



September 9, 2015

Ms. Maria Pallante
Register of Copyrights
United State Copyright Office
101 Independence Avenue S.E.
Washington, D.C. 20559

RE: Mass Digitization Pilot Program; Request for Comments (80 F.R. 32614, Docket No. 2015-3)

Dear Ms. Pallante:

The American Association of Law Libraries (AALL) submits the following comments in response to the Mass Digitization Pilot Program Request for Comments. The term “mass digitization” encompasses a broad spectrum of projects by for-profit and non-profit entities, including AALL members, seeking to digitize tangible works (e.g. books, pictures, letters, and ephemera). The legal implications of mass digitization projects vary depending on the types of works to be digitized, whether orphan works are included, whether works are currently subject to copyright, and even how long they are subject to copyright. As mass digitization projects increase in number, more projects will arise that may require the licensing of copyrighted works. AALL believes that current solutions, including fair use and voluntary licensing, are the appropriate methods for addressing many mass digitization projects, and that the Copyright Office’s (CO) proposed extended collective licensing (ECL) model is unnecessary at this time.

I. Does Mass Digitization Need a Solution?

Though creating and agreeing upon a standard definition for mass digitization is difficult, we believe that mass digitization, commonly understood, involves large scale projects including many hundreds, if not thousands, of discrete items. AALL believes that libraries conducting mass digitization projects that exclude orphan works should continue to undertake projects by following the fair use doctrine along with voluntary licensing agreements. AALL believes that orphan works legislation is still necessary and will inform mass digitization projects that include orphan works.

Mass Digitization Generally. The two largest mass digitization cases, *Authors Guild et al. v. Google*¹ and *Authors Guild et al. v. HathiTrust*,² have been litigated under the fair use affirmative defense provided for in Section 107 of the Copyright Act.³ Fair use is a robust and well developed doctrine dating back to 1841.⁴ While the Copyright Office suggests that fair use is an unpredictable doctrine determined on a case-by-case analysis, others argue that the fair use

¹ *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

² *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

³ 17 U.S.C. § 107 (2012).

⁴ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

doctrine can be fairly predictable.⁵ The Copyright Office's argument that the doctrine's unpredictability stems from the required case-by-case analysis is unpersuasive. Our common law system is based on fact specific analysis unique to each case and present in all areas of common law, not just copyright cases. For example, while many negligence cases are still litigated based on a centuries old doctrine, experienced litigators, in fact first-year law students, can determine the outcome based upon the factors of negligence and the facts of the case. A case-by-case analysis of mass digitization projects using the fair use doctrine permits a comfortable amount of predictability afforded by such a long history of the doctrine.

Beyond fair use, there are statutory provisions that permit the digitization of materials without a license for preservation by libraries⁶ and access for the blind or disabled.⁷ Currently, libraries are unimpeded by licensing requirements when mass digitizing under the auspices of Section 108 or Section 121. The proposed ECL model may force libraries that are not financially able to pay large litigation costs to seek licenses, even though the digitization work they are conducting falls squarely within digitization already permitted by statute.

Mass Digitization with Orphan Works. With the number of orphan works estimated in the millions,⁸ they are very likely to be a part of many mass digitization projects. AALL continues to support legislation for orphan works because we believe that such legislation will bring clarity to the issues surrounding orphan works, and that mass digitization presents different issues that can be best handled outside an ECL model. Orphan works legislation seeks to address issues surrounding unavailable copyright holders, the ECL model proposed by the CO is meant to streamline licensing where the majority of copyright holders are known. As stated in our previous comments on orphan works, legislation should (1) limit remedies available when a user of an orphan work has conducted a diligent, good faith search for the rights holder; (2) apply on a case-by-case basis; and (3) provide reasonable compensation for rights holders with a special provision for noncommercial actors engaged in noncommercial use of orphan works, but not statutory damages or attorney's fees.⁹ Under the proposed ECL model, collective management

⁵ U.S. Copyright Office, Orphan Works and Mass Digitization Report, at 76-79 (June 2015); See Matthew Sag, *Predicting Fair Use*, 73 Ohio State L. J. 47 (2012).

⁶ 17 U.S.C. § 108 (2012).

⁷ 17 U.S.C. § 121 (2012).

