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**Before the Copyright Office**

**Library of Congress**

In the Matter of )  
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**Mass Digitization Pilot Program** ) Docket No. 2015-3  
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**Comments of the Authors Guild**

**Submitted by Mary Rasenberger, Executive Director**

The Authors Guild submits this statement on behalf of its over 9,000 members in response to the Copyright Office’s Request for Comments on a limited mass digitization pilot program. Our members represent the broad sweep of American authorship. They are historians whose work depends upon access to records of the lives and events of the past. They are novelists whose inventions extend our literary traditions. They are rural and urban, translators and poets, Pulitzer Prize-winners and neophytes. They are the authors of every conceivable type of book. Most of these books have been subject to mass digital copying: indeed, the unauthorized, wholesale copying of these works was the subject of two kindred copyright infringement lawsuits, *Authors Guild v. Google* and *Authors Guild v. HathiTrust*.

As explained in our testimony to the House Judiciary Committee on the Preservation and Reuse of Copyrighted Works,<sup>1</sup> we believe that a collective licensing solution to the mass digitization of

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<sup>1</sup> *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. On Courts, Intellectual Property, & the Internet of the H. Comm. Of the Judiciary*, 113<sup>th</sup> Cong. 81 (2014) (statement of Jan Constantine, General Counsel, Authors Guild, Inc.), available at

literary works is not only proper, it is possible. An extended collective licensing solution is particularly suitable because it provides for the ability to obtain a broad license, while allowing for an opt-out.

We are grateful to the Copyright Office for recognizing this and for taking the initiative to spearhead a pilot program. The Authors Guild is ready and willing to participate in or to aid the Office in establishing a successful pilot that would increase public access to millions of out-of-commerce books while respecting copyright and channeling to authors and other rightsholders a crucial revenue stream—in an era where fair pay for authors is harder to come by than ever.<sup>2</sup>

### **The Benefits of an ECL Regime for Out-of-Commerce Literary Works**

An extended collective license for full-text access to out-of-commerce literary works would serve our nation’s authors and readers while fulfilling copyright’s constitutional mandate to “promote the progress of science and useful arts.”<sup>3</sup> By ensuring that entire books, not just snippets, can be read online, a Copyright Office pilot program could bring millions of out-of-commerce books to the readers and researchers who need them most. Authors and other creators will reap the benefits of increased access to out-of-commerce books; they’ll also see new revenue for the use of their works. No less important, the copyright law’s fair use exception won’t have to be stretched so far beyond the doctrine’s intended case-by-case analysis and application that fair use becomes the rule and copyright the exception.

### **The Public Good**

Knowledge builds on knowledge. Readers and researchers are moving online, where plenty of content of varying quality is available. Our literary heritage and the learning embodied in out-of-commerce books (which includes most books from the twentieth century) should be equally available to the public. The reality is that research practices have changed and many students and researchers don’t use libraries the way they used to. The days of hunting through the stacks may be over for most. If these books are not made digitally available, the learning and knowledge they provide is at risk of loss and we risk becoming an amnesiac culture. An ECL for out-of-commerce works would bring millions of currently inaccessible books back into the light.

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<http://judiciary.house.gov/index.cfm/2014/4/hearing-preservation-and-reuse-of-copyrighted-works> (hereinafter “Authors Guild Testimony”).

<sup>2</sup> A recently-released 2015 Authors Guild member survey revealed that the writing-related income of full-time book authors has dropped 30% since a similar 2009 survey, from \$25,000 to \$17,500. Part-time authors saw an even steeper decline, as their writing income over the same period dropped 38%, from \$7,250 to \$4,500. See “The Wages of Writing,” (Sept. 15, 2015) available at <https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/>.

<sup>3</sup> U.S. Const., art. I, section 8, clause 8.

### **Authors and Other Rightsholders**

Authors' livelihoods increasingly depend on their ability to monetize digital uses of their works. Over the last decade, the digital market for books has exploded. In 2009, less than 5% of adult readers had purchased an e-book in the past month. By 2015, that number had increased tenfold, to nearly 50%.<sup>4</sup> An ECL solution to mass digitization would enable authors and other rightsholders to be compensated for the uses of their works resulting from mass digitization projects. Otherwise, authors and other rightsholders will suffer yet furtherer losses in revenue.

