). We thank the Copyright Office for the opportunity to participate in the consultation; we will focus our comments, and information and experience sharing on the two issues specifically addressed in the invitation on the consultation website.

WAYS TO FACILITATE AND SUPPORT LARGE-SCALE DIGITISATION PROGRAMMES

Solutions to facilitate initiatives on large-scale digitisation and making available of copyright works, obviously needs to observe and adopt to local requirements, legal and other traditions, and other relevant circumstances. Nonetheless, in their advancement, it may prove advantageous to examine experiences from similar initiatives elsewhere. We believe that the development and implementation of the European Commission (EC) facilitated Memorandum of Understanding (MoU) on *Key Principles on the Digitisation and Making Available of Out-*

*of-Commerce Works*¹ by libraries and similar publicly available cultural institutions in Europe is of relevance to the Copyright Office proposal. This MoU² was developed through a dialogue involving broadly organisations representing the relevant stakeholder groups, which also signed it. These were the three European library association, representing the national, public and scientific libraries; the relevant associations of writers and of book and journal publishers; the European federation representing visual creators and their collectives; and IFRRO representing, in particular, the RROs (Reproduction Rights Organisations), the collective management organisations in print and publishing³.

A similar approach, involving the relevant US library, authors' and publishers' associations, and CCC, the US RRO, in a dialogue and a pilot scheme to agree on ways to facilitate and support large-scale digitisation programmes in the U.S.A. should represent a plausible way forward.

The European out-of-commerce works MoU

The purpose of the EC facilitated out-of-commerce works MoU signed by the stakeholder organisations in Europe, is to facilitate the large-scale digitisation and making available by European libraries and similar institutions of books and learned journals in their collections, which are out-of-commerce. It is a part of a two-pronged approach, which also includes the EU Orphan Works Directive 2012/28/EU⁴, as a means to further the development of digital libraries and make cumulative knowledge available in Europe.⁵ Uses allowed are limited to the reproduction and making available for non-commercial purposes.

Taking this into account the MoU is based on some fundamental principles, which include:

1. The digitising institution, in making the selection of the works, or categories of works it plans to digitise and make available, needs to ensure that the relevant organisations of rightholders have been consulted, initiating a dialogue with the representative bodies at an early stage of the planning process; The criteria for the selection of works to be included in the project, preferably also the number of works (or at least an estimate of the works) involved, needs to be agreed
2. The signing of the agreement between the digitising institution and the copyright holders is envisaged to be through voluntary collective licensing, normally with the national Collective Management Organisation (CMO), or the RRO, where the uses allowed and the conditions for the uses are set

¹ The MoU defines an “out-of-commerce work” as being “*when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).*”

² The full text of the MoU is available here: http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

³ See full text and signatories of the Out-of-Commerce work MoU signed in Europe here:

http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

⁴ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

⁵ See MoU FAQ, question 7: [http://europa.eu/rapid/press-release MEMO-11-619_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-619_en.htm?locale=en)

3. The CMO (or other licensor, where applicable) undertakes to collect mandates from authors and publishers in the fields to be digitised; this would normally be done in close cooperation with the associations of the authors and publishers
4. Acknowledging that works of non-mandating authors and publishers may also be included in a large-scale digitisation effort, there should be mechanisms to ensure legal certainty for publicly accessible cultural institutions and CMOs, to allow the CMO, which has the right to sign the licensing agreements, benefit from a presumption under the MoU to represent non-member rightsholders; One such mechanism is the Extended Collective Licence (ECL)
5. Rightholders; both mandating and non-mandating ones, shall retain the ability to opt out from the project, or to withdraw some or all of their works that might fall under it. The CMO, which has the lawful right to represent unrepresented rightsholders, should undertake “information campaigns” and widely publicise the project making “best efforts” to reach such rightholders as such efforts are understood in Europe, with the aim to arrive at a situation where rightholders that the CMO acts on behalf of can give what is known as “informed consent”
6. The digitising institutions must establish mechanisms to ensure that the licensing conditions are observed

These are fundamental criteria, which might be considered applicable also for large-scale digitisation initiatives in the U.S.A.

EXTENDED COLLECTIVE LICENSING (ECL)

RROs administer rights on behalf of authors and publishers under different models of operation, including when voluntary collective licensing schemes based on exclusive rights and voluntary mandating of the RRO by the authors and publishers are supported by legislation, as occurs in some countries. One such technique to support voluntary collective licensing agreements is the Extended Collective Licensing (ECL). IFRRO and its membership has considerable experience from administering rights under the ECL, under different jurisdictions and for different purposes and uses. Practice shows that the ECL can offer suitable solutions for selected clearly defined uses of copyright work, beneficial to both rightholders and users, provided certain criteria and steps are observed:

Criteria for the licensing scheme that may be granted extension through ECL

In an ECL, it is the scope of the specific agreement (in terms of works included), rather than the general mandate to the CMO, that is being extended. This distinguishes it from similar legal techniques to include works of non-mandating rightholders in voluntary licensing schemes, such as legal presumption. Moreover, for a voluntary licensing agreement based on exclusive rights and voluntary rightholder mandating of the CMO to be granted the extension effect, there are certain fundamental criteria, which should be observed:

