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U.S. Copyright Office
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Re: Docket Number 2015-3, Mass Digitization Pilot Program

Dear Mr. Amer:

We are writing on behalf of The College of William and Mary Libraries. As the oldest state institution of higher learning in the United States, we are dedicated to collecting, preserving, and making available cultural materials, especially collections related to our nation's history. We have a strong interest in digitizing our collections to provide better access to the public online to these important parts of our shared cultural heritage.

While we appreciate the Office's interest in helping resolve copyright obstacles to mass digitization, the Office's extended collective licensing (ECL) proposal would do little to help our digitization efforts, and could actually harm them.

ECL is premised on the development of a Collective Management Organization (CMO) capable of representing rights holders whose works will be used. Our collections are made up of works with vastly different ownership interests. Personal photographs, personal correspondence, and drawings, mixed together with some formerly commercialized works such as books, newspaper and magazine clippings, along with other works, such as maps and pamphlets likely created by agents of local and state governments. No CMO could represent such a broad array of ownership interests. Even if they could, the transaction costs associated with negotiating licenses with possibly many different CMOs would overwhelm our staff and drain our budget. The burdens associated with entering into an ECL agreement are likely higher than simply continuing our current approach to digitization. And because the proposed ECL pilot would include only published works, large sections of our collections would remain unlicensable anyway.

Another reason that the ECL is unnecessary is because we already have a legal way to digitize many of our orphan works collections: fair use. Over the past decade, case law about fair use has become clearer and more predictable, making institutions like ours more comfortable relying on fair use when appropriate to make our collections available. Fair use best practices documents have also given us confidence that our fair use judgments comport with those of

our broader community and legal scholars.¹ Fair use will not permit every potential mass digitization project, but many of the projects we want to accomplish involve digitization for non-commercial research uses of our unique collections of works, many of which were never commercially exploited or created with copyright in mind. These potential projects fit comfortably within existing law.

Perhaps the most important example of a project that could be affected by the proposed ECL is our University Archives Photograph collection. This collection consists of photographs that the College owns the copyright to as well as photographs donated by community members and neighboring institutions depicting important historical details about the College. This collection comprised of published and unpublished, institution-owned and photographer-owned copyrights exemplifies the challenges our institution would face in trying to decide which licensing agencies we need to work with and what content would need to be covered by such a license.

Other examples are the Libraries' ongoing collection of Racial and Ethnic Ephemera and the Gender and Sexuality Ephemera collection. These collection include significant amounts of unpublished material documenting the history of race relations and gender and sexuality both on the campus and in the United States. Because of the mix of published and unpublished materials, the Libraries would be in a situation where we would have to negotiate with many different collecting organizations who may or may not be able to identify the appropriate rights holders to these important historical ephemeral collections.

Despite the Office's assurances about inclusion of a fair use savings clause, we are nonetheless concerned that the proposed ECL system would cast a shadow over potential fair use assertions for mass digitization, steering organizations like ours away from using that important right and into more conservative and more costly licensing practices. Preserving and promoting fair use is one of the most important ways to facilitate digital access to our collections; the proposed ECL system could unintentionally chill fair use.

If the Copyright Office is serious about helping to increase legal mass digitization of our shared cultural heritage, it should instead focus its efforts on three things:

- 1) Encouraging the application of fair use to digitization projects;
- 2) Promoting the development of better copyright ownership and status information through enhanced registries, rethinking recordation, and asking copyright owners to identify themselves and their works through an internationally-compliant formalities system; and

¹ *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* (2014), <http://www.cmsimpact.org/sites/default/files/documents/orphanworks-dec14.pdf>; Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>; Society of American Archivists, *Orphan Works: Statement of Best Practices* (2009), <http://www.archivists.org/standards/OWBP-V4.pdf>

3) Providing better access to existing copyright ownership and status information by digitizing or encouraging others to digitize and provide free access to all of the Copyright Office's records.

Sincerely,

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