Authors rely on licensing revenues for just these kinds of uses to support their ability to write. Many authors live on the cusp of being able to support themselves, and such a loss in licensing fees, while it may seem trivial to some, may be the difference between being able to keep writing as a profession or not. In the case of Google Book Search, for instance, authors are not only losing fees that Google should be paying for copying and making their works available, they are also losing income from lost sales. This is because researchers can often find all they need from a book through Google Book Search. To allow this kind of use to go uncompensated dramatically undermines the very purpose of copyright law—allowing authors to control use of their works and obtain compensation for the use as an incentive to write, and to keep writing.

The pilot program should also take steps to ensure that authors aren't *harmed* by inclusion of their works in the ECL. It could achieve this by limiting the ECL to out-of-commerce works—so as not to interfere with existing digital markets—and by ensuring that negotiated security standards are in place for the digitized works.

Last, a point that is often overlooked: authors' interests in an ECL solution aren't just financial. Authors aren't only the rightsholders in this scheme, they're also the potential end-users of the books made available under an ECL. Writers are also researchers and depend on the availability of out-of-commerce works for research purposes and for the development of their craft. An ECL regime could provide these writers with the full-text access to out-of-commerce works they need.

### **Copyright Law**

For the entire history of U.S. copyright law, authors have been at the center of the copyright equation. While authors' rights have never been absolute, incentivizing authors to create by protecting their economic interests has been the bedrock of our robust copyright ecosystem. Now, some courts have turned the analysis on its head: Authors' exclusive rights are expected to yield to the technological advances of corporations seeking to gain market share and generate vast profits without paying, or obtaining the permission of, the people who wrote the books that they are using. Applying fair use to mass digitization is nothing other than a form of free compulsive licensing—one created by courts (when considering only one party's interests against another, and determining that authors get no compensation). This is a key point to bear in

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<sup>4</sup> Codex Group Survey, on file with the Authors Guild.

mind: there is virtually no practical difference between court holdings that mass digitization projects as a whole are fair use and a compulsory license for mass digitization—except that the former have none of the conditions or limitations of the nature Congress has provided in connection with compulsory licenses. Congress is the body that should determine what the rules should be for this sort of use, as it has the ability to broadly study and balance the needs of creators, users, and other interested parties in the best interest of the nation as a whole. An ECL solution will help reset the balance.

Extended collective licensing for mass digitization is an alternative to fair use litigation. In the context of mass copying, fair use litigation runs the risk of stretching the doctrine to its breaking point, where copyright for out-of-commerce books becomes meaningless. If we had a collective licensing system in this country, there’s no doubt that courts would look at fair use differently in the mass digitization context. Particularly, 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 requiring consideration of “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>5</sup>

Finally, an ECL for out-of-commerce books would allow digitization projects to evolve in a climate of legal certainty. The effects would be twofold. First, the ready availability of an ECL, by removing the legal risks of digitization, would allow smaller institutions to embark on digitization projects, increasing the variety and depth of specialization of the collections available to the public. Second, and no less important, an ECL—by clearly establishing the terms and the scope of permissible uses for out-of-commerce books—could serve as a palliative to the tortured exchanges between rightsholders and users that have so often made a battlefield of digital-era copyright law.

Our answers to specific question posed by the Copyright Office are below. It is important that throughout the process stakeholders remember that, as the Office has recognized, “despite the complexity of the issues surrounding creation of an ECL regime in the United States, they are by no means insurmountable.”<sup>6</sup>

Unless otherwise noted, our responses are intended to apply to a potential pilot, as well as a long-term solution, as the more closely the pilot reflects the envisioned ECL, the more useful it will be.

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<sup>5</sup> 17 U.S.C. § 107 (2012).

<sup>6</sup> U.S. Copyright Office, *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* (2015) at 96, available at <http://copyright.gov/orphan/reports/orphan-works2015.pdf> (hereinafter “Copyright Office Report”).

## 1. Examples of Projects

The Copyright Office has recommended that ECL be available for three categories of published copyrighted works: (1) literary works; (2) pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works; and (3) photographs. Our comments focus solely on ECL for literary works, specifically for full-text access to out-of-commerce books for research use.

