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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)

Thank you for the opportunity to comment on this Notice of Inquiry. The University of Michigan Copyright Office welcomes the discussion that this topic has generated. We appreciate the U.S. Copyright Office's efforts to address an issue that is both complex and a real concern for memory institutions, researchers, rights holders, and the public. Significant energy and resources have been invested in the questions raised by mass digitization.

We believe that extended collective licensing is a poor solution for education, research, scholarship and similar interests in the United States, largely because it obscures the information problem facing all of us, especially large-scale collections. Extended collective licensing would likely impose unreasonable costs for memory institutions. Libraries, universities and similar organizations have productive experience and ideas that could help to resolve this problem for nonprofit educational uses; exploring these ideas requires dialogue outside of the extended collective licensing framework. Respectfully, the Register's report of June 2015, *Orphan Works and Mass Digitization*, does not appropriately take into account our views or the range of views expressed by our peers in public comments and roundtables.

At the University of Michigan Library, we have developed significant experience in copyright determinacy through projects like the Copyright Review Management System (CRMS).¹ We are most interested in continued conversations around this topic,

¹ See <http://www.lib.umich.edu/imls-national-leadership-grant-crms-world>. In CRMS, the University of Michigan has worked for over 7 years with now over 15 partner libraries to research and document copyright information for books published in the US between 1923

and we want to work towards finding practical solutions for providing access to the rich heritage of our cultural institutions. Particularly, we want to develop solutions with a clear understanding that copyright law already provides us with important and adaptable tools. Fair use and other limitations to the otherwise exclusive rights of copyright holders provide a flexible, equitable legal framework for all parties, including nonprofit educational organizations. We are concerned that the gravitational pull of extended collective licensing would negatively affect fair use in this country. *Any proposed solution must be explicit that it will in no way diminish any of the rights, limitations, and uses described in §§107-122.*

Extended collective licensing presents a range of challenges.

Beyond our concern for fair use and other limitations, memory institutions have consistently gone on record to express their principled concerns regarding extended collective licensing, most prominently:

Extended collective licensing does nothing to solve the un-locatable author problem for works found in memory collections; funds would frequently go undistributed, failing to benefit the putative rights holders that the whole, complex regime is meant to benefit.

Extended collective licensing seems likely to lead to significant administrative costs, entrench CMOs, and risks creating opaque bureaucracies with a vested interest in enlarging the sphere of copyright, at the expense of the public good. These costs have been acknowledged by potential CMOs.² Given the start up cost alone, the investment for a five-year pilot seems inordinate for the thin benefit. We welcome the opportunity to explore with you some shorter-term projects that could test alternatives to extended collective licensing less expensively.

Extended collective licensing creates rights silos in multiple CMOs, which is a profound disincentive for those hoping to make use of diverse collections. Implementing a public registry or notice mechanism could be done in a fairly

and 1963 and books published in the UK, Canada and Australia. The Institute of Museum and Library Services (IMLS) has provided generous support for this effort. We are rolling up our sleeves to close the information gap where possible, especially regarding public domain determinations. See *IMLS award numbers LG-05-08-0141-08, LG 05-11-0150-11, and LG-05-14-0042.*

² During the 2014 Roundtable, Mr. Frederic Haber of the Copyright Clearance Center stated that in an effective extended collective licensing 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.” See <http://www.copyright.gov/orphan/transcript/0311LOC.pdf>, page 303, lines 8 - 19.

simple and cost-effective manner without the establishment of a complex extended collective licensing regime. Different CMOs for different media, as the request for comment suggests, would not ease the challenge for libraries and others who might be eligible for these licenses.

Extended collective licensing distracts and diverts time, energy, money and intellect from the development of information resources (a recordation system, a modern, meaningfully accessible, robust public copyright registry) that would allow users to identify rights holders. These resources have been repeatedly called for in other Copyright Office reports.

Extended collective licensing represents a “tax” on the use of works that are in the public domain or uses that do not otherwise require authorization or a license.

