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U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559

Re: Mass Digitization Pilot Program; Request for Comments (Docket No. 2015-3)

October 9, 2015

We at HathiTrust have read with interest the Register of Copyright's report "Orphan Works and Mass Digitization"¹ and the accompanying Notice of Inquiry date June 9, 2015², which called for comments on a possible voluntary system of extended collective licensing (ECL). Thank you for providing the community with an opportunity to comment on the Office's ideas for addressing mass digitization.

HathiTrust was founded in part to ensure the preservation of the products of mass digitization. Today our partnership includes over 110 research libraries from around the world, which together steward one of the largest aggregations of digitized books. HathiTrust thus has a strong interest in any discussion of mass digitization and especially legal reform efforts that would affect how we preserve and provide access to the 13.7 million volumes in our collection. The collection today includes over 5 million volumes in the public domain, which are available for reading in full. HathiTrust's users have benefitted from the Copyright Review Management System (CRMS) operated by the University of Michigan, which, with funding support from the Institute of Museum and Library services, has supported research on the copyright status of more than 500,000 works, finding more than 52% of them to be in the public domain.³ Whenever possible we provide for robust lawful uses of the remaining millions of texts under sections 107, 108, and 121 of the Copyright Act, enabling our partner libraries to support their patrons' educational and research goals. Our efforts were bolstered in 2014 when the United States Court of Appeals for the Second Circuit upheld a lower court ruling in our favor, finding that fair use supports both full-text search and access for the print disabled.⁴ In short, the existing laws have allowed HathiTrust to fulfill its mission to collect, organize, preserve, communicate, and share the record of human knowledge.

On behalf of HathiTrust I have previously stated our opposition to implementation of ECL in

¹ United States Copyright Office, "Orphan Works and Mass Digitization." June 2015. <http://copyright.gov/orphan/reports/orphan-works2015.pdf> (accessed October 9, 2010). Further references cited as "OW."

² "Mass Digitization Pilot Program; Request for Comments" Docket No. 2015-3 Federal Register, Vol. 80, No. 110, Tuesday, June 9, 2015. Further references cited as "NOI."

³ Information on the Copyright Review Management Services can be found online at <http://www.lib.umich.edu/copyright-review-management-system-impls-national-leadership-grant> and <http://www.lib.umich.edu/impls-national-leadership-grant-crms-world> (accessed October 9, 2015).

⁴ Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

the United States, first during roundtable hearings on Orphan Works and Mass Digitization at the Copyright Office in March 2014 and in subsequent written comments. HathiTrust has argued that ECL regimes were not readily adaptable to the US market, that ECL could threaten first amendment protections and fair use protections, and noted that fair use has offered us powerful avenues to pursue our objectives. At that roundtable I personally heard objections from creators, distributors, libraries and even potential collective management organizations. Our written comments noted that that we “were struck by the degree to which participant stakeholders opposed the implementation of an extended collective licensing scheme in the United States, and believe that this demonstrates clearly that such a legislative solution should not be pursued.”⁵

Thus my colleagues and I were surprised to see the June Notice of Inquiry asking for still further comments on a voluntary pilot Extended Collective Licensing program. HathiTrust’s opposition to ECL continues, and I have no expectation that further deliberations on this topic will yield a useful result. The proposal seeks to enable potential uses of in-copyright works that fall outside of what fair use might permit such as “providing digital access to copyrighted works in their entirety.”⁶ The proposal reads as a good faith effort to help the public derive additional benefit from mass digitization programs while also offering creators, authors, and publishers guarantees that they could derive new financial value from the works they control. However, HathiTrust does not believe an ECL cannot achieve what the Copyright Office seeks. I am concerned that an ECL will result in a regression of rights currently available to users, and will introduce costs so extreme that the value of an ECL would be severely limited.

Even a limited, “voluntary” Extended Collective Licensing program could eventually be used by others to try and compel us to take part in the program in order to do what we already do today under the law. The Copyright Office believes that the inclusion of a fair use savings clause and the existence of a license will be attractive because it will limit participants’ legal exposure: “For many mass digitization users – particularly non-state actors with limited resources – the avoidance of exposure to federal litigation and infringement liability will be well worth the cost of a license.”⁷ This assertion depends entirely upon the as-yet unknown cost of such a license. If that cost were to prove too high, then such actors are left with another, potentially more expensive option: “[T]hose making a different risk/reward calculation would be free to forego a license and assert the fair use defense in the event litigation arose.”⁸ This suggests a situation in which the existence of a voluntary license could encourage litigation, or threats of litigation in order to coerce participation or simply stop legitimate, lawful uses that fall outside of its scope.

The US library community is understandably skeptical that an ECL could produce terms that would be beneficial to students, researchers, and the public. Research libraries’ several decades of history with licensing of digital publications leads them to approach any license with extreme caution. Through licensing publishers have contractually forbidden such fundamental activities as interlibrary loan or even linking to articles on a course syllabus without an additional fee. Although the ECL proposal recommends a savings clause for

⁵ Comments of HathiTrust, Orphan Works and Mass Digitization, May 21, 2014, page 4, available at: http://copyright.gov/orphan/comments/Docket2012_12/HathiTrust.pdf (accessed October 9, 2015).

