The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

September 29, 2017

Dear Chairman Grassley and Ranking Member Feinstein:

The U.S. Copyright Office has completed its consideration of the current viability of establishing a pilot program to facilitate certain types of mass digitization projects through extended collective licensing ("ECL"). The Office recommended consideration of such a program in a June 2015 report to Congress and subsequently invited public comment to help develop specific implementing legislation. Based on the input received from stakeholders, and for the reasons discussed below, the Office concludes that any proposed legislation in this area would be premature at this time.

As the Office has noted previously, ECL is a market-based system and therefore can succeed only where there is significant voluntary stakeholder participation.[1] Under ECL, the government authorizes a collective management organization ("CMO") to negotiate licenses for a class of works or a class of uses, and those negotiated licenses apply to CMO members and non-members alike. Thus, without interest from both copyright owners and prospective licensees, even a limited pilot ECL program could not achieve its goals. In this proceeding, public comments submitted in response to the Office's *Federal Register* Notice of Inquiry ("NOI")[2] revealed that stakeholders currently have limited interest in an ECL program for mass digitization. Additionally, even among ECL supporters there is a lack of consensus on key elements of such a program. The Office thus concludes that there currently is insufficient stakeholder agreement to warrant submission of proposed legislation to Congress.[3]

Though the Office is not presently recommending statutory changes, we still believe that the establishment of an ECL framework in the United States could benefit the copyright system by facilitating certain publicly beneficial mass digitization projects. Therefore, we are providing the analysis below as a starting point for any future stakeholder discussions aimed at

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[1] *See* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 7 (2015) ("ORPHAN WORKS AND MASS DIGITIZATION"), *available at* https://www.copyright.gov/orphan/reports/orphan-works2015.pdf (stating that stakeholder input "is critical . . . given that the proposed system is premised on voluntary participation").

[2] Mass Digitization Pilot Program; Request for Comments, 80 Fed. Reg. 32,614 (June 9, 2015).

[3] In connection with its copyright review process, the House Judiciary Committee has expressed an interest in focusing on copyright legislation that has broad-based support. *See* Goodlatte & Conyers Release First Policy Proposal of Copyright Review, Press Release (Dec. 8, 2016), *available at* https://judiciary.house.gov/press-release/goodlatte-conyers-release-first-policy-proposal-copyright-review/ ("We intend to periodically release policy proposals on select, individual issue areas within the larger copyright system that are in need of reform where there is a potential for consensus.").

developing a consensus-based proposal for an ECL program in the United States. The following discussion surveys the landscape of public comments, identifies key elements of an ECL system, and highlights the issues worth focusing on in future stakeholder dialogues. It draws particular attention to specific questions related to the types of projects to be covered, procedures for determining ownership of digital rights, end-user access requirements, security obligations, dispute resolution processes, royalty distribution, and fair use.

We stand ready to work with Congress and interested stakeholders to develop legislation in the event sufficient interest develops. The Office, for example, would be willing to convene stakeholder forums to facilitate consensus on specific provisions of the legislation. In the meantime, the discussion below should aid Congress and interested parties in identifying the current range of views on various aspects of ECL.

1. Background

Recent technologies have made possible the large-scale digital copying of books and other copyrighted works; such efforts often are referred to as "mass digitization" projects. "Mass digitization" is not a self-defining phrase, and there is no generally agreed-upon standard for the point at which digitizing copyrighted works becomes a mass digitization project. In general, the Office uses the term "to refer to projects in which the scale of digital copying is so extensive as to make the individual clearance of rights a practical impossibility."[4] Mass digitization can serve a variety of valuable functions, such as preservation, text and data mining, and facilitation of wider access to copyrighted works, including for disadvantaged populations and the visually impaired.[5] But because of the sheer number of works involved, identifying and individually negotiating licenses with the owners of the copyrights in the works is often infeasible.[6]

In the United States, two well-known examples of mass digitization arose out of the Google Books project.[7] Beginning in 2004, Google reached agreements with libraries to scan whole copies of millions of books, many still protected by copyright. Google used the digital copies to create an online research tool that returned "snippets" of the books' text in response to search queries. In a related project, Google provided copies to members of a consortium of colleges, universities, and other nonprofit institutions known as HathiTrust. The HathiTrust Digital Library allowed members to use the copies for three purposes: (1) to create a database allowing

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[4] ORPHAN WORKS AND MASS DIGITIZATION at 73.

[5] *See, e.g., Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011) ("Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart buried in library stacks—will be preserved and given new life.").

[6] *See* ORPHAN WORKS AND MASS DIGITIZATION at 72.

[7] *See Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

members of the public to search for particular terms, (2) to provide full-text access to patrons with certified print disabilities, and (3) to create replacement copies under certain circumstances.[8] In response to each project, authors and publishers sued, arguing that the projects violated their exclusive rights under the Copyright Act. In both instances courts found the mass digitization project to be protected by the fair use doctrine.[9] Key to the fair use finding in each case was the fact that the project at issue did not allow access to the full texts of the works by the general public.[10]

The Copyright Office first began an inquiry into mass digitization with a 2011 discussion document and preliminary analysis.[11] That document surveyed the then-existing landscape for mass digitization of books. It raised several policy questions, such as how to apply existing copyright treatment of mass digitization to works that are "born digital"; whether the law should treat mass digitization by nonprofits and public institutions differently than that by private for-profit entities; and whether Congress ought to encourage mass digitization through legislative action or instead leave mass digitization to the marketplace.[12] Then in 2012 the Office began a comprehensive study looking at the overlapping issues of mass digitization and orphan works,[13] culminating with the June 2015 publication of a report entitled *Orphan Works and Mass Digitization* (the "Report"). The Report examined how the existing provisions of copyright law may hinder the development of mass digitization projects in which there is a substantial public interest and considered potential voluntary and legislative solutions.

During the study's public process, some participants expressed interest in an ECL system for facilitating mass digitization projects. Though the United States lacks experience with ECL, such systems have a long history in many European countries. The Report looked carefully at these systems, discussing both the longstanding ECL frameworks in Nordic countries, as well as the recent adoption of ECL-like systems in France, Germany, and the United Kingdom.[14] The Report also considered several alternative approaches for helping to facilitate mass digitization

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[8] *HathiTrust*, 755 F.3d at 91–92.