⁸ No empirical analysis has been conducted in the United States to determine the number of orphan works, but studies from Europe highlight the scope of the problem. See EUROPEAN COMMISSION, THE NEW RENAISSANCE: REPORT OF THE "COMITE DES SAGES" (2011), https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/final_report_cds_1.pdf ("Association des Cinémathèques Européennes estimates that 21% of films held in audiovisual archives are orphaned, with 60% of these being over 60 years old. The British Library estimates that 40% of its in-copyright collections are orphan. The 'In from the Cold' report estimated approximately 90% of the photographic record in UK cultural institutions as orphaned."); ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 69 (2006), <https://www.gov.uk/government/publications/gowers-review-of-intellectual-property> (estimating that 90% of museum works have no known author and that researchers in the British Library were unable to identify rights holders for over 50% of works when sampling of over 200 sound recordings.); IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 38-40 (2011), <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>.

⁹ American Association of Law Libraries et. al., Reply Comments to Notice of Inquiry Concerning Orphan Works and Mass Digitization at 2, (Feb. 1, 2013), <http://aallnet.org/Documents/Government-Relations/Formal-Statements/2013/NOIcomments020113.pdf>.

organizations (CMO) would collect royalties on orphan works included in a mass digitization project, then distribute funds at a later date less any administrative fees. The Copyright Office needs to clarify how an ECL model will complement orphan works legislation; its current proposal fails to do so.

I. Is ECL a Viable Solution for the United States?

During the roundtable discussions on Orphan Works and Mass Digitization in March 2014, the general consensus of the speakers during Session 8 and Session 9 disfavored an ECL model.¹⁰ Instead, many suggested the continued application of the fair use doctrine and voluntary licensing. The group was concerned about the “one-size-fits-all” nature of ECL where each industry has competing interests. Participants pointed out issues with ECL including, but not limited to, antitrust issues with a single CMO, susceptibility of CMOs to corruption, and distribution of funds for known and unknown rightsholders.¹¹

A. ECL Examples

Europe’s ECL Experience. The Nordic countries have decades of experience with ECL. While their model is being adapted to other European countries, such a model would face significant challenges in the U.S., including cultural views towards collective bargaining and scaling. The Nordic communities experience with ECL dates back to the 1960s, and most of the Nordic commenters agree that ECL has flourished due to a culture and history of broad collective bargaining in areas beyond copyright.¹² In contrast, the United States has a relatively short history of collective bargaining that has weakened considerably over the past 10 years.¹³ While that does not preclude the United State from attempting a similar ECL model, it does present a cultural hurdle to creating a mutually agreeable ECL model.

Scaling ECL to the U.S. would be the most challenging aspect of implementing such an ECL model. The U.S. has a population of roughly 318 million¹⁴ compared to the combined population of Denmark, Finland, Iceland, Norway and Sweden equally approximately 27 million.¹⁵ Such a large difference in population impacts not only the number of copyrights produced but also the number of consumers interested in copyrighted works. The intellectual property industry in the

¹⁰ See Library of Congress, Orphan Works and Mass Digitization Roundtables, Sessions 8 & 9 (March 11, 2014).

¹¹ Id.

¹² Thomas Riis, *Extended Collective Licenses and the Nordic Experience: It’s a Hybrid but is it a Volvo or a Lemon?*, 33 Colum. J.L. & Arts 471, 495 (2010).

¹³ See Nicholas Kristof, Opinion, *The Cost of a Decline in Unions*, N.Y. Times, February 19, 2015, at A25; Mike Collins, *The Decline of Unions is a Middle Class Problem*, Forbes (March 19, 2015), <http://www.forbes.com/sites/mikecollins/2015/03/19/the-decline-of-unions-is-a-middle-class-problem/>; Quoctrung Bui, *50 years of Shrinking Union Membership*, In One Map, NPR Planet Money (February 23, 2015), <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map>.

¹⁴ World Bank, United States Data, <http://data.worldbank.org/country/united-states>.

¹⁵ World Bank, Denmark Data (5.6 million), Finland Data (5.4 million), Iceland Data (327,000), Norway Data (5.1 million), and Sweden (9.6 million), <http://data.worldbank.org/country>.

U.S., including copyrights, is estimated to contribute five trillion dollars to the GDP.¹⁶ The CO processed more than 577,000 copyright registration in 2013 alone.¹⁷ The sheer number of works that any individual CMO would manage would number in the millions, if not tens of millions. Responsibility for such a large corpus of work leads to serious concerns regarding antitrust and inefficiency.

Google Books Proposed Settlement. The Copyright Office looks to the Google Books proposed settlement as an acceptable working model for creating an ECL scheme in the United States, but does not address the concerns voiced by interested parties, not to mention the fundamental differences between large for-profit entities, such as Google, and non-profit entities, such as libraries and museums. Libraries, in particular, are in a very different financial position when embarking on a digitization effort than Google. The costs of licensing can be easily absorbed and recovered through advertising by a for-profit enterprise. Public libraries, including large academic libraries at public universities, are most commonly funded through a combination of local, state, and federal funds. As a result of this funding model, funding can, and does, fluctuate with the economy and the political leaning of elected officials. Taking on years long mass digitization projects under an ECL model requires consistent, predictable funding that is not part of libraries funding models. In addition to financial concerns of non-profits, the Copyright Office fails to address issues related to antitrust, privacy, and the profit-driven motives of Google.

