

Dear Ms Pallante:

I am a writer, inventor and composer, the co-creator of numerous products, including award-winning collaboration tools (for example, the Polycom SoundStation and ShowStation audio and visual conferencing systems). I count myself lucky to live in an era of such unprecedented access to works spanning many eras and regions and am deeply concerned at the potential, even likelihood, of contemporary works being lost forever because of poor planning, unreasonably possessive protection policies, ambiguous and undependable rules, and overenthusiastic enforcement.

In the words of Dr. Cory Doctorow, I'm also frustrated by collateral damage arising from the abolition of formalities for copyright registration, coupled with the extension of copyright terms. These two facts mean that much of the ephemera that tells the stories of everyday people from bygone eras are *automatically* copyrighted, with no visible rightsholder. They're orphan works, without any significant commercial value, but nevertheless protected by the "author's monopoly" for periods that will certainly outlast my life -- and my daughter's. In many (if not most) cases, it's likely that all extant copies will have vanished before they return to the public domain.

I'm a great fan of blanket licensing schemes as least-worst (and sometimes the best) way to resolve copyright deadlocks. I relish the odd cover versions in my record collection, love my cable TV, and I'm happy that clubs can hold open-mic nights where anyone can play any song. So I was excited to hear that the Copyright Office was contemplating a system of blanket licenses through extended collective licensing.

But as I have read and reflected on the U.S. Copyright Office report on Orphan Works and Mass Digitization, the harder it is to imagine how the five year pilot program you imagine for literary works (does this include software, too?), illustrations in books, and photographs can really work.

Problems with the USCO Proposal:

First: The ECL as presently construed is inhospitable to orphan works, since it provides no way to manage payments for their uses. Consequently, if archives want to make their scanned collections available, they have to limit themselves to non-orphan works. But orphan works are the crux of the problem that blanket licenses try to solve: excessive transaction costs. Collectively, orphan works represent a cultural treasurehouse; but any single work has a value that likely approaches zero, and could cost thousands to clear for use in an archive. Even figuring out which works are orphans and which ones have a visible rightsholder -- so that orphans may be excluded -- would be prohibitively expensive. Any significant archival research immediately turns up more orphans than non-orphans, no matter what the collection.

Next: Those using the ECL may not apply it to works that are still commercially available, or, perhaps, works whose authors have opted out. There's no way to know, a priori whether a work has is commercially available or whether an author has opted out -- it's easy to check whether a work is in Amazon, say, but not finding it there does not mean that the work isn't still in the stream of commerce. Even if a work is determined to have no commercial life, that is no guarantee that it won't be revived tomorrow meaning that its presence in an archive becomes illegal. Likewise, an author who has not opted out today might do so tomorrow. An ECL must give downstream users certainty. Not knowing which works may be included under the license, and having no way of knowing from instant to instant whether that initial determination still stands makes the ECL impossible to use -- and more importantly to value as a commercial product. How can a licensee know if they are paying a fair rate when the catalog under license can never be enumerated, and when all works are subject to removal without notice?

This also means that all subsequent works anywhere must be monitored - essentially, forever - and re-created if a referenced unprotected work changes status to "protected:" clearly, an impossible task, yet mandatory under the USCO proposal.

Next: There's the question of commercial activity. The ECL proposal prohibits archives from undertaking commercial efforts to pay the license fee. This means that libraries and archives need to find new

money -- which seems unlikely in this climate of austerity -- to pay the fee, and it bars them from doing anything to fundraise for this purpose. For example, a large university archive couldn't offer its patrons the right to plunk down \$10 to have a work scanned and cleared, in exchange for getting their names embedded in the scans as the donors who made the work available.

For the USCO to intercede in the methods by which organizations manage their funding is intrusive, ridiculous, invasive and probably illegal. I also doubt that the USCO could even do this effectively and fairly without adding staff and raising its expenses, all for an effort with no provable benefit but many downsides.

Finally: If all of that weren't enough, there's the fact that this is a pilot program, and there's no guarantee that it will be extended. It asks some of the most desperately underfinanced public institutions in our society to invest significant capital into a project that could be summarily shut down in three years, taking all that work with it. I want an ECL. I want it for my own work as a writer, and I want it for my posterity. I didn't miss all those family moments and endure all that rejection just to be forgotten by history a few years after my death (or before). The odds aren't good for authors, historically: we are forgotten far more than we're remembered. I want my work to live on in archives and libraries, to be available to scholars and researchers in perpetuity.

Proposal:

Again, largely in the words of Dr. Doctorow, here's a better way for us to do this, and how I hope you'll end up doing this as the next stage in the evolution of this work:

> Open ECL Management: Mandate that ECLs be managed with the transparency of free software projects like GNU/Linux and the statistical nous of Google. Every line on its books should be open, its software should be free and open and community-managed, and its overheads should never exceed more than a few percentage points of its total budget.

> Recognize modern realities of the collecting task: Decades ago, collecting societies did something hard: today all they do is perform

mathematical operations on databases. If the collecting society needs more than 5 or 6 employees, something is wrong. Every penny trousered by the collecting society's administrators is a penny denied to the authors it represents. Make its directors representative of all types of authors, not just the commerce-oriented minority that I hail from -- university archives and libraries are primarily full of scholarly writers, who have completely different relationships to their publishers, readers, and copyrights to writers like me.

> Uniform coverage: Have the license cover all published works found in archives, period. If you must exclude works, require rightsholders to clearly enumerate those works, in electronic form.

> Enforce legitimacy of claims: Make false representations about having the right to control a work punishable as a form of perjury -- none of this DMCA-style business where anyone can claim to be an author's representative and order a takedown with no penalties for being sloppy. This issue has become a major obstruction in the constructive use of America's patent system through the actions of patent trolls, and in our digital copyright protection through the unreasonable broadening of its scope to include tractor software and refillable ink cartridges through the actions of copyright trolls.

> Define deadlock resolution: In the event that the writer and publisher both claim the rights to payments under the license, ask Congress to mandate a 75/25 split in the writer's favor.

> Add value by publicly tracking the status of orphan works: Publish a list of orphan works ranked by usage to make it easy for writers' organizations to figure out which creators are worth locating

> Solve the problem of orphan works by statute: create a notice-and-takedown procedure (with appropriate penalties for abuse, see above) for removal of digitized works in publicly available online archives that are erroneously believed to be unpublished.

> Comprehensively cover data-mining, indexing and search under the license terms

The US does not have a collecting society that currently issues blanket licenses for authors of literary works. Of the author organizations that exist in the US, I'd trust the Authors Alliance to do the right thing over other organizations.

Please take this under consideration. As Dr. Doctorow says, the dream of a blanket license for our collective cultural heritage is beautiful. This implementation is more likely to make the situation worse, and I hope you will adopt these recommendations through your continued process of consideration and revision.

Thank you,

Jeffrey Rodman

Founder and Fellow, Polycom Inc.

Writer and creator, numerous blogs, 40 patents, visual designs

Composer and producer, Rich Inner Life and over 100 songs