At the outset it bears mentioning that an ECL is always tailored to a particular category of work and a particular type of use, or uses, and potential users, of those works. Without these particulars at hand, any commentary is bound to remain abstract and speculative. As such, we address our comments, where possible, to the particular type of ECL we propose. Specifically, we believe that full-text access to out-of-commerce literary works is ideally suited for extended collective licensing for mass digitization. These works are the core of the collections of most libraries and archives, particularly those used by researchers. Books remain an unsurpassed medium for the dissemination of knowledge and the voicing of human experience, and are the primary vessels for the transmission of past and even current learning. We have relied on libraries for most of our history to retain those books and make them discoverable to researchers. As research moves increasingly into an online environment, researchers should have online access to older out-of-commerce books, but in a way that compensates the rightsholders, namely the authors, for that access. Thus, we support an ECL regime enabling full-text access to out-of-commerce books for research use. We agree with the Copyright Office that permissible uses during the pilot phase should be limited to those “undertaken for nonprofit educational or research purposes.”<sup>7</sup> Other uses could be considered for inclusion in the ECL at a later date.

As a threshold matter, mass digitization projects undertaken as part of the pilot program should be limited to those instances where there is a demonstrated need for an extended collective license. That is, where there is a market failure, and the costs of negotiating individual licenses for the many works to be digitized exceed the benefits.<sup>8</sup> Millions of books have been published in the copyright era, and the overwhelming majority of these languish out of print and out of the reach of most potential users. The difficulty of procuring licenses for the number of out-of-commerce works in a mass digitization project is pronounced, because out-of-commerce works by definition don’t circulate on the open market and the price any one user is willing to pay to read any one book is usually relatively small. One of the great promises of digitization lies in its ability to connect these out-of-commerce books with the readers and scholars who can best put them to use.

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<sup>7</sup> Copyright Office Report at 89.

<sup>8</sup> See Copyright Office Report at 80 (“The need to identify, locate, and negotiate individual licenses with a multitude of rightsholders may render a direct licensing solution cost-prohibitive for many potential users.”).

Very importantly, we 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. For instance, the *Google* and *HathiTrust* cases have not resolved the issue of full display access for out-of-commerce books. There is no reason that the digital copies of books already digitized by Google and used in Google Book Search and available in the HathiTrust repository should not be eligible for the pilot program.

#### **a. Qualifying Collections**

##### **Should the pilot be limited to collections involving a minimum number of copyrighted works?**

There should be no per se requirement for a minimum number of works. Any strict numerical bar to entry would be arbitrary and could exclude suitable projects from the pilot program. As discussed above, one of the benefits of an ECL would be that, by removing the risk of litigation, it would enable smaller, more modestly funded organizations to reap the benefits of digitization. It should be sufficient for qualification that a prospective ECL licensee demonstrate the threshold market failure, namely, “that the clearance of rights on an individual basis would be impracticable.”<sup>9</sup>

That market failure might easily occur for small projects as well as large projects because the costs of clearance cannot necessarily be absorbed even where there are not a vast number of works to clear. End-user fees for the use of out-of-commerce works must be kept relatively low in order for any licensing scheme to work; if fees are set too high, the books will not be used. Thus, the ECL should apply to any qualifying use where the cost of securing rights outweighs the value of obtaining the rights. Rather than a rigid volume threshold, any permanent ECL regime should use guidelines or regulations to establish the criteria for demonstrating market failure, which should include, among others factors, the number of works sought for use. Mass volume of works often is a component of market failure, but it is not the only measure.

Volume may, however, come into play in assessing whether the CMO will be able to collect enough fees overall to cover the costs of administering the ECL. For this reason, the CMO should not be limited to overseeing the administration of only one collection. It should have the ability to provide licenses for digitizing books and providing access for research use to any potential qualifying ECL licensee.

##### **Should the pilot include commercially available works, or only out-of-commerce works?**

The ECL should limit full-text access to out-of-commerce works so as not to interfere with existing revenue streams. This is an essential piece of the puzzle in ensuring the public benefit of

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<sup>9</sup> Copyright Office Report at 89.

mass digitization projects while at the same time guarding against a digital collection’s potential to cannibalize existing e-book markets. An out-of-commerce limitation will ensure that public access to mass digitization collections doesn’t interfere with the existing e-book revenue streams, an increasingly significant portion of book publishing revenue.