B. Concerns Regarding CMOs

In addition to our belief that an ECL system is not needed and would not be beneficial for the United States, we are also concerned with the potential problems that CMOs would bring to the copyright system.

Antitrust. The Copyright Office glosses over serious concerns over CMO price setting and antitrust. Authorizing a single CMO to issue licenses for all works for a particular category of works allows the CMO to set prices with little recourse by the user. The Copyright Office seeks to appease users' concerns over such a monopoly by allowing users to form collective bargaining units to negotiate licenses with the CMOs.¹⁸ Creating collective bargaining units on the consumer side does not change the fact that a single entity, without any competition, provides the good or service allowing them to use a take it or leave it model of negotiation.

Lack of Transparency. The CO suggests "sufficient standards of transparency, accountability, and good governance" governed by regulations yet to be contemplated. We believe that any CMO will have a natural tendency toward secrecy, and appreciate the CO's acknowledgement that transparency standards are necessary. As we've seen around the world, there are many examples of CMOs that suffer from overly complex management systems, a lack of fiscal

¹⁶ Economics and Statistics Administration & United States Patent and Trademark Office, Intellectual Property and the U.S. Economy: Industries in Focus (March 2012), http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf.

¹⁷ U.S. Copyright Office, Fiscal 2013 Annual Report.

¹⁸ U.S. Copyright Office, Orphan Works and Mass Digitization Report, at 94 (June 2015).

openness, and opacity around the distribution of funds.¹⁹ It is crucial than any CMO in the United States prioritize transparency by providing access to basic information about the CMO, including who serves on its Board, how funds are distributed, how to file a complaint or resolve a dispute, and who to contact for more information. Annual reports outlining the number of licenses granted and the cost of said licenses would help to create a culture of transparency and may possibly combat concerns related to antitrust and inefficiency.

Representation and Distribution of Royalties. CMOs will be tasked with representing the interests of, and distributing royalties to, a tremendous number of known and unknown rights holders. When it comes to unknown rights holders, the Copyright Office acknowledges that a conflict of interest exists and assures the public that it can be redressed through a diligent search requirement and by requiring the CMO “to distribute the balance to education or literacy based charities selected by its membership” after it has deducted a reasonable fee to defray costs.²⁰ This scheme does little to overcome the conflict interest and fails to address orphans works that may appear in mass digitization projects. The CMO is still permitted to deduct costs associated with locating rights holders, presumably in addition to any other costs accrued until a distribution is made to a designated charity.²¹

For-Profit Interested Parties. The creation of CMOs would add complexity to an already crowded copyright landscape by creating additional enterprises that seek to profit from copyrights. Beyond authors and creators, who put great effort into creating, the copyright landscape already has a plethora of for-profit middlemen, such as publishers and music companies. By creating another for-profit interested party, libraries could be sued for infringement at an increasing rate if they choose to forgo ECL and instead rely on fair use.

Cambridge University Press v. Patton (GSU), involving Georgia State University, exemplifies the concern.²² The Copyright Clearance Center, acting as a de facto CMO, partially funded a suit brought by publishers against GSU’s use of e-reserves. At trial, the court found only five instances of copyright infringement, while the other uses in question were found to be fair use. While the Eleventh Circuit did reverse and remand the case due to improper application of the four factors of fair use, the publishers petitioned for rehearing en banc presumably out of fear that on remand the court would once again find fair use in the majority of relevant copyright works. This lawsuit has come at considerable cost, both in money and time, to the state and GSU, while the copyright owners are being partially funded by the Copyright Clearance Center and the case may end with little benefit for the copyright owners.

II. Conclusion

AALL supports efforts to streamline the process for mass digitization projects, but does not believe an ECL solution will solve issues related to mass digitization. We believe the mass

¹⁹ See Jonathan Band & Brandon Butler, Some Cautionary Tales about Collective Licensing, 21 Mich. St. U. Coll. L. Int’l L. Rev. 687 (2013).

²⁰ U.S. Copyright Office, Orphan Works and Mass Digitization Report, at 100 (June 2015).

²¹ Id.

²² Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).

digitization projects that do not contain orphan works can continue under the fair use doctrine. Those with orphan works would benefit from orphan works legislation.