[9] *See Google*, 804 F.3d at 229; *HathiTrust*, 755 F.3d at 103. *See also* 17 U.S.C. § 107 (codifying the judicial doctrine of fair use). The *HathiTrust* court did not resolve whether the use of the works for creation of replacement copies constituted fair use. *See* 755 F.3d at 103–04 (remanding for consideration of plaintiffs' standing to raise preservation issue).

[10] *See Google*, 804 F.3d at 216–18 (stating that Google Books does not provide full text but "provides the searcher with snippets containing the word that is the subject of the search"); *HathiTrust*, 755 F.3d at 91–92 (stating that HathiTrust "does not display to the [general public] any text from the underlying copyrighted work").

[11] *See* U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011) ("LEGAL ISSUES IN MASS DIGITIZATION"), *available at* https://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

[12] LEGAL ISSUES IN MASS DIGITIZATION at 15–16.

[13] Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555 (Oct. 22, 2012).

[14] ORPHAN WORKS AND MASS DIGITIZATION at 18–19, 25–30.

projects, but it concluded that ECL "is the best answer to solving the mass licensing that is inherent to mass digitization."[15]

The Report recommended that "to garner experience with ECL in the United States," Congress consider adopting a pilot program limited to a narrow class of uses.[16] The Office did not provide a formal legislative proposal, but proposed general elements for the ECL pilot program. First, the Office suggested that ECL would be most appropriate for literary works, pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works, and photographs.[17] Second, the proposal would not limit "the categories of users who may engage in mass digitization activities, but [would] limit permissible uses to those undertaken for nonprofit educational or research purposes and without any purpose of direct or indirect commercial advantage."[18] The Office proposed a number of additional elements as well, including opt-out procedures, a dispute resolution mechanism, the implementation and maintenance of adequate security measures, CMO approval and oversight processes, royalty distribution standards, a fair use savings clause, and a sunset clause.

On June 9, 2015, the Office issued an NOI soliciting public comments to help further shape a legislative proposal based on stakeholder input. The Office received eighty-three written comments, from a variety of interested parties, including licensing organizations, public interest groups, rightsholder associations, individual copyright owners and users, and libraries and archives, both physical and online. In most instances, the comments only responded to some of the NOI's questions. The discussion below focuses on those commenters who offered feedback on specific elements of the Office's proposed pilot program.

2. Stakeholder Feedback[19]

Generally, the ECL proposal had the most support among rightsholders and the least support among libraries and archives.[20] Roughly twenty-two commenters—representing copyright owners, CMOs, user groups, and other interests—either supported or at least did not oppose an

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[15] *Id.* at 83.

[16] *Id.* at 83.

[17] *Id.* at 84.

[18] *Id.* at 89.

[19] All subsequent references to "Comments" are to written comments received in response to the June 9, 2015 NOI. These are available on the Copyright Office website at https://www.copyright.gov/policy/massdigitization/comments/.

[20] Some commenters said they would only support an opt-in ECL. *See, e.g.*, Getty Images Comments at 1; National Music Publishers' Association ("NMPA") Comments at 4. But an ECL by definition must be opt-out—otherwise it could not apply to members and non-members alike. As a threshold matter, the Office believes that stakeholders must be amenable to an opt-out system before moving on to discussing and negotiating key second-level issues.

ECL program, though not necessarily in the form proposed by the Office.[21] In general, even commenters expressing support for ECL disagreed on numerous aspects of such a system. For example, substantial differences exist regarding the types of projects that commenters thought should be covered by the ECL pilot. The majority of commenters, however, opposed any ECL program.[22]

Collectively, the comments sketched a landscape of the aspects of ECL that appear to matter most to stakeholders, and where they are furthest apart. The biggest areas of attention appeared to be the size of qualifying collections and the works that would be included; if and how access would be provided to the general public; the baseline security requirements; and the likelihood of finding appropriate CMOs.

A. Qualifying Collections

Among those favoring an ECL program, the widest support was for a system that sets a loose minimum threshold for the number of works a collection must contain,[23] is not limited to works published before a specific date,[24] but is limited to out-of-commerce works.[25] Copyright owners expressed concern that the inclusion of works still in commerce could harm the value of those

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[21] *See, e.g.*, Association of American Publishers ("AAP") Comments at 2; SESAC Comments at 1; Stanford University Libraries Comments at 2–3.

[22] *See generally, e.g.*, American Association of Law Libraries ("AALL") Comments; American Society of Illustrators Partnership Comments; Authors Alliance Comments; Creative Commons Comments; HathiTrust Comments; Internet Archive Comments; Library Copyright Alliance Comments; National Writers Union ("NWU") & Science Fiction and Fantasy Writers of American ("SFFWA") Comments; Pamela Samuelson Comments; Society of American Archivists Comments; University of Michigan Copyright Office Comments.

[23] *See* Authors Guild Comments at 6; AAP Comments at 3; Copyright Alliance Comments at 3; Copyright Clearance Center ("CCC") Comments at 8; Digital Media Licensing Association ("DMLA") et al. Comments at 4; Kernochan Center for Law, Media, & the Arts ("Kernochan Center") Comments at 2–3; Barron Oda & Katherine E. Lewis Comments at 3; Software & Information Industry Association ("SIIA") Comments at 6.

[24] Authors Guild Comments at 7; Author Services, Inc. Comments at 2; CCC Comments at 9; Janice T. Pilch Comments at 3; Oda & Lewis Comments at 3; SIIA Comments at 7.

[25] *See, e.g.*, Intellectual Property Owners Association ("IPO") Comments at 2 ("IPO notes . . . that the Pilot program focuses on 'out-of-commerce' works for non-profit (education and research) purposes. . . . These limitations make sense for an initial effort . . . ."); Center for Democracy and Technology ("CDT") Comments at 8 ("The in-print/out-of-print distinction is administrable and the case for an ECL regime for out-of-print works is apparent as there is currently no widespread marketplace solution for facilitating digital access to out-of-print books."); SIIA Comments at 7 ("[T]he default should be that only out-of-commerce works are eligible for the ECL."). *But see* Association of Medical Illustrators ("AMI") Comments at 3 (arguing that that "the distinction of out-of-commerce has little relevance to the visual components in a collective work," because even where the collective work (*e.g.*, a medical book) goes out of print, the pictures contained therein may remain available for future licensing).