The Copyright Office has questioned whether an out-of-commerce limitation would diminish the research and educational value of the digital repertoire.<sup>10</sup> We believe it would not. Rather, in order to benefit all parties, digital collections should be supplemental to—not substitutes for—existing digital markets. Furthermore, limiting the ECL to out-of-commerce works would not greatly diminish the research and educational value of the digital repertoire: in-commerce works are by their very nature available in the marketplace. This is true now more than ever, where readers and researchers in the most remote parts of this country have at their fingertips the ability to purchase books whose variety and availability would make an analog-era reader’s jaw drop.

Moreover, limiting the basic ECL to out-of-commerce works doesn’t entail excluding in-commerce works from the pilot program. In-commerce works could be included in the CMO’s repertoire on an opt-in basis—with the rightsholder’s permission—in licenses provided at additional fees. They could be available, for example, for non-commercial uses, including research and educational use, or only for narrow uses such as full-text search and snippet display.

#### **Should the program be limited to works published before a certain date?**

It is inadvisable to limit the pilot program to works published before a certain date. As the Copyright Office recognized in its Report, this limitation would “sweep in a significant number of works for which digital markets do exist.”<sup>11</sup> This is because the literary marketplace contains thousands of “evergreen” titles—books that, often because of their status as classics, still perform strongly in the marketplace despite the fact that they might be decades old. These titles are often of great value to publishers and literary estates. Allowing these titles to be included in any ECL pilot program would be an oversight resulting in a costly loss to rightsholders. By the same token, limiting the pilot program by date would also exclude from the program many out-of-commerce works—precisely those works whose rightsholders stand to benefit most from the increased revenue and visibility a licensed digital library can provide.

A note on terminology: it is sometimes less than clear whether stakeholders prefer the term “out-of-commerce” or “out-of-print.” Indeed, at times these phrases are used interchangeably. Due to some major changes in book distribution over the last decade, we believe an “out-of-commerce” standard is preferable to an “out-of-print” standard. In this age of electronic and print-on-demand editions, determining what’s “out-of-commerce” is much simpler than determining what’s “out

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<sup>10</sup> See Copyright Office Report at 86 (“[L]imiting ECL to out-of-commerce books could diminish the research and educational value of the digital resources that the system is intended to make possible.”).

<sup>11</sup> Copyright Office Report at 87.

of print.” The Google Books Settlement, by way of example, defined “Commercially Available” as a book “being offered for sale new by a seller anywhere in the world to a buyer in the United States, Canada, the UK or Australia.”<sup>12</sup>

## **b. Eligibility and Access**

### **Should access be limited to students, affiliates of the digitizing institution, or should ECL licensees be permitted to provide access to the general public?**

In any ECL, an important goal is to limit exceptions to copyright’s exclusive rights to those cases “which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”<sup>13</sup> This can be accomplished by restricting the type of works, use, and/or users the ECL applies to, but will not necessarily require restrictions for each.

Generally speaking, authors want their books to be read, and the goal of most digitization projects is to make works more widely available. The reason to limit users to a certain category would be to reduce undue interference with or harm to the rights of the copyright owner. As long as there are limits on the types of works in the ECL at the input phase (i.e., the ECL is restricted to out-of-commerce works), as well as on the type of permitted use (i.e., educational or research purposes), it becomes less important to qualify the end-user. On the other hand, limitations on the ECL licensee (e.g., a library or archives) that is providing access to the end-user might be considered as a way to ensure compliance with use restrictions. For instance, limiting licenses to libraries and archives for their users or members likely would reduce the potential for unauthorized commercial use by end-users.

In any event, we contemplate a system where other uses could be included on an opt-in basis, via negotiations between the rightsholders and the licensee-user. Just as, for an additional licensing fee, in-commerce works could be made available for limited uses such as research, education, or full-text search and snippet display, the scope of access allowed to any given collection might be subject to negotiation.

### **Should licensees be permitted to offer access to a collection remotely, or only through onsite computer terminals?**

Different types of licenses should be available for different users and for different uses. A qualified university, for instance, should be able to buy a subscription offering offsite printing to

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<sup>12</sup> Supplemental Notice to Authors, Publishers and Other Book Rightsholders About the Google Book Settlement at 2, available at <https://www.authorsguild.org/wp-content/uploads/2008/10/Supplemental-Notice.pdf>.

<sup>13</sup> World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 33 I.L.M. 81.

its affiliates so long as that offsite access is paid for and measures are in place so that the remote access is secure.

The benefits of remote access are undeniable. Remote access can ensure that a digitizing institution will be able to share a collection with the broadest possible spectrum of users, especially in today's climate of increasing digital mobility. But for this very reason, the risks associated with providing remote access are undeniable, and they center on the security of works offered remotely.

