Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	Docket No. 2015-3
Mass Digitization Pilot Program	)	

COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
IN RESPONSE TO JUNE 9, 2015 NOTICE OF INQUIRY

The National Music Publishers' Association ("NMPA"), the trade association representing the interests of music publishers of all sizes in the United States, appreciates this opportunity to offer comments in response to the Copyright Office's Notice of Inquiry on the proposed Mass Digitization Pilot Program ("Pilot Program"). 80 Fed. Reg. 32614.

NMPA works to protect the interests of music publishers and their songwriting partners and serves as the leading voice of the American publishing industry in Congress and the courts. As such, NMPA would like to reiterate its position raised in earlier rounds of comments submitted regarding mass digitization that musical works would be an inappropriate category of work for inclusion in the Pilot Program, any extended collective licensing ("ECL") program or any long-term codified mass digitization law. *See* National Musical Publishers' Association and the Harry Fox Agency Comments, Submitted in Response to U.S. Copyright Office's February 10, 2014 Notice of Inquiry at 7-16. Unlike certain categories of works that may be more appropriate for inclusion in the Pilot Program or ECL, such as photographs, extensive licensing frameworks for music are already in place to ensure that any party wishing to include musical works in a mass digitization project, has the ability to do so through pre-existing licensing

platforms. Therefore, there is little risk that musical works will not be available for mass digitization projects.

NMPA applauds the Copyright Office's decision not to include musical works in the proposed Pilot Program. However, as the current Pilot Program proposal would be applicable to (1) literary works; (2) pictorial or graphic works published as illustrations, diagrams or similar adjuncts to literary works; and (3) photographs, the Copyright Office should explicitly clarify that certain embodiments of musical works are explicitly excluded from the three defined categories above. Specifically, the Copyright Office should exclude all forms of written musical notation and lyrics, whether as stand-alone sheet music, music folios, music notation or lyrics reproduced as part of a book or any other physical or digital embodiment, as well as any visual representation of the musical notation and/or lyrics as a pictorial work or even embodied in a photograph (e.g., a photograph of music notation). As with all categories of musical works, music folios, lyrics, and other forms of musical notation or stand-alone lyrics, in physical or digital form, are already widely accessible for licensing to the public and are inappropriate for inclusion in the Pilot Program. A substantial number of resources currently exist for users to access and license musical works, whether embodied in sound recordings on music streaming services like Spotify, synched to user-generated content on platforms like YouTube, or displayed as lyrics or sheet music on lyric and sheet music websites, all of which are legally available as the result of the establishment and success of the various licensing portals available to those using musical works.

However, if the Copyright Office subsequently considers expanding the scope of works after the proposed initial five-year term of the Pilot Program or otherwise proposes broader ECL legislation, NMPA would appreciate the opportunity to provide input on any proposed or

contemplated legislation that could potentially impact music publishers or their songwriting partners.

Notwithstanding, because the Copyright Office has asked for input on questions raised in the NOI generally, and in the event the Copyright Office seriously considers including music in any future legislative proposal after the pilot program concludes, NMPA would like to address the most important, but not all of the concerns NMPA has as the Copyright Office implements, monitors, and assesses the test program:

A. If music is ultimately included, incentives should be provided whereby focus is placed on using only commercially unavailable or out-of-commerce musical works for inclusion in a mass digitization project. Furthermore, any mass digitization project should only be for non-commercial use, and should be limited to traditional users of non-commercial material, like students, library/archive staff and employees of the digitizing institution. This has been suggested as a baseline threshold for the test program, but as suggested below, the limiting definitions are in many instances hard, if not impossible to apply uniformly.

B. The Copyright Office should mandate that all mass digitization projects must include terms and conditions requiring the user to implement and reasonably maintain adequate digital security measures, either mandated in the law or as a regulation. This issue is similar to the concerns raised with cloud services regarding adoption of necessary protections or disincentives against subsequent unauthorized infringing activity of newly created digital collections of musical works, like a cloud service individual music depository.

