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Response In Behalf of:

The American Society for Collective Rights Licensing, Inc.
("ASCRL")

To
**Federal Register/Vol. 80, No. 110 [Docket No. 2015-3]
Mass Digitization Pilot Program; Request for Comments**

I. Introduction:

The American Society For Collective Rights Licensing, Inc. ("ASCRL") thanks the Register and Copyright Office for its research and investigation into an extended collective licensing system that will serve both the public's interest in digitized content access and in an appropriate compensation system for rights owners and authors.

ASCRL is the first North American CMO established specifically for the purposes of maximizing the collection and distribution of foreign and domestic collective, statutory, and other direct and indirect licensing revenues for U.S. based copyright owners and authors, and for foreign rights owners and authors that are obtained from domestic licensing systems.

ASCRL is committed through its board structure to industry wide representation, to the representation of the financial interests of rights owners and authors, and to transparency and efficiency in the management of rights owner and author distributions, all with the goal of maximizing the benefits of licensing to rights owners and authors. Founded in

2015 with support by American Photographic Artist's, Inc. ("APA"), and with the support of other leading visual art and photographic associations in the United States, and organizations overseas, ASCRL is also working closely with foreign RRO's and CMOS for the purpose of addressing foreign distribution issues for U.S. based rights owners and authors. ASCRL is also looking forward to its continued relationship with the PLUS Registry, as ASCRL and PLUS are working together for the purpose of designing and implementing distribution systems that will maximize distributions to ASCRL's future members. ASCRL and PLUS have overlapping directorships on their respective boards. ASCRL also wishes to thank American Photographic Artists for its support of the comments here presented.

II. Comments:

ASCRL believes that an extended collective licensing system for certain educational, scientific, and non-commercial social objectives, will serve the public interest and the financial interests of rights owners and authors, provided that appropriate checks and balances are in place. ASCRL does not believe that an ECL system should operate as windfall content source for content aggregators and ISPs, or for publishers who manage large amounts of content and who stand to realize volume-based revenues largely due to portfolio size. ASCRL also believes that such a system must properly compensate rights owners and authors, whose markets are increasingly usurped by the use of their content in the digital space. Accordingly, ASCRL believes that any ECL system, particularly for mass digitization purposes, must involve appropriate rights owner and author directed compensation, and content end-use limitations in order to protect author markets.

The Problem of Mass Digitization

The Copyright Office points to the possibility of establishing an extended collective licensing system in order to address the public's interest in the mass digitization of copyrightable content. The Office points out that public access to content may be thwarted due to the large volume of works that require licensing and gaps between available licenses and those needed. Part of the public's interest in obtaining content access involves the public's specific need to address the financial interests of authors and publishers to assure that they receive appropriate compensation for their work. Under an extended collective licensing system, licenses could be granted by approved CMOS to qualified licensees for the mass digitization of literary and pictorial work. This might be done under an arrangement whereby the CMOs collect and distribute an appropriate license fee for digital uses. ASCRL believes that there is a complete and total market failure in the current licensing system. It is a system that totally fails to address both the access and compensation problems existing in the mass digitization context, especially when it comes to the compensation problems confronted by authors. ASCRL believes that a properly implemented ECL system may provide solutions.

Scope of Covered Activity

As a preliminary matter, the Copyright Office Notice of Inquiry itself surfaces but does not precisely resolve what activities qualify as "mass digitization." Activities like the Google Books project, and the scanning of entire libraries are apparently included. But

some less extensive activity might qualify. The proposal is to include scientific and educational uses (by commercial and non-commercial enterprises). While embracing the inclusion of the large-scale digitization of materials included in enterprises like the Google Books project, ASCRL believes that the concept of mass digitization might be more inclusive.

Inherent in the challenge of addressing the definitional scope of the term “mass digitization” there is also the concern with how one is to treat the fragmented mass digitization of materials that occurs on social media websites. This is an area in which there has been an absolute, complete, and total market breakdown of rights licensing schemes. This is in part based on alleged ISP immunity, in part based on the anonymity of those that copy content into digital platforms, the inadequacy of take down procedures, and the insufficiency of copyright remedies for these types of uses.