It would be overkill, though, and would defeat the broader purpose of an ECL, to categorically deny the possibility of remote access. The Authors Guild sees no problem with the possibility of remote access being offered by qualifying institutions, such as libraries and universities, provided that the institution meets requirements for the necessary technical security measures, as established by the CMO and/or the governmental agency charged with overseeing the ECL (i.e., the Copyright Office or the Copyright Royalty Board).

### **c. Security Requirements**

The Authors Guild agrees with the Office's recommendation that CMOs and users be required to include, as part of any ECL license, terms requiring the user to implement and reasonably maintain "adequate digital security measures to control access to the collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works."<sup>14</sup>

#### **What specific technical measures should be required?**

The specific technical measures would likely vary based on the scope of the license. But it's fundamental that security must be a part of any real solution to mass digitization; the risks of a breach are too great to be overlooked. We've had experience negotiating the proper security standards for a major mass digitization project during the discussions leading up to the proposed Amended Settlement Agreement (ASA) in *Authors Guild v. Google*.<sup>15</sup>

We recommend that security guidelines for the various uses and users be created and updated (at least annually) by the Copyright Office or by the CMO with expert consultation and the approval of its board (which would be comprised of a broad, representative group of rightsholders, appointed by vote of member rightsholders). For a large collection, such as one with the size and scope of HathiTrust, a security implementation plan could be formulated in coordination with the CMO, along the lines of the Security Standard negotiated by the parties to the proposed *Authors*

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<sup>14</sup> Fed. Reg. Vol. 80, No. 110, Tuesday, June 9, 2015, 32,615.

<sup>15</sup> Amended Settlement Agreement, *Authors Guild v. Google*, available at <https://www.authorsguild.org/wp-content/uploads/2014/10/2009-Nov-13-AGvGoogle-Amended-Settlement-Agreement.pdf>.

*Guild v. Google* settlement agreement,<sup>16</sup> updated, of course, to account for technological changes. Any such plan would have to be reviewed and amended regularly to reflect changes in technology and hacking practices.

### **Should the security requirements be set forth through statute or Copyright Office regulations?**

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 to set forth the security requirements for any digitization project undertaken as part of the pilot program. Statutory law is simply not sufficiently nimble to keep up with the pace of technological change.

### **2. Dispute Resolution Process**

Here, the guiding principle ought to be to make sure to avoid the sorts of disputes that produce negative attention and raw feelings, sully the pilot program in the eyes of stakeholders and the public and jeopardizing it before it has the chance to get off the ground. Dispute resolution under the pilot program should be swift, affordable, and painless, designed to avoid the expense of litigation and to settle disputes efficiently. The Authors Guild supports the Copyright Office's recommendation that, when a CMO and a prospective user are unable to agree on licensing terms, "the ECL pilot provide for a dispute resolution process before the Copyright Royalty Board (CRB)."<sup>17</sup>

If disputes should arise under the pilot program, parties should attempt to resolve them informally amongst themselves. If, after thirty days, they are unsuccessful, then they could choose a non-binding mediation or go directly to a binding proceeding before the Copyright Royalty Board, which has in-depth experience with dispute proceedings in connection with the existing statutory licenses.<sup>18</sup> A pilot could operate with non-binding mediation, but for a fully functioning ECL there must be a means of appeal to a body with final, binding dispute resolution authority.

### **3. Distribution of Royalties**

For over twenty years the Authors Registry, which the Authors Guild houses and helped found and has supported financially, has acted as a payment agent for foreign collecting societies who send revenues from secondary uses of books (such as photocopying and library lending) to be paid out to U.S. authors. To date, the Authors Registry has paid out more than \$27 million to more than 10,000 authors. The Authors Guild has learned a tremendous amount from building the Authors Registry and is ready and willing to share that experience distributing royalties to

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<sup>16</sup> Attachment D to the Amended Settlement Agreement.

<sup>17</sup> Fed. Reg. Vol. 80, No. 110, Tuesday, June 9, 2015, 32,615; Copyright Office Report at 96-97.

<sup>18</sup> See 17 U.S.C. §§ 112, 114, 118, 119.

authors in the United States with the Copyright Office to ensure that the pilot provides efficient, fair, and effective distribution of royalties.

