



AUTHORS  
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Senior Counsel for Policy and International Affairs  
U.S. Copyright Office  
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Washington, D.C. 20559-6000  
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Re: Docket Number 2015-3, Mass Digitization Pilot Program

Dear Mr. Amer,

Authors Alliance is a nonprofit organization that works to empower and advocate for authors who, like our approximately 700 members, “write to be read.”<sup>1</sup> These are creators who are motivated primarily by the prospect of advancing knowledge, discourse, and culture. In our community, the question of what happens to works of authorship when they leave the marketplace is a central one, and one of our key commitments is ensuring that our members’ works endure and remain accessible after their commercial lives have ended.<sup>2</sup>

Accordingly, Authors Alliance fully supports efforts that would “encourage or facilitate mass digitization projects providing substantial access to the expressive contents of copyrighted works.”<sup>3</sup> We believe strongly that mass digitization offers unprecedented promise for the long-term preservation and accessibility of works, and that mass digitization projects have already and will continue to provide a tremendous service to both our community of authors<sup>4</sup> and the general public.

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<sup>1</sup> More about our organization, our mission, and our projects is available on our website. See AUTHORS ALLIANCE, *About Us*, <http://authorsalliance.org/about>.

<sup>2</sup> One of our ongoing projects is to assist our members in recovering rights to out-of-print or otherwise inaccessible works in order to make them more widely available, particularly in digital form. To this end, we have created a guide to the rights reversion process, and provided direct assistance that has already resulted in a number of titles being made available to the public on an open access basis. See AUTHORS ALLIANCE, *Rights Reversion Portal*, <http://authorsalliance.org/reversion>.

<sup>3</sup> U.S. COPYRIGHT OFFICE, *Report on Orphan Works and Mass Digitization* 78 (June 2015).

<sup>4</sup> One frequently overlooked service facilitated by mass digitization is the provision of digital copies to authors of pre-digital works. For many authors, the availability of these copies is key to making their older, out-of-print works newly available. See, e.g., AUTHORS ALLIANCE, *What Will You Do*

Fortunately, fair use already accommodates many important mass digitization projects,<sup>5</sup> and we strongly believe that fair use is a capable and appropriate avenue for many more such efforts. Authors Alliance also agrees with the Office’s conclusion in its *Report on Orphan Works and Mass Digitization*<sup>6</sup> (the “Report”) that many other beneficial mass digitization efforts might “need to look beyond fair use to a licensing model, either voluntary or statutory.”<sup>7</sup> However, we have grave concerns that the proposed Extended Collective Licensing (“ECL”) pilot project (the “Proposal”) will simultaneously fall short in its ability to make works available, while serving to intractably complicate the licensing landscape in ways that would prove detrimental to the interests of our community.

For the purposes of our organization and our members, two concerns in particular stand out. First, we are not persuaded that the Proposal will ensure that Collective Management Organizations (“CMOs”) adequately represent the diversity of author interests, and particularly those of authors who write to be read. Second, we question the feasibility of correctly identifying and compensating rightsholders in a fragmented and uncertain rights landscape, and worry that this uncertainty will require cumbersome licensing arrangements painstakingly negotiated among several parties. Finally, we also share many of the reservations concerning the feasibility of the project that have been voiced by other commenters. Our position is that any ECL regime adopted by the United States should be well positioned to succeed from day one. For the reasons independently stated in the comments of Professor Pamela Samuelson, an Authors Alliance co-founder and member of our board of directors, the present proposal does not appear poised for success.

### **1. A Successful ECL Program Must Adequately Address the Diversity of Rightsholder Interests**

The Report leaves unaddressed the important question of *who* rightsholders might be for any given class of works. We believe the answer to that question has a great deal of importance for how to best structure any statutory licensing regime for mass digitization projects. For the literary works envisioned by the Proposal, the rights landscape is uncertain and divided between any number of diverse constituencies. As a preliminary matter, the necessary rights might be controlled by publishers, authors, heirs, or other third parties. In the case of collective works and compilations, rights ownership may be even more fragmented.

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*After Recovering Your Rights? Stephen Sugarman’s Success Story* (Aug. 18, 2015) available at <http://www.authorsalliance.org/2015/08/18/what-will-you-do-after-recovering-your-rightsstephen-sugarmans-success-story/>.

<sup>5</sup> See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90 (2d Cir. 2014); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>6</sup> U.S. COPYRIGHT OFFICE, *Report on Orphan Works and Mass Digitization* (June 2015).