C. If the authorized CMO and the user are unable to agree on licensing terms, an independent arbitrator, not the Copyright Royalty Board, should determine the royalty rate. Furthermore, the Copyright Office should require a high degree of due diligence when users

search for copyright owners, but such due diligence standard should only be adopted after meaningful consultation with other Mass Digitization stakeholders, including NMPA and other music publishing stakeholder groups, should ECL legislation be expanded to cover music.

D. As a general matter, the Copyright Office should not promote development of "opt-out" licensing programs. As a matter of public policy, and in light of the recent push-back against the Google Book settlement by the courts and stakeholders programs, as much as possible, should incorporate an "opt-in" approach- not an "opt-out" approach. *See* The Authors Guild, et al., v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (finding that the proposed settlement ("ASA") "is not fair, adequate, and reasonable. As the United States and other objectors have noted, many of the concerns raised in the objections would be ameliorated is the ASA were converted from an 'opt-out' settlement to an 'opt-in' settlement. I urge the parties to consider revising the ASA accordingly.") In this regard, the Copyright Office should consider, if possible, use of works only if there is a pre-approval by copyright owners of their inclusion in the mass digitization project.

E. Even though the Copyright Office promotes inclusion of a "fair use" savings provision in any proposed legislation and as part of the pilot program, the Copyright Office should, again as a matter of public policy, take a definitive position pushing back against any expansion of fair use, either legislatively or through the courts, or indirectly because of the adoption of an ill-defined mass digitization law. As mentioned in the Copyright Office's Report on Orphan Works and Mass Digitization, some users believe that an ECL type of solution would weaken fair use because it would mandate a royalty payment even if a fair use defense arguably exists. *See* U.S. Copyright Office, Report on Orphan Works and Mass Digitization at 101 (2015). This view turns the problem on its head. Copyright owners reject the view that mass digitization

is "fair use" and specifically reject the recent change in the standard in the 2nd Circuit whereby fair use will be found if a "public good" is present. *See* The Authors Guild v. Google, Inc., 954 F.Supp. 2d 282, 293 (S.D.N.Y. 2013) (holding that the Google Books mass digitization program, despite making unauthorized copies of millions of books, is entitled to a fair use defense, as "In my view, Google Books provides significant public benefits.") A mass digitization legislative solution should not indirectly be expanded because a court unilaterally changes the contours of "fair use" copyright law by writing out of the "fair use" analysis the requirement that there be no economic impact on the copyright owner.

F. Despite the points raised in the Copyright Office Report regarding the WIPO "three step" test, NMPA continues to have serious concerns that the ECL or any mass digitization program may violate the WIPO "three-step" test because of the definitional uncertainty associated with non-profit educational or research purposes. There is a fuzzy and constantly changing line separating commercial and non-commercial use in today's copyright ecosystem. As such there is a compelling argument that, even though the use might be confined to certain special cases (the first factor in the three step test), the use nevertheless conflicts with the normal exploitation of the work and unreasonably prejudices the legitimate interests of the rightsholder – thus violating two of the three requirements for compliance with the test. In light of this, the Copyright Office should pay close attention to this issue as it engages in the pilot program.

While the above comments provide a brief overview of potential issues raised by the Pilot Program, NMPA looks forward to the opportunity to continue its involvement as the Copyright Office addresses the issue of mass digitization, particularly if the Office considers

proposing expanded ECL legislation that might more directly affect music publishers and their songwriter partners.

Respectfully submitted,

Danielle Aguirre
Senior Vice President & General Counsel
National Music Publishers' Association
975 F Street, NW
Suite 375
Washington, DC 20004
daguirre@nmpa.org

Natalie Madaj
Counsel, Licensing and Enforcement
National Music Publishers' Association
975 F Street, NW
Suite 375
Washington, DC 20004
nmadaj@nmpa.org

Jay Rosenthal
Mitchell Silberberg & Knupp
1818 N Street, NW
8th Floor
Washington, DC 20036
jar@msk.com

October 9, 2015