⁶ OW at 101.

⁷ OW at 101.

⁸ OW at 101.

section 107, it says nothing about a savings clause for sections 108 or 121, or indeed any other sections of the Copyright Act. Such additional clauses would be necessary to guarantee that the potential licensors would lose no rights available in the law. However, based on historical experience in libraries it is not clear that the existence of such savings clauses would be acceptable to collective management organizations if a pilot were attempted.

In addition to these concerns, annual licensing fees paid by libraries have continually increased faster than inflation, reducing the capacity of libraries to acquire new publications while attempting to maintaining access to an historical record that they now rent, rather than own.⁹ The HathiTrust collection is built from materials our partners own, not rent. The prospect of renting access that adds significant new costs to the market for research publications is not an attractive one. It is hard to see how the economics of even a pilot ECL program could make sense. The ECL parameters described by the Copyright Office appear to be modeled in part on the failed settlement to litigation among Google, the Author's Guild, and the American Association of Publishers. That settlement, if approved, would have created the infrastructure to support licensed access to the works included in the Google Books project. A Book Rights Registry would have supported the identification of rightsholders and allocation of royalties them, and would have defined processes to identify those whose works would be included under the license.

But there exists a significant difference between the voluntary pilot proposed by the Copyright Office and that three-way settlement rejected by the court: funding. Under the settlement Google agreed to invest \$34.5 million to create the Registry itself, with fees from a subscription licenses supporting the management of the Registry once operational. Potential candidate collective management organizations have since questioned the viability of ECL in the US. During the 2014 Roundtable, the Copyright Clearance Center stated that in an effective ECL program “there not only needs to be money for the rights holders...there needs to be money to run the thing. And the likelihood...that there is going to be money that is available to pay for running the system, in addition to paying the rights holders is a very, very difficult question.”¹⁰

On this point HathiTrust agrees with the Copyright Clearance Center: securing adequate funding for an ECL will challenge both potential licensors and those who would manage the program. Even if an investor could provide seed funding, the need to recoup costs would likely drive the cost of ECL too high for licensees. The Copyright Office itself is not currently in a position to support the development of infrastructure that would support the operation of an ECL in the United States. The proposal is impracticable if only for these reasons.

The potential costs of an ECL have apparently inhibited its development in at least one nation that has the legal framework to support it. The Orphan Works report cites the United Kingdom's regulations defining parameters for the development of an ECL in Britain.¹¹ At

⁹ See the Association of Research Libraries visualization of this trend. “ARL Inflation-Adjusted Expenditure Data, Materials & salary expenditures of Association of Research Libraries member libraries in inflation-adjusted, 2014 dollars.” October 2014. <https://public.tableau.com/profile/ct.census.data#!/vizhome/ARLInflation-AdjustedExpenditures/Story1> (accessed October 9, 2015).

¹⁰ Transcript of Library of Congress Orphan Works and Mass Digitization Roundtables , pg. 303, lines 9-17, <http://www.copyright.gov/orphan/transcript/0311LOC.pdf> (accessed October 9, 2015).

¹¹ Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, S.I. 2014/2588, art. 18. <http://www.legislation.gov.uk/ukdsi/2014/9780111116890> (accessed October 9, 2015).

the Roundtable in 2014, however, the Copyright Clearance Center referenced the lack of enthusiasm for an ECL program in the United Kingdom among publishers, rights organizations and libraries. Things appear to have not changed significantly, based on my own recent informal discussions with the leadership of several major UK Libraries. There appears to have been no movement by any party in the UK to serve as a collective management organization and I am led to believe that an ECL program is unlikely to be launched in the UK. The potential costs to administer such a program as well as the cost of the license were cited as primary reasons for the tepid response.

Copyright law may constrain certain uses of in-copyright materials held in HathiTrust, and additional uses of copyrighted works might be enabled under an ECL program. But I do not see a path to successful implementation of even a pilot program as described in the Report and Notice of Inquiry. Such a program would be too costly and curtail our current uses in ways that would not offset the gains. HathiTrust will continue work currently underway, including copyright investigations through the Copyright Review Management System. This project has contributed to closing the well documented “information gap” regarding the status of copyrighted works published in the United States, Australia, the United Kingdom, and Canada. Our experience with copyright investigation positions us well to develop data sources and authorities that will help us continue to expand the number of works available for students, researchers, and the public. HathiTrust will continue to engage among our entire partnership and with other allied organizations to do so.

I encourage the Copyright Office to work with both the community of collective memory organizations as well as the creative and technology sectors to support documentation of the status of rightsholders and the rights status of works published in the United States. HathiTrust has shown that collective action can produce powerful results. If the Copyright Office can begin to more directly collaborate with both public and private partners then we can as a community begin to develop realistic and meaningful measures that will greatly improve the public’s ability to build upon the creative works of their fellow citizens.

Respectfully,

A handwritten signature in black ink, appearing to read "Mike Furlough". The signature is written in a cursive, slightly slanted style.

Mike Furlough
Executive Director
HathiTrust