- The usages, for which the ECL may apply needs to be carefully considered, taking account of the purpose and character of the use of the work, the frequency and intensity of

the use, and how it may affect the rightholder's ability to exploit it. Large-scale digitisation by publicly available libraries and similar cultural and educational institutions for defined non-commercial uses may prove and has proven to qualify for voluntary collective licensing supported by ECL in a number of countries, as well as in the MoU on the large-scale digitisation and making available of out-of-commerce works signed by the representative stakeholder organisations in Europe. That said, it is important to remember that for academic and scientific authors and publishers, and perhaps individual authors and publishers in other fields as well, the primary markets for their works are non-commercial, so care must be taken in fashioning the ECL.

- Rightholders must be allowed to retain the ability to opt out from the licensing scheme, or to withdraw some or all of their works that might fall under it, and / or be granted the right to sign licensing agreement individually themselves, alternatively through an agent, or other rights administrator
- The criteria as to the CMO, which signs the licensing agreement that may be extended through an ECL, must be clearly defined:

Criteria as to Collective Management Organisation (CMO), which administers a licensing scheme, which may be extended through an ECL

Basic criteria to be observed regarding the CMO authorised to sign the licensing agreement, which may be extended through an ECL, include:

1. The CMO must document that it represents a substantial number of authors and publishers of the relevant category of works
2. Rightholders should be duly represented in the CMO's key decision-making bodies
3. The CMO must warrant that it will treat mandating and non-mandating rightholders alike. It must therefore make "commercially reasonable efforts" to locate, contact, and make payment to non-mandating rightholders, and inform of their rights to opt out of the licensing scheme

EXAMPLES OF LARGE-SCALE DIGITISATION PROJECTS AND SUPPORTING LEGISLATION

Negotiated solutions between stakeholders, based on voluntary collective licensing schemes supported by ECL, or a similar legal technique, to facilitate large-scale digitisation projects, already exist in several countries⁶. They have long been in place in the Nordic countries Denmark, Finland, Iceland, Norway and Sweden⁷, for instance in the Norwegian 'Bookshelf' service (*Bokhylla.no*), designed to provide online access to literature published in Norway before 2001. This service is based on an agreement between the National Library of Norway and Kopinor, the Norwegian RRO. When completed in 2017, it will eventually cover some 250,000 books published in Norway before 2001, to be made available online by the

⁶ See: U.S. Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, 35 (Oct. 2011) .

⁷ See: Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283-306 (D. Gervais, ed., 2d ed., 2010) (same).

Norwegian National Library for consultation on the screen by anyone with a Norwegian IP address⁸. Books not protected by copyright may also be downloaded.⁹

The ECL has also been introduced for large-scale digitisation projects in the UK (although no actual licenses have yet been issued), and France¹⁰ and Germany¹¹ have adopted legislation, similar but not identical to the ECL, which allows for the inclusion of works of non-mandating rightholders, with a right for authors and publishers to opt out, for certain types of large scale digitisation.

The French initiative covers the digitisation and making available of French out-of-commerce works, i.e. works, which are not commercially distributed by a publisher, and are no longer published in print or digital form, first published in France between 1900 and 1 January 2001.¹² The collective rights administration is performed by IFRRO member SOFIA. The German law on orphan and out-of-commerce works, explicitly implementing the EC facilitated MoU on German out-of-commerce works, enables publicly accessible libraries and similar institutions to digitise and make works available online, under voluntary collective licensing agreements with the German RROs VG Wort (for text) and VG Bild-Kunst (for images) published in Germany before 1 January 1966.

Our experience is that broad stakeholder dialogues and piloting, with the involvement of the representative organisations, is a constructive way to explore solutions for challenges in the copyright sector. In the case of large-scale digitisation projects and the use of ECL, this approach can, in addition, benefit from and benchmark against a large number of relevant initiatives in other countries. It is an approach, which may well prove to work in the U.S.A.

We thank you for taking IFRRO's comments into consideration in the further work on the consultation. We will be pleased to provide additional comments, information and explanation, and expand on this submission, as required.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Olav Stokkmo'.

Olav Stokkmo
Chief Executive and Secretary General

⁸ <http://www.ifrro.org/content/norway-%E2%80%93-bookshelf-service>

⁹ See Vigdis Moe Skarstein, *The Bookshelf: digitisation and access to copyright items in Norway*, available here: <http://www.deepdyve.com/lp/emerald-publishing/the-bookshelf-digitisation-and-access-to-copyright-items-in-norway-dObAXq0U1D>

¹⁰ <http://ifrro.org/content/french-parliament-passed-law-out-commerce-works-22nd-february-2012>

¹¹ https://www.vgwort.de/fileadmin/pdf/allgemeine_pdf/out_of_commerce_law_2013.pdf

¹² See Andre Lucas & Pascal Kamina, *France*, § 8[2][e][iv], in I P.E. Geller & M.B. Nimmer, *INTERNATIONAL COPYRIGHT LAW & PRACTICE* (2013).