Social media sites have arguably aggregated more digital content than the Google Books project, and certainly more than most libraries. The only difference is that rather than through an ISP’s own direct initiatives, the content is appropriated by providing a vehicle to millions of users who individually post and digitize content, much of it infringing. These users pose an even greater challenge for rights owners. Rather than addressing the use from a single source, such as Facebook, which enjoys immunity from infringement claims, the rights owners are forced to pursue individual and varied content appropriators. Social media sites, in turn, now have entire departments devoted to material takedowns for unlicensed uses. Certainly if there is a place where ECL might serve a purpose for the public who wants to enjoy content, and for the authors who provide it, it would be in this social media context. ASCRL therefore strongly endorses a definition of mass digitization that includes fragmented aggregated content, and urges that the definition of “qualified digital collection” include those “collections” assembled indirectly through the use of social media portals.

Protecting the Compensable Interests of Authors

Beyond accommodating a definition of mass digitization that is sufficiently broad to be meaningful to authors from a compensation standpoint, yet sufficiently narrow to protect them, ASCRL believes that the central question that an ECL system must address is how it proposes to allocate compensation in the marketplace. Standing next to the public’s interest in content availability are prospectively three distinct compensable interests that must routinely be addressed.

The first is the compensable interest of the content delivery systems. These systems, such as Google Books, mechanically control access to material, and thus, as a practical matter are able to monetize the access to content. Their financial interests are served by maximizing their inventory of content, so they can generate more revenue. They have collateral revenues sources (such as advertising revenues) that generate compensation indirectly and that are premised on the content they provide.

A second compensable interest that must be considered is that of the publishers of the content. Generally, the publishers will have acquired rights in context, text, photos, illustrations, and the like. This will ostensibly entitle them to compensation for use. This

will include compensation for digitization if the appropriate digital rights have been acquired. If not, there will be a gap between the needed rights and the rights available, and this may require return to an author for additional clearance. Of course these publishers may sometimes be the authors themselves. Any ECL system that permits the mass digitization of textual material must fully protect the publishers and authors of such material, and ECL rates must fully compensate publishers and authors for the market substitution that the digital platform might create, by assuring the publishers a revenue base that equals or exceeds that which they enjoy from their own digital publications, or from non-digital material that might be rendered obsolete. In certain circumstances the digitized platform might condition access to certain works on payment to the publishers and authors, and this might require that the platform include a payment mechanism in appropriate circumstances. Such a system can employ existing technology.

The third compensable interest that must be considered is that of the author of the content. In some instances the author's rights in content will derive through the publisher's interests if the authors rights have been assigned or licensed, or will accrue directly to authors in limited circumstances where those rights have been retained. In these instances the author is likely to receive a fractional interest, or no interest, in the ECL revenues to be derived through mass digitization of their content, unless their interest is separately addressed by the ECL system. The interests of authors would not be well served unless individual ECL payments to authors are maintained at appropriate licensing levels commensurate with their commercial licensing activities.

ASCRL endorses a collective licensing system that guarantees appropriate revenue distributions to all of the stakeholders. The financial interests of the digital platforms are sufficiently protected by the mechanical controls they place on content access, and the rights that accrue in the aggregation of their content. Additionally, they are able to control their own content acquisition, and scale it to affordable costs. The financial interests that will therefore require protection under ECL will be those of the publishers and authors.

ECL is itself a departure from the copyright law's existing compensation model. It creates an entitlement to compensation for use under a paradigm that does not currently exist. Content providers would negotiate rates with CMOS and the represented class of rights holders would receive distributions, unless they opted out. In essence, it is a compulsory license (fees are set by third parties or through arbitration or other Alternative dispute resolution mechanism) for all but those who withdraw. ECL therefore creates a means of use for users that did not previously exist, and a revenue base for publishers, that they did not otherwise have, and a resource for authors for licenses that might otherwise not obtain. The question, within this paradigm, is not only whether such a system will be functional in providing content, but to whose benefit the license fees will inure?