As noted, many of these observations were made in past comments to the US Copyright Office. These comments were not adequately recognized in the Copyright Office’s *Orphan Works and Mass Digitization* report. These viewpoints and practical experiences should be actively considered as proposed solutions move forward. Ignoring the key problems we collectively face will result in substantial waste of public resources.

The record already demonstrates a lack of interest in extended collective licensing from memory institutions.

A successful solution will require commitment and widespread support from a broad range of licensees. The record consistently reflects that many stakeholders do not support an extended collective licensing approach. Below, we highlight some past comments to illustrate the lack of licensee interest from memory institutions in extended collective licensing:

California Digital Library: “An extended collective license (ECL) is not a viable solution for library uses of orphan works.”⁴ While the Copyright Office may wish to distinguish extended collective licensing for orphan works from extended collective licensing for Mass Digitization, most large-scale digital collections will contain significant numbers of orphan works.

HathiTrust: “We were struck by the degree to which Roundtable participants opposed the implementation of an extended collective licensing scheme in the

⁴ Comments of The California Digital Library, *Orphan Works and Mass Digitization*, May 21, 2014 at page 9, available at: [http://copyright.gov/orphan/comments/Docket2012_12/California-Digital-Library\(CDL\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/California-Digital-Library(CDL).pdf)

United States, and believe that this demonstrates clearly that such a legislative solution should not be pursued.”⁵

Library Copyright Alliance: “In contrast to the disagreement concerning orphan works legislation, there was general agreement at the public meeting that extended collective licensing (ECL) would not be an effective solution to issues relating to mass digitization, even if limited only to books.”⁶

Society of American Archivists: “We cannot state too strongly that an ECL scheme will not work for archives. ECL does not solve the un-locatable rights holder problem.”⁷

Public Knowledge and the Electronic Frontier Foundation: “In comments, it was clear that almost no participants support the idea of extended collective licensing. Parties who opposed the idea included—among others—the Internet Archive, Independent Film and Television Alliance, the Berkeley Digital Library Copyright Project, Carnegie Mellon University, Dance Heritage Coalition, a broad coalition of documentary and independent filmmakers, the Society of American Archivists, the College Art Association, the National Federation of the Blind, and the New York Public Libraries.”⁸

The Notice of Inquiry does not provide an opportunity to address key concerns with an extended collective licensing framework.

In considering our response to this Notice of Inquiry, we struggled with the challenge presented by the Copyright Office’s *Orphan Works and Mass Digitization* report and this Notice of Inquiry, in part because they do not confront the most difficult issues created by extended collective licensing. For extended collective licensing to function, it would have to address and provide acceptable resolution to the following issues:

⁵ Comments of HathiTrust, *Orphan Works and Mass Digitization*, May 21, 2014 at page 4, available at: http://copyright.gov/orphan/comments/Docket2012_12/HathiTrust.pdf

⁶ Additional Comments of the Library Copyright Alliance, *Orphan Works and Mass Digitization*, May 16, 2014 at pages 6-7, available at: [http://copyright.gov/orphan/comments/Docket2012_12/Library-Copyright-Alliance\(LCA\)-American-Library-Association\(ALA\)-Association-of-Research-Libraries\(ARL\)-Association-of-College-and-Research-Libraries\(ACRL\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/Library-Copyright-Alliance(LCA)-American-Library-Association(ALA)-Association-of-Research-Libraries(ARL)-Association-of-College-and-Research-Libraries(ACRL).pdf)

⁷ Comments of Society of American Archivists, *Orphan Works and Mass Digitization*, May 20, 2014 at page 2, available at: [http://copyright.gov/orphan/comments/Docket2012_12/Society-of-American-Archivists\(SAA\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/Society-of-American-Archivists(SAA).pdf)

⁸ Comments of Public Knowledge and Electronic Frontier Foundation, *Orphan Works and Mass Digitization*, May 21, 2014 at pages 3-4, available at: [http://copyright.gov/orphan/comments/Docket2012_12/Public-Knowledge\(PK\)-Electronic-Frontier-Foundation\(EFF\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/Public-Knowledge(PK)-Electronic-Frontier-Foundation(EFF).pdf) (internal citations omitted).

