UNITED STATES COPYRIGHT OFFICE

NOTICE OF INQUIRY

CONCERNING

MASS DIGITIZATION PILOT PROGRAM –

REQUEST FOR COMMENTS

Published at 80 Fed. Reg. 32614 (June 9, 2015)

WRITTEN COMMENTS OF

COPYRIGHT CLEARANCE CENTER, INC.

October 5, 2015

INTRODUCTION

Copyright Clearance Center, Inc. ("CCC"), submits these written comments in response to the request of the Copyright Office set forth in its Notice of Inquiry ("NOI") published at 80 Fed. Reg. 32614 (June 9, 2015) in connection with a possible Extended Collective License (ECL) pilot for mass digitization, specifically for text-based works.[1]

First, CCC wishes to thank the Copyright Office for its thorough report on orphan works and mass digitization[2] and for its continuing efforts to address the issues and opportunities presented by large-scale digitization projects in the context of copyright law. We view the current NOI and round of public comments as the beginning of a new phase of discussion towards a common goal of developing an innovative (and more efficient) solution to the challenges of mass digitization (which likely include uses of orphan works) in the interest of all stakeholders, as well as that of the public at large. The Office's proposal to test a concept that is brand new to U.S. law and practice – the Extended Collective License (or "ECL") – is a thoughtful and creative effort to

[1] As stated in the text of the Request for Comments at page 32,614, the Copyright Office proposes pilot ECLs for three categories of published copyrighted works. CCC's general comments on ECLs below apply, we believe, to any form of ECL; our more specific comments are addressed to text-based works.

[2] U.S. Copyright Office, Orphan Works and Mass Digitization: A Report of the Register of Copyrights (2015), available at http://copyright.gov/orphan/reports/orphan-works2015.pdf, hereinafter the "Copyright Office's 2015 Report".

attack some of the copyright problems inherent to mass digitization. Given CCC's long experience with collective licensing in general, and our familiarity with the operation of ECLs by some of our counterpart organizations in other countries, we take this opportunity to offer our views of how an ECL might operate in the United States in the context of mass digitization projects.[3]

Although the concept of an ECL is new to US copyright law, in our comments below we seek to contextualize ECLs as a potentially powerful *extension* of existing conventions in intellectual property licensing – but an extension that comes with all the attendant tradeoffs associated with collective licensing of any sort. Our analysis walks through the basics of collective licensing, voluntary collective licensing (what we do), and extended collective licensing (largely based on ECLs in the Nordic countries). As we support many of the comments about licensing and ECLs in the Copyright Office's 2015 Report, we take this opportunity to discuss, in response to the specific questions in the NOI, more practical details aimed at making this effort a success.

WHAT IS A COLLECTIVE LICENSE?

Licenses are commonly used in the field of intellectual property to enable a user to enjoy the benefit of an item of intellectual property – whether it is a copyright, a patent, a trademark or a trade secret – while enabling the rightsholder to derive value (usually but not always in the form of money) from the intellectual property without giving up ownership rights. The separation of ownership and use in a capitalist economy takes different names and different forms – rental, lending, leasing, access – but the nature of intellectual property permits non-exclusive licenses in a way that is more difficult (or practically impossible) to do than with rental of a car or a house.

In the field of copyright, particularly of works involved in mass distribution, licensing must resolve a special problem: most often, the value of an individual copyrighted work intended for mass distribution (such as a book chapter or a magazine article) is such that licensing non-core rights to it alone (such as the right to make photocopies for business purposes) cannot generate revenue in excess of the transaction costs of creating and managing the license. For this reason, various copyright industries – including text publishing – developed the notion of a collective license. This notion can take a simple form as a subscription – a subscriber (user) pays a single price for a group of copyrighted works, perhaps published as a serial (a magazine or a newspaper) or as a collection (a book of essays). However, often enough, when it comes to uses that are secondary to the main reason that a work is published (such as a business making photocopies of a portion of a work for its internal use, rather than buying multiple originals of the entire work), a license that covers only a single serial or collection is itself still insufficient to address the user's need.

To address this problem the notion of a collective license was developed, as first applied in the 19th century to the performance of background music in locations like cafes. Collective licenses involve many works from many rightsholders and the administration of a small set of rights

[3] Described in the Copyright Office's 2015 Report, beginning on p. 5 (in the Summary) and then again beginning on p. 72.

within the copyrights in those works for users who are prepared to pay something, but not much per unit, for the use of those copyrighted works. The facilitation of such a market vindicates copyright's grant of an exclusive right to the creator and his/her successors while allowing users to pay an amount commensurate with the value of the incidental use. With the development of inexpensive convenience photocopiers in the mid-20th century – which allowed users to make multiple copies for the copying cost of pennies per page – the same notion of a collective license for secondary uses of text-based works developed, first in Europe and then in the United States. Thus, at the suggestion of Congress,[4] CCC was created by private parties to begin addressing in 1978 the problem of the convenience photocopier in American business and higher education. We will describe further details of CCC's activities below.

