Submission to US Copyright Office
RE Notice of Inquiry, Orphan Works and Mass Digitization

Michael Bradley
Member, National Writers Union-UAW 1981
(For identification purposes only)
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I. Background

In general, I support the positions of the National Writers Union and colleague organizations. In particular, I acknowledge that unidentified rightsholders present a significant problem to potential users of copyrighted works. The problem is caused partly by the revisions of 1978 that made copyright automatic and registration with the Copyright Office unnecessary. Uncounted numbers of creators understandably did not register and subsequently might not be readily identifiable. Possibly more plentiful are creators and other rightsholders of works copyrighted before 1978 who are unknown or unavailable in spite of having to register. Be that as it may, as proposed in the Office's ECL pilot program, breaking copyright is not the appropriate response to rightsholders' presumed absence. Breaking copyright will undermine the creative industries in particular and the commerce in intellectual property in general. It will surely have unknown, and possibly seriously harmful, consequences. On a broad basis, enjoyment of the rights to a work will no longer be assured.

As they are conceived by the Office, ECLs create a Catch 22 dilemma for rightsholders. Without their knowledge, rights that they own will be exploited by CMOs, thereby creating new markets. But the very acts that create the markets will undermine them by having already published the works. What's more, the ECLs as proposed may well compete directly against innovative ways in which legitimate rightsholders are exploiting their rights.

With regard to the proposed pilot, the Office explicitly recognized that the pilot should be limited in scope by restricting it to three genres and only for nonprofit educational and research purposes. However, I argue that these limits are still far too broad and that the program should be limited in other ways as well. Historically, ECLs have been used to grant limited permission under controlled circumstances that posed few threats to rightsholders' ability to exploit their rights more broadly. The Office proposes to use ECLs in exactly opposite ways, granting permission for a very wide range of uses of uncountable numbers of many categories of works for the full term of copyright. These are not licenses in the accepted sense of the word, nor are they supported in the law.

II. Request for Comment

1.a. Qualifying Collections

It hardly seems necessary for the pilot program to sweep with so broad a brush as three genres of what are uncounted millions of copyrighted works. Literary works alone, as defined by the Office, include "fiction, nonfiction, poetry, textbooks, reference works, directories, catalogs, advertising copy, compilations of information, computer programs and database, [articles published in serials]," and, presumably, all US websites' displayed content and programming code. The Office reported in 2013 that it processed roughly half a million registration claims in

all genres. A realistic figure for all literary works under copyright in the same year is close to incalculable.

The basic outlines of ECLs and CMOs are well understood, given their extensive use in Europe. The Office's tasks are to develop procedures that are appropriate for US law and practice, implement scalable software systems, and closely monitor the results throughout the proposed five-year span of the pilot. Given the Office's continual budget constraints and Congress's reluctance to legislate, it seems unwise and risky for the Office to propose sweeping an enormous body of works, which includes all graphics associated with literary works and all photographs under copyright, into the project. It would be better to limit their number by tightly restricting the types of works allowed.

To insure that the project runs as smoothly as a pilot can, it would also be wise for the Office to limit the rights that the ECLs are empowered to grant. The Office proposes that rights be granted "for the benefit of the public, a community, or other specified users," but it does not specify either its understanding of "community" or the other users. This is too broad a scope. The rights to be granted should be narrowly and explicitly defined. Given that the ECLs will be granting rights without the knowledge or consent of most rightsholders, it is only fair that the rights be narrowly defined, partly to prevent the involuntary publication of a work from interfering with any plans the rightsholders might have for their own exploitation of their rights and partly to allow for failures to identify the relevant rightsholder for the given use of a work.

1.b. Eligibility and Access

Uncontrolled general public access, such as publicly available online databases, should never be granted. Users participating in the pilot should be explicitly defined and the uses they propose for the project works should be defined beforehand and limited only to the uses they already make of similar works.

Grants to the works of unidentified rightsholders should be limited to the specific rights requested by the users; for the sake of the unidentified rightsholders, broader grants, particularly grants of all rights, should not be permitted.

1.c. Security Requirements

Potential users should be required to demonstrate that they can meet the document security needs of the unidentified rightsholders. Given the Catch 22 of publication creating a market and undermining it at the same time, the opportunities for exploiting the rights that unidentified rightsholders own should be as encumbered as possible.

2. Dispute Resolution Process

Unidentified rightsholders as well as CMOs and users should have the right to bring disputes to the project. Given that the project is a pilot and that the project sunsets out in five years, it seems best to resolve all disputes quickly. Final resolution of all disputes should occur within six months of filing notice of the dispute, otherwise a resolution should be imposed by project arbitrators.

When an unidentified rightsholder comes forward to claim a work for which an ECL has been granted, the ECL should be voided when a new agreement is negotiated between the rightsholder and user. The agreement should be reached in a reasonable time, say within six months of the rightsholder's filing of the claim. Royalties that have been set aside for the work should have no bearing on the negotiation except that they can be used to offset any future royalties that are finally agreed to.

3. Distribution of Royalties

Royalties for all works licensed by the CMOs, including for works of unidentified rightsholders, should be consistent with current market practice; royalties for works of unidentified rightsholders should not be discounted. Unclaimed royalties should be held for the length of the pilot, then distributed with accumulated interest to the CMOs in their standard share of royalties; undistributed royalties could go to the Office or to organizations of rightsholders corresponding to the CMOs'

Under no circumstances should royalties be paid to former rightsholders and licensees unless they can document that their rights are current. For instance, former publishers of works should not be presumed to own current rights and should not earn royalties on the basis of that presumption.

4. Diligent Search

The above notwithstanding, everything hinges on the unidentified rightsholders: who they are presumed to be and what rights they are presumed to be holding.

"Out of commerce" is an unsatisfactory criterion for works eligible for compulsory licenses. The term generally means not actively published in mainstream channels. It replaced "out of print" as a criterion when potential users had to acknowledge the relevance of non-print media, but it is little better than the former term. Commerce, even including newly-developed commercial channels, does not equate with availability, especially now that works are increasingly available in digital format through non-mainstream channels. Nor does it include non-commercial publication, which is often chosen by creators and other rightsholders and which does not negate their copyright. Therefore, searches for unidentified rightsholders must include extensive searches in all channels, including non-mainstream, digital both online and media-recorded, and non-commercial.

As well, "diligent" is undefined in law. The searches are critically important, so the CMOs should meet a recognized, reliable standard for them, such as "best evidence" and "due diligence." The search procedures should be certified by the Office as sufficient to protect the rights of known and unidentified rightsholders alike.

As the Office suggests, a public record of the licenses granted for works of unidentified rightsholders should be maintained by the CMOs. The record should also include searches conducted, rights granted, and royalties paid, as well as uncompleted current searches, so that unidentified rightsholders can claim their works in a timely manner. All this data will be maintained by the CMOs in any case; making it available to the public will not be burdensome.

Finally, a critical issue in compulsory licenses is that they can prevent current rightsholders from exploiting the rights they already own. To protect the rightsholders, on their request all conflicting compulsory licenses must terminate and the works be withdrawn when rightsholders identify themselves. Likewise, when the project sunsets out, all grants of works of unidentified rightsholders should terminate and the works be withdrawn.

Final Remarks

Creators and other rightsholders are eager to see their works more widely available through legitimate commerce. At the same time, they need to protect their livelihoods and the primacy of copyright law must not be undermined.