works by "interfer[ing] with existing digital markets."[26] Some commenters, however, suggested that in-commerce works could be included provided there were additional use restrictions not applicable to out-of-commerce works.[27] The Association of American Publishers, for example, expressed openness to including in-commerce works for "search-only or small excerpt display, on a project-by-project basis."[28] The Copyright Clearance Center, meanwhile, indicated that the market likely would resolve this issue, noting that "[t]he details of how in-commerce works should be addressed would be an element of the negotiation" between a CMO and interested users.[29] And one commenter, the Society of American Archivists ("SAA"), stated that while it thought ECL "might be more efficient" for *in-commerce* works, out-of-commerce works "are better handled through other, less expensive, means," such as fair use.[30]

A few commenters also addressed whether to limit the program to published works. In the Report, the Office advised against covering unpublished works in the ECL framework.[31] Two commenters argued that this limitation would make ECL less effective for archives, libraries, and historical societies, which often hold documents and photographs that "are 'unpublished' in the sense that copies have not been commercially distributed in the U.S. marketplace."[32] These commenters, however, shared the Office's conclusion that including unpublished works

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[26] Authors Guild Comments at 3; *see also* SIIA Comments at 7 ("[I]f remote access to the digitized works is permitted . . . then the potential to significantly devalue the digitized works—whether through piracy or competition with existing commercial offerings of the work—is so significant that including in-commerce works would be unacceptable.").

[27] For example, following the model in the European Union, in-commerce works could be defined as works being offered for sale or distributed new, from sellers through customary channels of commerce to purchasers in the United States. *See* Memorandum of Understanding from EU Single Market Stakeholder Dialogue, Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (Sept. 20, 2011), *available at* http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm.

[28] AAP Comments at 4; *see also* DMLA et al. Comments at 4 ("If it were readily possible to identify works that are no longer in commerce . . . the Pilot Program could be expanded to include broader use by the public for the out of commerce work, with an ability for authors and representatives to correct any misidentification.").

[29] CCC Comments at 9.

[30] Society of American Archivists ("SAA") Comments at 3 ("SAA can conceive that collective licensing of in-commerce works might be more efficient than negotiating with a number of individual publishers. Out-of-commerce and orphan materials, however, are better handled through other, less expensive, means.").

[31] ORPHAN WORKS AND MASS DIGITIZATION at 84–85.

[32] Samuelson Comments at 7; *see also* SAA Comments at 2 ("Archives almost always consist of a combination of published and unpublished material.").

in an ECL program would be unworkable.[33] Most commenters who addressed the issue agreed that unpublished works should not be included.[34]

Commenters raised numerous other issues that would need to be addressed in defining qualifying collections. For example, some commenters questioned whether the program would extend to born-digital works or to works previously digitized by another user.[35] Others debated the Office's recommendation that ECL be limited to projects undertaken without any purpose of direct or indirect commercial advantage, with some commenters arguing that such a requirement would unduly narrow the universe of potential licensees.[36] These issues received limited attention in the comments, but future discussion should not ignore them.

In sum, should Congress wish to pursue ECL legislation in the future, there are several outstanding issues concerning the program's basic scope that would require resolution. Chief among these are the definition and treatment of in-commerce works, the limits of any exclusion on projects providing a commercial benefit, and the treatment of born-digital and previously digitized works.

B. Eligibility and Access

In the NOI, the Office requested comment regarding "any appropriate limitations on the end-users who should be eligible to access a digital collection under a qualifying mass digitization project."[37] Most commenters supported permitting remote access for institutional affiliates of

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[33] *See* Samuelson Comments at 7; SAA Comments at 2–3.

[34] *See, e.g.*, National Press Photographers Association ("NPPA") et al. Comments at 4 ("[I]t is essential that any mass digitization authorization be limited to works that are already published, and that unpublished works not be eligible for the program."); Oda & Lewis Comments at 2 ("The Office explained that restricting the pilot program to published material would help with the commercial valuation of licenses while respecting a creator's exclusive 'dormant' right of determining when to publish his or her work. We agree with the Office's position . . . ."); SIIA Comments at 8 ("[T]he program should also be limited to published works.").

[35] Authors Guild Comments at 6 ("[W]e feel strongly that the pilot program should not be limited to digitization projects undertaken specifically for the pilot program: preexisting digitized collections should also be eligible."); IBM Corporation ("IBM") Comments at 4 (arguing that the "large body of existing digital information . . . would greatly contribute to the value and success of the program"); Copyright Alliance Comments at 3 (stating that "by definition, mass digitization involves the transformation of works from traditional analog or print form to digital form" and thus "[i]n no event should works that are already in digital form be available for ECL"); Getty Images Comments at 2 ("[A]ny work that has already been digitized should be excluded."); SAA Comments at 5–7 (opposing an ECL that includes works already in digital form).

[36] *Compare* Getty Images Comments at 2 (describing the limitation as "imperative"), *with* IBM Comments at 2 ("Rather than enabling greater benefits, the indirect commercial purpose limitation will, in effect, limit users almost exclusively to traditional non-profit organizations, such as libraries or archives.").

[37] Mass Digitization Pilot Program, 80 Fed. Reg. at 32,615.

the licensee (*e.g.*, faculty, staff, and students),[38] though many other commenters were vague on this point.[39] On the other hand, commenters were clearly divided about whether and how to permit access by the general public. Several commenters supported allowing some form of public access, either remotely[40] or through dedicated, on-site computer terminals.[41] Others would not permit any general public access.[42] The majority of commenters' positions did not fit

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[38] Artists Rights Society ("ARS") Comments at 4 ("[A] library serving a university or research institution might be permitted under a site license to provide online access through an intranet to students, faculty and researchers in such institutions."); Authors Guild Comments at 8–9 ("A qualified university . . . should be able to buy a subscription offering offsite printing to its affiliates so long as that offsite access is paid for and measures are in place so that the remote access is secure."); CDT Comments at 9 (arguing that "restricting how and where [individuals] may access [a work pursuant to an ECL] would significantly limit the value . . . in participating in an ECL regime"); DMLA et al. Comments at 4 ("If a secure system is established, the Associations would be more comfortable with allowing qualified users remote access, as the ability to access works for research without the burden and expense of traveling for on premises review is the significant benefit of creating digital copies."); Internet Archive Comments at 3 ("[T]he ECL proposal seems to limit digital access to those who largely already have it . . . rather than expanding access to underserved communities without large institutional libraries nearby."); Oda & Lewis Comments at 4 ("Acknowledging the growing urge to grant virtual visitors access to institution collections, we recommend that the Office establish minimum technology requirements for any digital collections open to remote access. . . ."); Pilch Comments at 4 ("Licensees should be permitted to offer access to an ECL-licensed collection remotely."); SAA Comments at 4 ("At a minimum, any license must allow remote access to a designated user community."); Wikimedia Foundation Comments at 8 ("[I]t is critical that digitizing institutions be permitted to offer remote access to a collection, and not be restricted to providing access only through on-site computer terminals.").