<sup>7</sup> *Id.* at 80.

Within and across classes of rightsholders, motivations and concerns vary widely. In the case of book authors, many—in particular academics, but others also—write primarily to communicate their ideas and creations, rather than primarily to make a profit.<sup>8</sup> These authors and their unique concerns are the Authors Alliance’s reason for being. Of course, many others write with primarily commercial motivations. Can one Collective Management Organization speak for both these kinds of authors, to say nothing of others whose interests might be different still?

This question has been answered in another guise in the context of the *Authors Guild v. Google* litigation.<sup>9</sup> There, when considering a proposed settlement that would have acted in many respects as an ECL regime for Google’s book scanning project, Judge Chin found that the divergence in values and interests among the affected authors (including the difference between academic authors and commercial authors) was inadequately represented by the commercially-oriented Authors Guild.<sup>10</sup> While the posture of the present proposal is different—and the identities of the potential CMOs remain unclear—this same divergence in interest may similarly affect the representativeness of any CMO whose membership draws primarily from one class of author or the other.

The practical impact of a CMO’s representativeness is significant. For authors who write to be read, access-oriented mass digitization programs are not a second chance at extracting revenue from a retired text. They are instead a new and welcome opportunity for reaching readers and having an impact. Accordingly, a CMO representing their interests would take a meaningfully different approach to licensing from one merely trying to maximize revenue. For instance, such a CMO would respect the role fair use plays in mass digitization, and not seek to license uses that are more properly considered fair. When agreeing to licensing terms, such a CMO would be more inclined to favor accessible prices, and would avoid imposing conditions on use or term that might unreasonably prejudice a licensed project’s positive impacts on discovery and access.

These concerns are especially pressing given that many licensed mass digitization projects would focus on works by authors with non-commercial motivations. In fact, those works that will most benefit from mass digitization are those that suffer most from a lack of availability—those for which rightsholders are least likely to “opt out” of any ECL regime.

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<sup>8</sup> See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 941–42 (2d Cir. 1994) (citing *American Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1, 27 (S.D.N.Y. 1992)) (“Scientists communicate through journals, and use them to stake claims to new ideas, disseminate their ideas, and advance their careers and reputations. These ‘authors have a far greater interest in the wide dissemination of their work than in royalties . . .’”).

<sup>9</sup> 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

<sup>10</sup> *Id.* at 679–80.

These are works that have either been created outside of the traditional market,<sup>11</sup> or that have not been adequately disseminated by the market. Many times, these are works for which creators never expected market success.

Almost three out of five books that were digitized in two of the United States' leading mass digitization efforts, those of Google Books and HathiTrust, were intended for an academic readership,<sup>12</sup> reflecting the fact that roughly one in two books published in the United States are published for academic audiences.<sup>13</sup> Scholarly monographs, typical texts in academic research library collections, are often written specifically to advance the discourse within a field. Their authors often proceed without advance payments, and very rarely view these books as significant sources of long-term income. A mass digitization program that would seek to provide greater access to texts of this kind that are no longer commercially available should be licensed by an entity with an appreciation of their authors' motivations and interests.

Finally, we have grave concerns that, in some respects, the ability of a CMO to adequately represent rightsholders is predicated on a shared interest in maximizing licensing revenue. Establishing CMOs will prove costly and difficult. Once established, CMOs will be intrinsically motivated to maintain or grow revenues. Where such a CMO uses its mandate to represent authors who write to be read, this interest might well run counter to those of its membership. It is possible to imagine an ECL regime designed to mitigate this conflict of interest—decoupling the funding model from the CMOs' licensing revenue comes to mind—but otherwise it seems unlikely that the CMO model will act in the interests of our community of authors who write to be read.

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<sup>11</sup> Additionally—though these projects are outside the scope of the present proposal—many archival mass digitization programs would like to focus on unpublished and private works, made entirely without the expectation of publication and sale. The Proposal cannot help these projects as unpublished works are out of its ambit, but how could it be otherwise? It is hard to envision a CMO established to speak for authors and other rightsholders who never intended for their work to be distributed or sold.