### **What would be an appropriate timeframe for required distributions under a U.S. ECL program?**

One of the most relevant things we have learned through the Authors Registry is that, for the most part, there are fairly small amounts of money changing hands in this type of clearinghouse. For this reason it's essential to keep administrative costs low—otherwise, the system is unworkable. To prevent the CMO from being overwhelmed with the work entailed in providing accountings and sending out checks at an unsustainable pace, the Authors Guild recommends that the timeframe for required distributions under a U.S. ECL program be not more frequent than semi-annually. A timeframe more demanding will place undue operating pressures on the CMO and endanger the success of ECL in this country. More frequent distributions may also prove unrealistic from a collections perspective, and the check amounts in most cases would be too small to justify the work entailed.

Administrative efficiency should also compel the Copyright Office to consider instituting regulations to establish a “royalty floor”—a minimum dollar amount that must be met before the CMO distributes a check to a rightsholder for the use of a work. A reasonable royalty floor might vary depending on how much money is flowing through the system and how many authors are dividing that money. The Authors Registry has instituted a \$25 royalty floor—but that number may well be higher depending on the above factors.

When making determinations regarding the nuts and bolts of royalty distribution for a pilot program, it's important to proceed carefully to avoid mistakes that might jeopardize the future of ECL in this country.

#### **4. Diligent Search**

The Authors Guild agrees with the Office that a CMO should be “required to conduct diligent searches for non-member rightsholders for whom it has collected royalties” and that this obligation should include “maintaining a publicly available list of information on all licensed works for which one or more rightsholders have not been identified or located.”<sup>19</sup>

A diligent search should be conducted that includes searching appropriate publicly available search engines and databases, as well as licensed ones. First, the rightsholder needs to be identified and contacted. Both the publisher and the author should be contacted to determine where the rights currently lie. A reasonable diligent search should be conducted to find the current contact information.

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<sup>19</sup> Fed. Reg. Vol. 80, No. 110, Tuesday, June 9, 2015, 32,615; Copyright Office Report at 99-100.

There should be a mechanism in place in the event both the author and publisher (or their respective heirs or successors) claim ownership of the rights, or if there is a dispute as to ownership between other rights holders. This could also be determined by regulation or legislation: for instance, if the book has not generated revenue over a certain period, and the publisher decides not to start actively selling the book again within a set amount of time after the author's request to do so, the rights will revert to the author. That would avoid messy disputes resulting from unclear contractual provisions entered into prior to the print-on-demand era. The Authors Guild would be willing to work with publishers to help craft an appropriate solution.

The potential benefits of an ECL regime are not merely financial. By establishing a commercial market for a collection of out-of-commerce works, an ECL would incentivize rightsholders to come out of the woodwork and identify themselves with their works, clearing the path for efficient future transactions. As the Authors Registry's experience has shown, the longer a CMO is in place, the more complete its database will be. Ideally, the CMO administering licenses for literary works would develop a nearly all-inclusive registry of rights holders. This is eminently achievable. Such a list will have benefits beyond the ECL; it will make it vastly easier for those seeking to use copyrighted works to do so within the law. In particular, the perceived problem of "orphan works" for books—where the rightsholder is unknown or cannot be found—will be greatly diminished, since prospective licensees will be spared a lengthy and potentially expensive search to determine who owns what rights.<sup>20</sup>

This burden of such a list, however, shouldn't be borne solely by the CMO. The digitizing institution or other licensee should be required to share with the CMO any relevant information or metadata relating to works in the repertoire.

While diligent search is essential, when it comes to literary works, finding rightsholders is often easier than with other types of works. Books carry their metadata with them—the name of the

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<sup>20</sup> The Authors Guild has recently embarked upon establishing a similar list. We call it the FindAuthors Registry ("FAR"). We have developed software that would allow authors from around the world to claim their Library of Congress identities and would then link those authors to the millions of books catalogued by the Library of Congress. This authoritative database would be a game-changer for the literary world. An additional e-commerce layer of software would allow works to be easily licensed online through the database. Authors could dictate the terms for certain uses and those licenses could be easily obtained online through the Find Authors website.

To make this happen, we'll need to work with author societies from around the world, which will operate their own national portals into the book-claiming database. It will be the responsibility of each author society to authenticate each claiming author and maintain contact information for each claimant.