[39] *See, e.g.*, AAP Comments at 5; American Intellectual Property Law Association ("AIPLA") Comments at 2; American Society for Collective Rights Licensing Comments at 5–6; Author Services Comments at 2 ("This is going to depend on who the end-users are going to be and what they are going to use them for . . . ."); Michael Bradley Comments at 2; CCC Comments at 9–10 ("[I]t is difficult to assess the reasonableness of such limitations without further information about the nature of the use proposed and the nature of (and any existing market for) the copyright rights in question."); Getty Images Comments at 2 ("Who should have access to digitized copyrighted works will depend on the nature of the intended educational or research use."); IPO Comments at 2; NMPA Comments at 3; NPPA et al. Comments at 5; SIIA Comments at 8; Stanford University Libraries Comments at 3. *But see* NWU & SFFWA Comments at 14 ("Access restrictions would not rescue the illegality and inappropriateness of ECL for digital rights.").

[40] *See* SAA Comments at 3–4 ("Restrictions on eligibility and access would defeat the purpose of ECL, which presumably is to allow uses of works that would not otherwise be fair."); Wikimedia Comments at 8 ("[A]ccess to digitized materials should not be limited to . . . people who are able to travel to use the digitized resources at an on-site computer terminal.").

[41] *See* ARS Comments at 5 ("[I]n the case of public libraries access should be limited to computer terminals physically located in the library."); Kernochan Center Comments at 5 ("A better means by which to allow a university to serve the local community would be to allow the university to permit access to the public from terminals on the premises of the library.").

[42] *See* NMPA Comments at 3 ("[A]ny mass digitization project . . . should be limited to traditional users of non-commercial material, like students, library/archive staff and employees of the digitizing institution.");

neatly into any of these categories. Several commenters stated that access should vary by project and by institution.[43] These commenters did not provide specifics on the factors they believe should be relevant in this analysis, but generally cautioned against, as one commenter said, "a one-size-fits-all standard [that] is likely to be too restrictive to gain the benefits that are possible" through an ECL system.[44]

The Office agrees with the majority view that an ECL program should allow for remote access by affiliates of a licensee institution in at least some circumstances. To confine access to the physical premises of the licensee would substantially diminish one of the fundamental benefits of mass digitization, which could have the counterproductive effect of limiting the number of entities willing to pay for a license.[45] The Office further agrees that an ECL program should permit CMOs and users to negotiate licenses that would provide for access by the general public at least on the licensee's premises. Whether the legislation should also permit *remote* access by the general public is a more contested issue that would require further stakeholder dialogue in conjunction with the security issues discussed next.

C. *Security Requirements*

The Report recommended that an ECL licensee be "obligated as a condition of its license to implement and reasonably maintain adequate security measures to control access to its digital collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works."[46] In response to the NOI, however, there was little agreement about the specific security standards and technologies that mass digitizers would be required to implement, or about whether such requirements should be established by statute, regulation, private agreements, or some combination of the three. Most commenters opposed relying solely on the statute. One challenge that several noted is the frequency with which any security requirements will need to be reviewed and possibly amended.[47] More commenters appeared to

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Pilch Comments at 3 (stating if the general public were given access, "only one library would need to pay for the license; the database would then serve the global public").

[43] *See* AAP Comments at 5 ("Limitations on the types of authorized end users and scope of use permitted should depend upon the particular circumstances of each mass digitization project."); Getty Images Comments at 2 ("Who should have access to digitized copyrighted works will depend on the nature of the intended educational or research use."); *see also* AIPLA Comments at 2 ("AIPLA recommends that entities be able to provide broad access to the digitized works that comprise the collection resulting from the mass digitization . . . but that access to these Projects should be traceable to a user and/or an access point.").

[44] AAP Comments at 5.

[45] *See* Kernochan Center Comments at 5 ("[W]e suspect that an arrangement that requires users to come to the library premises would be of little interest to university and other research libraries.").

[46] ORPHAN WORKS AND MASS DIGITIZATION at 98.

[47] *See, e.g.*, Authors Guild Comments at 10 (stating that the "plan would have to be reviewed and amended regularly to reflect changes in technology and hacking practices"); NPPA et al. Comments at 5

support relying on regulations, or a combination of regulations and licensing agreements.[48] Some suggested articulating general requirements in the statute and then filling in the details with regulations.[49] Though most commenters addressing this issue recommended that the Copyright Office be the agency that sets the security standards, a few commenters expressed concerns.[50] Finally, one commenter appeared to favor resolving security requirements issues solely through licensing agreements.[51]

Regarding specific security requirements, rightsholders and the user and library communities had very different suggestions. Rightsholders suggested various measures that could be required to guard against unauthorized access or uses, such as login authentication mechanisms to limit accessibility; watermarks to identify leaked digitized works; services that monitor how many works a user downloads; saving images in the smallest size and lowest resolution possible; and disabling right-click functionality for copying or downloading.[52] They also recommended measures to ensure institutions comply with security requirements, such as an institution certification process and disabling access to the collection in the case of a security breach.[53] Commenters from the user and library communities, on the other hand, cautioned against requiring the use of specific security technologies, such as technological protection

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(stating that the Office should evaluate and update standards on a continuous basis, or at a minimum every six months, and should have the ability to make emergency updates as needed).

[48] *See* Authors Guild Comments at 10 ("Technology changes far too quickly for security requirements to be set forth by statute; Copyright Office Regulations or CMO board-approved guidelines, as described above, are the preferable mechanism."); Copyright Alliance Comments at 3 ("[R]equirements 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."); DMLA et al. Comments at 5 ("The Copyright Office could set standards for security and digital quality to ensure that the collections are properly digitized and operated securely."); Getty Images Comments at 2 ("Because . . . technical restrictions may need to change as technology changes, specific security requirements are better handled by regulation than by statute."); NPPA et al. Comments at 5 ("[L]egislation should direct the Copyright Office to determine and update those standards based upon evolving industry criteria."); Oda & Lewis Comments at 4 ("[W]e recommend that the Office establish minimum technology requirements for any digital collections open to remote access . . . , including minimum standards for building and maintaining such portals or online applications, data and privacy standards and user registration requirements.").