For publishers amassing large volumes of content there is much to be realized from such a system. Certainly millions are to be made, even if only at a penny per digitized page. However, the benefits for authors, who are the source of the content, lack parity. They have little to gain from participating in a fraction of the penny paid for the appearance of their work on a page. And it is quite certain that publishers will be motivated to decline dealings with authors who do not abrogate their rights, as this would dilute publisher

revenues and impose administrative burdens upon them to make distributions. Here the interests of the publishers and non-author rights owners diverge from those of the authors. Generally authors are entitled under publishing agreements to either no revenue from digitized uses, or to fractional amounts. Further, an ECL system that would usurp author markets at fractional gain, or possibly in the absence of any gain, would not have been a consideration in rights negotiations with the publishers with whom they originally dealt. ASCRL therefore believes that any ECL system that works to generate new revenue sources for publishers should be one that shares the revenue sources with authors.

ASCRL therefore also endorses an ECL system that seeks to compensate authors in parity with the other stakeholders. Toward that end, ASCRL proposes several options for consideration. First, ASCRL proposes that a system would be possible pursuant to which any ECL cleared work would require a division of payment that would include a 25% share to the publishers who are likely to derive massive sums based on their volume), and a 75% share to be distributed to authors (or among participating authors if more than one). If the publisher and author were the same, the entire sum would go to the author. Alternatively, ASCRL proposes for consideration a system where any authored ECL content must be cleared through rate negotiations in behalf of the authors themselves, even if an ECL clearance had been obtained from the publisher.

The key theme of such a system is already embraced in current copyright law for the streaming of recordings and the revenues that are administered under 17 U.S.C. Sections 112 and 114, and through SoundExchange. Under this legislation, revenue sharing is statutorily prescribed for recording companies and recording artists. Additionally, as the Copyright Office notes in regards to the Google books settlement the amended settlement agreement only authorizes Google to display the pictorial images in such Books if a U.S. Copyright owner of the pictorial image also is a Rights-holder of the book. Therefore, a separate accommodation would be required; at least for the author contributors who had reserved rights. These concepts preserve the author's rights to compensation and deserve inclusion in any ECL scheme.

Point Of Access (“POA”) Limitations

The implementation of an ECL scheme for mass digitization inherently entails concerns about the resulting access, the scope of end use, and its implications. Different digitization platforms implicate different types of content access. Access might, for example, be obtained in a library. It might be in a school. For social media it might be from a private terminal. ASCRL believes that access should be limited to the point-of-access as much as possible. POA restrictions are necessary to guard against re-transmission, and to prohibit output.

ASCRL believes that appropriate end use restrictions might also help to expand the market for the work. Unless the platform user is willing to pay for or purchase additional permissions, e.g., a download or output for the work, additional use would be unavailable. Currently, there is a complete and total market failure to compensate authors for the provision of unauthorized access to their materials in large segments of the digital

space, and there is a complete and total failure to compensate them for unauthorized private archiving and downloading of their work.

Under an ECL system, in which payment can be provided for these uses, rights owners and authors might enjoy an additional market and means to monetize their materials rather than to suffer the free unauthorized access given to their material under the current system. ASCRL also believes that CMOS might be able to maximize the authors' interests in expanding end uses of the content. With an ECL system in place, further monetizing the end uses can be addressed by the CMOS and authors on a case by case basis, with author approval. In any case, the appropriate author-based compensation would be set commensurate with the scope and nature of the digitization scheme that is being employed, and in accordance with the agreement between the CMO and author.

III. Conclusion:

ASCRL appreciates the Copyright Office's interest in accommodating the public's interest in access to content, and also the need to balance that with appropriate compensation for authors. ASCRL believes that mass digitization needs a broad enough definition to include social media. Additionally, a premise of any ECL system must be that the financial interests of authors are protected, and that end uses are properly controlled. Finally, ASCRL also favors conflict resolution through binding decisions by a copyright royalty arbitration panel, provided that appropriate rate standards are set and that they are designed to protect author interests. ASCRL believes that further discussion concerning the establishment of these standards would be appropriate.

ASCRL thanks the Copyright Office for its attention to these important questions.

Sincerely,

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The Intellectual Property Group, PC
Counsel to
American Society For Collective Rights Licensing, Inc.