To the user, this will all be seamless. Those wishing to license rights to specific works will go to a website we've reserved for this purpose: FindAuthors.com. There, users can determine who owns those rights and what rights are available to license. Then, through FAR, they will be able to obtain standard licenses where terms are set by the rightsholder, or they may contact the rightsholder to arrange terms.

author, the name of the publisher. And people usually don't die without a trace. When HathiTrust announced its "Orphan Works Program," for instance, we quickly identified—through simple online searches—many of the "orphan" books the libraries claimed weren't able to be found.<sup>21</sup>

Our experiences with the HathiTrust Orphan Works Program and with the Authors Registry have taught us this: few books are truly "orphans." The problem, in other words, is not that rightsholders *can't* be found, it's that tracking down rightsholders is not easy, especially for those who don't do it all the time. Finding rightsholders requires software, expertise, and perseverance. The Authors Registry subscribes to two national databases—Spokeo and PeopleSmart—for use in finding rightsholders, and regularly consults resources such as the WATCH file (Writers, Artists and Their Copyright Holders) maintained by Harry Ransom Center at the University of Texas; *Publishers Marketplace*; *Contemporary Authors*; the membership lists of various writers' organizations; the website of the U.S. Copyright Office; obituaries published in *The New York Times*; university and college websites; even social media profiles.

In the course of our experience with the Authors Registry we have developed diligence procedures that the Copyright Office and other stakeholders may find illustrative. The Authors Registry's diligence procedures include searching relevant databases for authors, confirming the addresses are up to date, then sending a minimum number of letters per year, at three month intervals, with e-mails sent and phone calls placed in the intervals.

The Authors Registry has sampled its efforts and found that, with one full-time and one part-time employee, it located more than 80% of rightsholders of out-of-print books. Longer-established collecting societies, such as the ALCS in Britain, claim success rates of 90%.<sup>22</sup> If anything, the Authors Registry's experience has shown that the difficulty lies not in finding the author, but in persuading the author to sign up and that the Registry is legitimate.<sup>23</sup> As more authors are brought into the system over the years, this problem has diminished.

While these success rates are impressive, any potential CMO must be careful not to underestimate how time-consuming and expensive it is to track down rightsholders. As part of

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<sup>21</sup> Authors Guild Testimony at 14-15.

<sup>22</sup> Authors Guild Testimony at 19; Comments of the Authors Guild in Response to the Copyright Office's Request for Additional Comments on Orphan Works and Mass Digitization at 11, available at [http://copyright.gov/orphan/comments/Docket2012\\_12/Authors-Guild.pdf](http://copyright.gov/orphan/comments/Docket2012_12/Authors-Guild.pdf) (hereinafter "Authors Guild Additional Comments").

<sup>23</sup> Because the Registry provides income, it must report it as taxable and so must have social security or other tax identification numbers, which some are hesitant to provide if they are not already familiar with the Registry. This becomes less of a problem over time as more authors become familiar with the Registry and sign on.

the qualification process, any potential CMO should be evaluated by the Copyright Office to ensure they have the institutional capacity to exercise the required diligence.

### **What additional actions should be required as part of a CMO's diligent search obligation?**

The Copyright Office has recommended a distribution regime similar to that which regulates the statutory licenses of Sections 112 and 114 of the Copyright Act.<sup>24</sup> Such a system would permit a CMO to deduct reasonable fees from its receipts “*prior to distribution.*”<sup>25</sup>

The Authors Guild believes additional incentives should be built into the system in order to ensure that a CMO conducts diligent searches to find rightsholders. We've proposed before, for example, that the CMO should not be able to collect its administrative fee for a work until it locates and pays the rightsholder.<sup>26</sup> This assures diligent, ongoing searches for rightsholders.

The requisite level of diligence has to be commensurate with the amount of the royalty owed. As we mentioned above, finding copyright owners from scratch can be quite costly. The required diligence, therefore, should bear some rational relation to the amount of money at stake. No one should spend \$100 to find an author owed \$5. There might be a threshold amount of money sent to authors, to avoid cutting checks for pennies. The Authors Registry, as mentioned above, has instituted a \$25 royalty floor.