[49] SIIA Comments at 9; Kernochan Center Comments at 6; *see also* AAP Comments at 5 (stating that the benchmarks for security requirements should be set by regulations that "provide critical flexibility for defining appropriate and up-to-date security procedures").

[50] Public Knowledge ("PK") & Electronic Frontier Foundation ("EFF") Joint Comments at 6; Samuelson Comments at 8 ("[T]he Office should be aware that neither it nor prospective CMOs may have the technical expertise to set the standards and procedures that would need to be adopted . . . .").

[51] CDT Comments at 10 ("[I]t may be preferable to leave any security requirements as a matter to be negotiated between CMOs and licensees.").

[52] *See, e.g.*, AAP Comments at 6; Kernochan Center Comments at 6; Getty Images Comments at 2.

[53] *See, e.g.*, DMLA et al. Comments at 5; SIIA Comments at 9.

measures or digital rights management,[54] and urged keeping security requirements generally low.[55] They also expressed concerns that security requirements could adversely affect digitizing institutions and end-users by, for example, creating hurdles that "might limit participation to extraordinarily well-funded and technologically advanced digitizers"[56] and "preventing uncontroversial fair uses like quoting, excerpting, and research."[57]

As a general matter, the Office was persuaded that "[s]tatutory law is simply not sufficiently nimble to keep up with the pace of technological change" in this area.[58] Accordingly, we believe the most appropriate starting point for future stakeholder discussion is a model under which general security requirements would be sketched out in the statute, with more specific requirements to come later from regulation. These provisions generally should require licensees to maintain security systems consistent with prevailing industry standards. In developing these requirements, Congress and the Office could look to security provisions in existing licensing agreements between commercial database services and user institutions.[59]

D. Dispute Resolution

The NOI requested comment on the form and substance of a dispute resolution process to govern situations in which a CMO and a prospective user are unable to agree to licensing terms.[60] This question yielded few responses. Most commenters who did respond—primarily rightsholders—favored using arbitration, but they were more divided on whether participation should be voluntary or compulsory.[61] Additionally, although it was not raised in the inquiry,

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[54] *See, e.g.*, PK & EFF Joint Comments at 6; Wikimedia Comments at 9.

[55] *See* Stanford University Libraries Comments at 3.

[56] *See* Authors Alliance Comments at 6; *see also* Boston Library Consortium Comments at 5–6 (stating that required technological protection measures would burden libraries and archives without benefitting rightsholders); Samuelson Comments at 8 ("There is a risk that security measures will create barriers to entry that will impede the success of any pilot program.").

[57] PK & EFF Joint Comments at 7.

[58] Authors Guild Comments at 10.

[59] *See* Kernochan Center Comments at 6.

[60] Mass Digitization Pilot Program, 80 Fed. Reg. at 32,615.

[61] *Compare* AAP Comments at 6 (supporting binding arbitration only when both parties voluntarily consent), *and* DMLA et al. Comments at 5 (same), *and* Getty Images Comments at 2 (same), *with* IPO Comments at 3 (supporting mandatory binding arbitration when the CMO and user cannot agree on a rate), *and* NMPA Comments at 3 (same), *and* Authors Guild Comments at 10 (stating that dispute resolution could start with non-binding meditation but would need final, binding dispute resolution, such as before the Copyright Royalty Board, as a backstop); Kernochan Center Comments at 6 (similar).

three commenters recommended a process for judicial review of dispute resolution decisions, but they did not agree on the appropriate court or propose a standard of review.[62]

Some commenters also raised a separate issue concerning the resolution of threshold copyright ownership questions. They noted that, to work efficiently, an ECL system would need some mechanism to determine the allocation of royalties as between authors and publishers where the relevant publishing agreement does not expressly address digital rights (as in the case of older books).[63] One participant suggested that the same tribunal charged with resolving disputes between CMOs and prospective licensees should also be authorized to adjudicate "legal issues relating to title, rights, and licensing."[64] Others discussed alternative approaches. Some posited that Congress could statutorily set the allocation of royalties, similar to the framework under the statutory license for public performance of sound recordings by digital audio transmission.[65] For example, the proposed Google Books settlement (ultimately rejected by the district court) would have allocated 65 percent of revenues to the author and 35 percent to the publisher for out-of-print books published prior to 1987, and 50 percent to each for books published during or after that year.[66] Another option would be for Congress to vest the right and all royalties in a default party (*e.g.*, the publisher) unless another party (*e.g.*, the author) asserts a claim within a specified time.[67]

Overall, the comments revealed little stakeholder agreement on how best to resolve either CMO/user or author/publisher disputes. Any future consideration of ECL would benefit from further public input on both of these critical issues.

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[62] *See* AIPLA Comments at 4 ("We recommend that any dispute resolution process include an appeals process through the court system, especially if there is enough at stake in the dispute."); AMI Comments at 7 ("Appeals from the Copyright Royalty Board (or a successor commission) should be directly to a designated circuit of the United States Court of Appeals."); IPO Comments at 3 ("Appeals could be made to the D.C. District Court, if necessary from a constitutional standpoint.").

[63] *See* Samuelson Comments at 2–3; Triangle Research Libraries Network Comments at 2–3.

[64] AIPLA Comments at 3.

[65] *See* 17 U.S.C. § 114(g)(2); American Society for Collective Rights Licensing, Inc. Comments at 5; Doctorow Comments at 2.

[66] *See* Amended Settlement Agreement, Attachment A, Sec. 6.2(c), *Authors Guild v. Google Inc.*, Case No. 05-cv-8136 (S.D.N.Y. Nov. 13, 2009), ECF No. 770-2; *see also* Samuelson Comments at 2 (discussing how the Google Books settlement agreement would have resolved ownership issues and the challenges ownership questions would present to potential licensees); Triangle Research Libraries Network Comments at 2 (same).

[67] One example of this type of approach is France's law on the Digital Exploitation of Unavailable Books of the Twentieth Century (Loi 2012-287 du 1 mars 2012). For a detailed explanation of that law, see ORPHAN WORKS AND MASS DIGITIZATION at 25–27; *see also* Jane C. Ginsburg, *Fair Use for Free, Or Permitted-But-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1425–30 (2014).