<sup>12</sup> On estimate, 80% of the books in the Google Books corpus are from the collections of major research libraries. See *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 1-3 (2009)* (Prepared Statement of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.) (estimating that 8 million of the 10 million books then in the GBS corpus were obtained from research library partners) available at [http://judiciary.house.gov/hearings/printers/111th/111-31\\_51994.pdf](http://judiciary.house.gov/hearings/printers/111th/111-31_51994.pdf). A study of the books in several of those research libraries reveals that over 93% of the titles are nonfiction, and 78% of these nonfiction titles are intended for an academic readership. Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-copyright Print Books in Library Collections*, D-LIB MAGAZINE (NOV./DEC. 2009) available at <http://www.dlib.org/dlib/november09/lavoie/11lavoie.html>. This means that almost 60% (i.e. 58%) of the books in the entire Google Books corpus are intended for an academic readership.

<sup>13</sup> Lavoie & Dempsey, *supra* note 12 (showing that 92% of all printed books in libraries in the period 1923-2006 were nonfiction, of that 92%, 54% was made for a scholarly audience, resulting in 50% of all printed books being made for a scholarly audience).

## **2. A Successful ECL Program Must Account for a Fragmented Rights Landscape**

The fragmented nature of the rights landscape in books and other literary works that would be affected by the Proposal also raises troubling feasibility questions about how CMOs could adequately identify the works falling into their mandates. Authors and publishers divide their rights in publishing contracts, most of which are negotiated and many of which are subject to unclear language regarding the ownership of digital and electronic rights.<sup>14</sup> Moreover, printed works often include licensed third-party materials, including illustrations and photographs. Without detailed consideration of individual contracts and circumstances, it is hard to imagine any practical method for CMOs to properly understand what it is they may license and on whose behalf.

As a practical matter, this uncertainty means that the proposed licensing scheme would either require licenses from several CMOs representing various kinds of rightsholders, or from one single CMO that would stretch the representativeness requirement to the breaking point. Should an ECL regime proceed under the fragmented model, it is unclear how many CMOs would be necessary to enable even a single digitization project. Given that potential digitizers might struggle to reach terms with many groups, and given that no CMOs presently exist to represent any of these classes of rightsholders, it seems unlikely that an ECL regime could prove successful under present market conditions.

ECL is far from the only area where the difficulty of tracing rights proves problematic. Authors Alliance has noted elsewhere that a lack of information on rights transfers has been a significant contributor to the orphan works problem.<sup>15</sup> Given the potential impact for improved information flows to assist with the Office's efforts regarding both mass digitization and orphan works, we encourage the Office to consider how such improvements might be incorporated into its proposals to Congress on both subjects.

## **3. Any ECL Pilot Must Be Positioned to Succeed from the Beginning**

In addition to our primary concerns, outlined above, we are worried that other aspects of the Proposal, as pointed out by other commenters and particularly by Professor Samuelson, might compromise its ability to achieve its goals. We caution the Copyright Office not to embark on a pilot program that is not positioned to succeed, particularly as the costs of failure will prove high to both rightsholders and the public.

In particular, Authors Alliance shares concerns with many other commenters over the feasibility of running an ECL pilot program limited to five years. The considerable expense required for mass digitization projects is not an investment many would consider making

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<sup>14</sup> See *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490 (2002); *HarperCollins Publishers LLC v. Open Road Integrated Media, LLP*, 7 F. Supp. 3d 363 (S.D. N.Y. 2014).

<sup>15</sup> See AUTHORS ALLIANCE, *Principles and Proposals for Copyright Reform* (May 21, 2014) available at <http://www.authorsalliance.org/principles-and-proposals-for-copyright-reform/>.

with such a limited horizon. The same can be said of the expense involved in creating and scaling CMOs. While the result might simply be a lack of participation, we are even more concerned that these sunk costs will create pressure to extend the program or make it permanent, regardless of whether the model has proven successful. A trial should not be organized in such a way as to be a self-fulfilling prophecy.

We are also concerned that features of the Proposal, including its security requirements, might limit participation to extraordinarily well-funded and technologically advanced digitizers. Where entry into the market is restricted only to the limited few who can afford the overhead, the result would frustrate the ultimate objective of increasing the availability of the least available works, especially as many of the collections that would most benefit from mass digitization are in the hands of smaller and less well-funded entities.

Authors Alliance is optimistic about the future of mass digitization, and is pleased to see the Copyright Office adopt a proactive stance toward reopening access to our cultural and intellectual heritage. Unfortunately, we do not believe that the current Proposal can get us all the way there, and we recommend that the Office consider alternative approaches to improving the availability of twentieth century culture and scholarship. In any case, we are confident that exploring the topic is an important step toward building the legal infrastructure we need to realize the promise of mass digitization for authors who write to be read.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Wolfe", with a stylized flourish at the end.

Michael Wolfe  
Executive Director  
Authors Alliance