## **1. Additional Issues the Copyright Office May Want to Consider**

### **ECLs arising out of the pilot program should be permitted to survive the pilot phase**

We think an ECL pilot program is an excellent way to test the idea of an ECL solution. However, it is hard to see how a pilot program would work on a temporary basis. While we understand the Copyright Office's recommendation of a five-year sunset clause is intended “to give Congress the opportunity to assess the program's effectiveness and to consider whether ECL should be implemented on a long-term of permanent basis,”<sup>27</sup> we worry that the inclusion of a sunset clause could disincentivize potential stakeholders from making the investments necessary to sustain a successful ECL in the first place. As noted in these comments, there is a good deal of upfront work involved in setting up a well-functioning, robust CMO.

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<sup>24</sup> Copyright Office Report at 99.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> Authors Guild Additional Comments at 10. *Contra* Copyright Office Report at 99.

<sup>27</sup> Copyright Office Report at 102.

**Authors should be able to opt out at the level of the individual work, and to exclude their works from any and all uses**

As we've consistently advised in our submissions to the Copyright Office and to Congress on the matter of potential licensing solutions to mass digitization, any collective licensing solution to the legal problems of mass digitization must be "non-compulsory," or "opt-out."<sup>28</sup>

This is a key element of any collective licensing regime, as it implicitly recognizes a copyright holder's right to exercise control over her literary property via that traditional property right, the right to exclude. That exclusionary right should extend to the level of the work: an author, that is, could choose to include most of her works in an ECL, but if she had a newly released title that she wanted to exclude, the pilot program should do the same. The author should also be able to opt out of particular uses, as suggested in the NOI. Such a compensation scheme ensures that authors are compensated both for the value their works bring to the completeness and profile of the collection as a whole and for the proportional amount of use they are getting when compared with other works in the repertoire.

**The pilot should allow uses beyond the scope of the ECL to be negotiated**

As discussed above, a fully functioning ECL should allow for additional uses, beyond the scope of the ECL, to be negotiated on one-off bases.

**The *Authors Guild v. Google* Settlement as a Model for Extended Collective Licensing of a Limited Set of Book Rights**

Less than a year after the authors and publishers filed their copyright infringement suits against Google, the authors, publishers, and Google sat down to reach a compromise. A proper solution, the parties believed, would allow readers to benefit while also making sure that authors and publishers got paid for Google's use of their work. That settlement provides the basis for the solution we seek today.

After 30 months of talks, an agreement was reached in October 2008: Google would pay out \$125 million. Some would go to the owners of the books that were scanned without permission; the rest would fund the Book Rights Registry, an organization that would track down and distribute fees to authors. Google would be able to display out-of-print books to users and charge licensing fees for copyrighted works. Also, the settlement required Google to provide portals in every public library and more than 4,000 colleges and universities in the U.S., allowing widespread access.

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<sup>28</sup> Authors Guild Testimony at 17-18; Authors Guild Additional Comments at 3.

The settlement agreement was a win for everyone. Authors and publishers would get paid. Readers and researchers would have access to out-of-commerce books. And Google could have provided full-text access as provided in the agreement. Those benefits are still achievable through an ECL. There are many details to be addressed in the management of an ECL. We believe that the *Authors Guild v. Google* settlement agreement provides excellent guidance on many of the details on how the ECL might work in practice.

## **Conclusion**

The Authors Guild does not contest the benefits of mass digitization and access, but strenuously objects to allowing these types of uses for free. While there are policy justifications for reducing transaction costs through collective licensing, there is no good justification for allowing entities like Google, Hathi Trust, universities and others to free ride off of the backs of authors. As between corporations or universities and authors, authors are the least able to bear the costs of creating these types of services. Most of our members live on the edge of being able to keep writing or find other paying work, and many have had to find other jobs. While the loss of relatively small amounts of potential income may seem trivial to courts, it is a matter of being able to continue writing full-time or not for many authors. The Founders included copyright law in the Constitution because they understood that the ability to earn a living from authorship is key to ensuring the freedom of expression necessary to a democracy, as well as the importance of a thriving culture of authorship to a democracy.

An ECL solution to mass digitization will bring renewed economic life for authors for books that are otherwise unavailable or have limited availability. Authors will control whether their books—and which books—are included in the license. Colleges, universities, school libraries, public libraries and other institutions will have ready access to millions of copyright-protected works. The agreement will also benefit readers and scholars, who will have unprecedented access to millions of books.

The Authors Guild thanks the Copyright Office for its attention to this matter, and looks forward to working with the Office and other stakeholders towards a workable solution to the challenges posed by the mass use of copyrighted works.