E. Distribution of Royalties

The Office recommended that any ECL framework establish a time period for the distribution of royalties by a CMO and invited comment on specific requirements.[68] Commenters suggested requiring distributions on timeframes ranging from one month to more than nine.[69] The timeframe requirement should, some commenters argued, be based on how easy it is to locate the rightsholder.[70] Several commenters argued that a CMO should not be required to distribute funds until a large enough amount accumulates;[71] others suggested that, regardless, all royalties should be distributed within a year.[72]

The timeframe for distribution did not appear to be a crucial issue among commenters, though it is one where a wide variety of views exist. Further discussion would be needed for stakeholders to arrive at a consensus provision to be included in legislation.

F. Diligent Search

The Office recommended that "a CMO be required to conduct diligent searches for non-member rightsholders for whom it has collected royalties" and that this obligation "include, but not be limited to, maintaining a publicly available list of information on all licensed works for which one or more rightsholders have not been identified or located."[73] In response to the Office's inquiry regarding what additional obligations should be required, several commenters

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[68] *See* Mass Digitization Pilot Program, 80 Fed. Reg. at 32,615.

[69] *See, e.g.*, Artists Rights Society Comments at 6 (twice yearly or more frequently); Authors Guild Comments at 11 (semi-annually); DMLA et al. Comments at 5 (quarterly or less frequently if minimum amount not met); NPPA et al. Comments at 5 (within 30 to 60 days for known copyright owners when royalty over a minimum amount and additional time if the rightsholders are not known or the minimum amount is not met); NWU & SFFWA Comments at 15 (monthly); Stanford University Libraries Comments at 3 (every nine months).

[70] *See, e.g.*, NPPA et al. Comments at 5.

[71] *See, e.g.*, Authors Guild Comments at 11 ("Administrative efficiency should also compel the Copyright Office to consider instituting regulations to establish a 'royalty floor' . . . ."); CCC Comments at 12 (stating that, in the context of mass digitization, it may be "that it will be many years until the system accrues enough royalties for some works and rightsholders to make it economically viable to pay out those royalties"); DMLA et al. Comments at 5 ("[I]t may be necessary to establish a threshold amount before distribution so that the administrative costs do not make the distributions financially unviable."); SIIA Comments at 10 ("It would be more cost effective for the CMO to allow the money to accumulate over time and distribute a larger check to the copyright owner at a later date.").

[72] *See* Kernochan Center Comments at 7 ("[T]here should be no requirement to make a payment more than once a year if the royalties fall below a certain threshold (perhaps $10)."); NPPA et al. Comments at 5 ("In situations where the amount collected is below a certain threshold (i.e. $25), it would be acceptable for distributions to occur at the end of the fiscal year, so that any additional royalties may be aggregated.").

[73] Mass Digitization Pilot Program, 80 Fed. Reg. at 32,615.

advocated a standard similar to that proposed in the Report's legislative recommendation for orphan works.[74] Under that standard, "[a] search is considered to be 'diligent' if users search or utilize: (1) Copyright Office online records; (2) reasonably available sources of copyright authorship and ownership information, including licensor information where appropriate; (3) technology tools and, where reasonable, expert assistance (such as a professional researcher or attorney); and (4) appropriate databases, including online databases."[75] Some commenters, however, desired a lower standard so that it not be overly burdensome for the CMO. For example, SAA supported a standard under which "a 'diligent search' would consist simply of an automated search of the [copyright] registry."[76] Others sought a more stringent standard than the Office proposed for orphan works, noting that "the CMO has a built-in incentive not to find the copyright owner since presumably the CMO gets to retain any money owed to a copyright owner who cannot be located."[77] In the Report, however, the Office sought to address that concern by recommending that a CMO be required to transfer undistributed royalties to a segregated trust account and, if the funds remained unclaimed after three years, to disburse them (less a reasonable fee to defray costs) to charitable organizations.[78]

To the extent they addressed the issue, commenters agreed with the Office that a CMO should be required to maintain a publicly available list of works for which there are absent

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[74] *See* IPO Comments at 4–5 (describing a standard that is highly similar to that proposed in the orphan works proposal); Triangle Research Libraries Network Comments at 4 (noting reservations about the orphan works proposal but stating that "a 'diligent search' should be the same for both CMOs and users of orphan works"); *accord* Oda & Lewis Comments at 7 (recommending that a standard "should, at the very least, be no less stringent than what the Office would require of licensees under its proposed orphan works legislation").

[75] ORPHAN WORKS AND MASS DIGITIZATION at 57. Whether a source must be used depends on the circumstances. Users must also "take any other actions that are reasonably likely to be useful in identifying and locating the copyright owner. What is 'reasonably likely' depends on the facts known at the outset of the search, as well as upon facts uncovered during the search . . . ." *Id.* at 57–58. Qualifying searches may also require the user to consult resources that impose a charge. *Id.*

[76] SAA Comments at 6; *see also* Kernochan Center Comments at 7 ("[T]he CMO's responsibility should not be defined in the same terms as the requirement for a potential user to qualify for an orphan works limitation of liability . . . . It is likely to be expensive to establish and run an ECL, and revenues are uncertain."); Stanford University Libraries Comments at 4 ("[A]n overly extensive requirement to meet the qualifications for a diligent search will only serve to deter the use of orphan works materials. . . . [I]t will be important to limit the search requirement to a defined set of accessible resources and a small number of attempts to reach the possible owners of rights . . . .").

[77] SIIA Comments at 10; *accord* AIPLA Comments at 4 (suggesting that the Office "specify a standard search process comprising a plurality of ordered and possibly dependent steps for searching which . . . would constitute due diligence"); Bradley Comments at 3 (stating that "search procedures should be certified by the Office").

[78] *See* ORPHAN WORKS AND MASS DIGITIZATION at 100.

rightsholders owed royalties.[79] As for who should bear the burden of conducting a diligent search, most commenters who addressed the issue argued that the licensee should have some obligation to assist the CMO in locating rightsholders.[80] On the other hand, one commenter argued that the obligation should rest entirely on the rightsholder, who it argued should be required to identify herself in a registry.[81]

The Office recognizes that what constitutes a reasonable search in the context of individual orphan works may not be reasonable in the case of a CMO conducting searches for a multitude of copyright owners. For that reason, should Congress and stakeholders wish to consider this issue in the future, it may be useful to look to the search practices of existing CMOs, particularly those operating in ECL jurisdictions.