Extended collective licensing does not solve the information problem found in large-scale collections. In the Appendix to its February 10, 2014 comments, the Scholarly Communications Office at the University of North Carolina, Chapel Hill provided a rich set of examples of the information problem embedded in large-scale digital collections. Illustrations relevant to extended collective licensing include: (1) author identity being separated from the work in hand; (2) inability to determine whether a work was published or unpublished; (3) impossibility of identifying rights holders due to passage of time; (4) unclear public domain status, based on lack of certainty regarding copyright formalities applicable to older materials.⁹

Extended collective licensing is perceived as a diversion of already stretched resources from library activities that must be sustained and are essential to current authorship, progress, and the public good. For example, the California Digital Library has stated: “Rather than placing a backward-looking tax on old books that aren’t economically viable, scarce library budgets are better spent on new content purchases that directly benefit and amplify the reach of today’s authors and stimulate new creative work, advancing the fundamental purpose of copyright.”¹⁰

There is rational distrust of extended collective licensing, based on past national and international experience. “Cautionary Tales about Collective Rights Organizations” details mismanagement, transparency failures, high administrative costs, and other damaging inefficiencies in many extended collective licensing frameworks.¹¹ Any extended collective licensing framework must demonstrate that it could be simultaneously transparent, efficient, and accurately compensate rights holders.

The U.S. Copyright Office should consider modeling or providing oversight to a small-scale study.

Some applied research would allow for low cost experimentation to study extended collective licensing alternatives that could be meaningfully transparent, efficient, and accurately compensate rights holders. This would avoid the high costs of the proposed pilot, which would require legislative action, expensive development and authorization of CMOs, negotiation and payment of licensing fees, and myriad other substantial transaction costs.

⁹ Comments of University of North Carolina at Chapel Hill’s Scholarly Communication Office, *Orphan Works and Mass Digitization*, February 10, 2014 (Appendix), available at: [http://copyright.gov/orphan/comments/Docket2012_12/University-of-North-Carolina-Chapel-Hill\(UNC-Chapel%20Hill\)-Scholarly-Communication-Office.pdf](http://copyright.gov/orphan/comments/Docket2012_12/University-of-North-Carolina-Chapel-Hill(UNC-Chapel%20Hill)-Scholarly-Communication-Office.pdf)

¹⁰ Comments of The California Digital Library, *Orphan Works and Mass Digitization*, May 21, 2014 at page 10, available at:

[http://copyright.gov/orphan/comments/Docket2012_12/California-Digital-Library\(CDL\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/California-Digital-Library(CDL).pdf)

¹¹ Jonathan Band and Brandon Butler, “Some Cautionary Tales About Collective Licensing.” *Michigan State International Law Review* (2013).

The University of Michigan Copyright Office would be pleased to collaborate with the U.S. Copyright Office to provide a list of in-copyright works as a sample for a study. For example, we could study a sample of 10,000 titles to establish an effective, equitable approach. Potential CMOs could also work with those titles to see if and how they would identify rights holders and project how they would distribute funds. This could be done as an explicitly short-term study over a six-month period with a public report out at the end. With this kind of small-scale model executed under the supervision of the U.S. Copyright Office, there may be better appreciation of the problems or opportunities represented by extended collective licensing or variant frameworks. Research under the auspices of the U.S. Copyright Office would be an important guidepost for any future framework; regardless of outcome, the lessons learned would help inform future workable solutions.

Conclusion

We welcome the opportunity to explore balanced and cost effective solutions and appreciate the US Copyright Office's willingness to foster conversations about these matters. On a pragmatic note, we believe that much of this can be addressed by improved access to US Copyright Office records as a foundation for addressing the information failure we currently face. For now, we sincerely hope that the Copyright Office will re-examine the record and recognize that its current position on extended collective licensing, as implied by this notice of inquiry can be better balanced. The great cost of piloting an extended collective licensing framework would be a disservice to the public and misses the opportunity to research and identify approaches that may lead to more fruitful outcomes.

Sincerely,



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Justin Bonfiglio
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