G. Other Issues

Finally, the NOI asked commenters to discuss "any additional issues that the Copyright Office may wish to consider in developing draft ECL legislation."[82] Commenters raised a number of issues, including the interaction of the proposal with the fair use doctrine, the viability of an ECL program with a five-year sunset provision, and the eligibility of a CMO to become authorized to operate extended collective licenses.

A large number of commenters raised questions related to fair use. Many from the library and archives communities argued that ECL is unnecessary because fair use already covers most of the activities that are relevant to their mass digitization projects.[83] Several user groups

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[79] *See* AAP Comments at 7; Copyright Alliance Comments at 3–4; DMLA et al. Comments at 5; Kernochan Center Comments at 7; NPPA et al. Comments at 6; Pilch Comments at 5; Stanford University Libraries Comments at 4.

[80] *See* Authors Guild Comments at 12 (stating that licensees "should be required to share with the CMO any relevant information or metadata relating to works in the repertoire"); CCC Comments at 13 ("[T]he obligation to conduct diligent searches must belong not only to the CMO but also to licensees and prospective licensees who are benefiting from the license and who are almost certainly far closer to the works used than the CMO or anyone else."); Copyright Alliance Comments at 4 ("[T]he licensee should also have some obligation to assist the CMO with the diligent search."); SIIA Comments at 10 ("There may be many instances where the [mass digitizer] has better and more accurate information about the identity and/or whereabouts of the copyright owner. Accordingly, the [mass digitizer] should be required to assist and cooperate with the CMO . . . .").

[81] SAA Comments at 6 ("A registry-based ECL would place the administrative costs of an ECL where they belong: On the few who wish to profit from the exploitation of their work.").

[82] Mass Digitization Pilot Program, 80 Fed. Reg. at 32,615.

[83] *See, e.g.*, Agnes Scott College – McCain Library Comments at 1–2; *see also* Belhaven University Library Comments at 1; College of William and Mary Libraries Comments at 1; Emerson College Iwasaki Library Comments at 1; Fairfield University DiMenna-Nyselius Library Comments at 1; Lancaster Theological Seminary Comments at 1; Princeton Theological Seminary Library Comments at 1; State Historical Society of Missouri Comments at 1; University of Nevada, Reno, University Libraries Comments at 1; Wake Forest University Comments at 1. *But see* Sue Ann Gardner (Scholarly Communications Librarian

contended that an ECL system would impair the development of the doctrine in the courts by encouraging risk-averse users to obtain a license for activities for which they have a strong fair use claim.[84] Similarly, numerous libraries commented that "[d]espite the Office's assurances about inclusion of a fair use savings clause, we are nonetheless concerned that the proposed ECL system would cast a shadow over potential fair use assertions for mass digitization, steering organizations like ours away from using that important right and into more conservative and more costly licensing practices."[85]

Many commenters, however—including both supporters and opponents of an ECL system—recognized that the fair use doctrine likely would not cover mass digitization projects providing public access to the full texts of books. Copyright owners argued that "reliance on fair use cannot provide the public benefits of mass digitization that the ECL model . . . promises"[86] and that "[a] legislative framework for mass digitization . . . has the potential to provide greater legal certainty, and greater permission, than fair use."[87] User groups generally acknowledged that fair use may not permit "the display and distribution of the entire work."[88] But many user

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at University of Nebraska – Lincoln) Comments at 2 ("The ECL framework could facilitate lawful uses that would not otherwise be possible."); Pilch Comments at 6 ("ECL may prove difficult to implement broadly if library organizations and individual libraries and archives continue to oppose the idea of paying rigtsholders either under the belief that information should be free or because they lack the resources to fund ECL licenses."); Stanford University Libraries Comments at 2 ("[T]here are many cases where digitized materials are desired to be read as individual works, and Fair Use will not be an appropriate approach to that work.").

[84] *See* Creative Commons Comments at 5 ("Adopting an ECL system undermines fair use because digitizers and users will be reluctant to rely on it. Instead, they'll ask, 'why bother with the risk when all we have to do is pay a small fee?'"); Wikimedia Comments at 7 ("[W]e are concerned that the projects will obtain ECL licenses unnecessarily simply to avoid being sued for copyright infringement.").

[85] Agnes Scott College – McCain Library Comments at 2; Belhaven Universtiy Library Comments at 2; William and Mary Libraries Comments at 2; Emerson College Library Comments at 2; Fairfield University Library Comments at 1–2; Lancaster Seminary Library Comments at 2; Princeton Theological Seminary Library Comments at 2; Historical Society of Missouri Comments at 2; University of Nevada, Reno, University Libraries Comments at 2; Wake Forest University Comments at 2.

[86] IPO Comments at 2; *accord* IBM Comments at 5; Pilch Comments at 2.

[87] AAP Comments at 2. *But see* Getty Images Comments at 1 ("Of the few scenarios in which mass digitization has occurred in recent years (for example, the Google books case and HathiTrust), the courts were adequately able to apply the Copyright Act and find that mass digitization was permitted as a fair use.").

[88] PK & EFF Joint Comments at 1; *see also* Authors Alliance Comments at 2 ("Authors Alliance also agrees with the Office's conclusion . . . that many other beneficial mass digitization efforts might 'need to look beyond fair use to a licensing model, either voluntary or statutory.'" (citation omitted)); Library Copyright Alliance Comments at 8 ("[T]he applicability of fair use to the display of the full text of digitized books may be less certain . . . ."). The Library Copyright Alliance did express the view that "libraries could have strong fair use arguments for making available the full text of certain types of books, such as books with time-limited markets" and "books that are distributed by their rights holders for free." Library Copyright Alliance Comments at 8 n.23.

groups nevertheless opposed the adoption of ECL because they felt that it would do little to facilitate mass digitization projects while simultaneously harming the fair use doctrine and complicating copyright licensing.[89]

The Office acknowledges the concerns about the potential impact of an ECL system on the availability of a fair use defense to mass digitization. For that reason, the Report recommended that any ECL legislation include a savings clause expressly providing that nothing in the statute affects the availability of fair use.[90] Indeed, the existence of a fair use savings clause has effectively preserved the application of fair use in the past. In *Authors Guild, Inc. v. HathiTrust*, both the district court and the Second Circuit concluded that section 108 did not foreclose an analysis of HathiTrust's activities under fair use. In doing so, the courts cited to the fair use savings clause in section 108(f)(4), which provides that nothing in section 108 "in any way affects the right of fair use as provided by section 107."[91] In comments in this proceeding, the Authors Guild did express the view that an ECL system would cause "courts [to] look at fair use differently in the mass digitization context" because "an ECL regime would be proof positive of a market for out-of-commerce literary works, substantially simplifying analysis of the fourth fair use factor."[92] Under the Office's ECL proposal, however (and in contrast to the Google Books cases), the relevant market would be for public access to full or substantial portions of the texts of copyrighted works. As noted, user groups generally appeared to recognize that, even without a licensing market, such activity would be difficult to justify as a fair use in most circumstances.[93] In other words, ECL would only create a market for a use "for which there is broad agreement that no colorable fair use claim exists."[94] For all other activities, the Office continues to believe that the inclusion of a savings clause would adequately protect users' ability to assert fair use.

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[89] *See, e.g.*, Authors Alliance Comments at 2 ("[W]e have grave concerns that the proposed Extended Collective Licensing . . . pilot project . . . will simultaneously fall short in its ability to make works available, while serving to intractably complicate the licensing landscape in ways that would prove detrimental to the interests of our community.").

[90] *See* ORPHAN WORKS AND MASS DIGITIZATION at 101.

[91] 17 U.S.C. § 108(f)(4); *see HathiTrust*, 755 F.3d at 94 n.4 (quoting 17 U.S.C. § 108(f)(4)); *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 457 (S.D.N.Y. 2012).

[92] Authors Guild Comments at 4; *see also* DMLA et al. Comments at 6 ("As there is no direct licensing alternative for what would be infringing uses, the risk [is] that these uses will be considered a fair use by courts, without due consideration of the impact on professional visual artists and their representatives.").

[93] *See supra* note 88.

[94] ORPHAN WORKS AND MASS DIGITIZATION at 101; *see also Google*, 804 F.3d at 225 ("If Plaintiffs' claim were based on Google's converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong."); IPO Comments at 2 ("[R]eliance on fair use cannot provide the public benefits of mass digitization that the ECL model proposed by the Copyright Office promises."); Pilch Comments at 2 ("[F]air use is not a viable solution for mass digitization of such a collection and . . . an ECL framework affords the best possible solution.") (footnote omitted).

Another consideration for several commenters was the proposed five-year sunset for the ECL pilot.[95] Several commenters argued that allowing licenses to expire would discourage investment in mass digitization projects and thereby undermine the viability of the pilot.[96] As one professor noted, "[i]t might very well take five years just to establish a viable CMO, and no revenues would be flowing into its coffers until the CMO had actually negotiated licenses with qualified organizations and began receiving funds from its uses of the works covered by the ECLs."[97] This burden would be compounded, she argued, by the potential need to establish a CMO for each group of affected rightsholders, including authors, "publishers, graphic designers, [and] photographers."[98] To address these concerns, two commenters advocated a savings clause that would guarantee that certain uses would be allowed to continue post-sunset.[99]

A final key question for many commenters was the criteria a CMO must satisfy to be eligible to administer an extended collective license. In the Report, the Office concluded that any ECL legislation should require a CMO seeking ECL authorization to demonstrate "its level of representation among authors in the relevant field, the consent of its membership to the ECL proposal, and its adherence to standards of transparency, accountability, and good governance."[100] Some commenters, however, particularly those opposed to ECL, argued that no CMO could adequately represent all works that would be of interest to a mass digitizer.[101] One noted that the lack of an established CMO for administering an ECL system in the United States, as well as the diversity of author interests, "make[] fair representativeness of non-member interests especially challenging to achieve."[102] Commenters also had numerous questions about establishing and monitoring the CMO, such as: Could a CMO's authorization be revoked and, if so, based upon what standard?[103] Would there be one CMO or many?[104] Who might pay to

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[95] *See* ORPHAN WORKS AND MASS DIGITIZATION at 102.

[96] *See* AIPLA Comments at 4–5; CDT Comments at 12; IBM Comments at 5.

[97] Samuelson Comments at 4.

[98] *Id.*

[99] CDT Comments at 12; IBM Comments at 5.

[100] ORPHAN WORKS AND MASS DIGITIZATION at 8.

[101] *See, e.g.*, AALL Comments at 5; College of William and Mary Libraries Comments at 1; Princeton Theological Seminary Library Comments at 1; Authors Alliance Comments at 2–5; PK & EFF Joint Comments at 4; *see also* Creative Commons Comments at 3–4 (stating that a CMO would struggle to adequately represent book authors because some authors, such as authors of scholarly books, "are not primarily interested in financial rewards").

[102] Samuelson Comments at 6.

[103] SIIA Comments at 11.

[104] Authors Alliance Comments at 3–4; SIIA Comments at 11.

establish the CMO infrastructure?[105] These outstanding questions would need to be resolved prior to the formal development of legislation.

Conclusion

The comments revealed limited interest in an ECL system for mass digitization projects at this time. Moreover, those stakeholders who expressed interest in an ECL program shared widely different views on how the system should be structured. Therefore, before pursuing ECL legislation, additional efforts to identify more areas of common ground among stakeholders—including rightsholder, collective management, and user communities—are needed. Core topics for further discussion and consensus-building include:

- The definition of the covered collections, including whether or under what circumstances in-commerce works should be eligible;
- Whether licenses should be available only for noncommercial uses and, if so, the proper scope of that limitation;
- Forms of access for end-users, including affiliates of licensee institutions and members of the general public;
- Security requirements in light of prevailing industry practices;
- Mechanisms for resolving disputes between CMOs and users and between authors and publishers;
- Royalty distribution requirements;
- Diligent search obligations; and
- CMO eligibility, oversight, and funding.

The Office continues to believe that ECL represents a viable solution for mass digitization projects and stands ready to assist stakeholders in developing a consensus-based legislative framework should Congress wish to pursue further discussion in this area.

Please do not hesitate to contact me should you require any further information on this subject.

Respectfully,

Karyn A. Temple Claggett
Acting Register of Copyrights and Director,
U.S. Copyright Office

[105] Samuelson Comments at 3–4.