WHAT IS A VOLUNTARY COLLECTIVE LICENSE?

The problem of "secondary uses" of text-based works (such as internal photocopying) was originally approached in Europe primarily through statutory-based systems aimed at accommodating certain exceptions and limitations to copyright through the collection of "remuneration" from users by governments or government-sanctioned entities without specific focus on individual uses. Today, such systems continue to exist in Europe, particularly to address "private copying", usually through levies imposed on particular equipment or devices or estimates of use of works in libraries. Because these systems rely on government imposition of obligations on users and/or rightsholders – even if they are subject to "opt out" provisions – they cannot fairly be characterized as "voluntary".

In the U.S. economic model, statutory (or involuntary) licenses tend to be disfavored.[5] As a result, CCC has built an entirely voluntary licensing system first (1984) for uses such as internal reproduction and distribution of paper copies of certain works within businesses and academic institutions and then (2000) adding uses such as internal emailing and intranet posting within businesses and academic institutions. These collective licenses (which we identify as "repertory licenses" because they cover identified works from many rightsholders, collected into a very large repertory) are specifically designated for internal or other non-public uses; in this way, they avoid conflicts with the voluntary individual licensing that rightsholders choose to do, most often through subscriptions or for unique public uses that they perceive as competing with the primary distribution channels for their works.[6] We will provide more detail below.

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[4] See, for example, the Report on Copyright Law Revision of the Judiciary Committee of the United States Senate on a working, near-final draft of the legislation that became the Copyright Act of 1976, S. Rep. 94-473 (1975), at page 71.

[5] Several statutory licenses do, of course, exist in the United States, for example in connection with cable and satellite television. See 17 U.S.C. §§111, 119, 122.

[6] Beginning in 1978 for photocopying and 1997 for digital uses, CCC also developed "pay-per-use" license services (sometimes called permissions services in the publishing industry) to enable rightsholders to conduct such transactions with users more conveniently and efficiently, but for purposes of this Comment, these are more properly characterized as providing "centralized" licenses rather than "collective" licenses.

Thus, a voluntary collective license (or "VCL") includes a number of common elements:

(1) A VCL begins with a large set of works (a repertory) belonging to a large number of identified rightsholders, and identifies a single right, or small group of rights, applicable across all works in the repertory, that is of likely interest to a sizable number of users.

(2) In instances where there are multiple rightsholders to any individual work (for example, a text's author and the publisher of the text work which has been "hired" by the author to take responsibility for distribution of the work), one of the rightsholders or a representative is formally or informally delegated the public-distribution-related task of dealing with the VCL and then distributing royalties received from the VCL among the multiple rightsholders (a task ordinarily delegated to publishers by contract in the U.S. model for text-based works).

(3) Some form of collective management organization ("CMO") is put in place to administer the VCL. The CMO holds mandates from rightsholders (in the form of written agreements conveying authorization to license) and creates standard license arrangements with users (also in the form of written agreements describing the scope of the license granted). The CMO also has a business structure organized to make the entire VCL affordable and attractive for all participants.

(4) There are agreed rules by which the CMO sets license prices to users. Those rules ordinarily rely on the premise that like users should be treated alike.

(5) There are agreed rules for allocating collected royalties among works or rightsholders. In a repertory collective license, those rules ordinarily rely on the assumption that all users (or at least large subsets of users) are making statistically similar uses and so allocations of royalties can be based on statistical analysis.

(6) There is a user community willing to take licenses for the right to make the uses covered by the collective license.

These elements are important to enumerate here because they will return in the discussion of extended collective licenses below.

THE ATTRIBUTES AND SUCCESSES OF CCC'S VOLUNTARY LICENSES

Building on the elements described above, CCC has extensive expertise, and detailed operational experience, in managing voluntary collective licenses of various kinds, and, to a lesser extent, in distributing monies derived from ECLs in the Nordic countries. The following descriptions are provided by way of illustration:

- CCC's first repertory collective license, now called our Annual Corporate License ("ACL"), was initially offered to businesses in the early 1980's, and in revised and expanded form,

continues to this day.[7] The ACL enables staff at companies to make the copies they need in the regular course of business, both traditional paper copies and digital copies for uses such as e-mail attachments and internal posting, so long as this copying is not used as a replacement for subscriptions reasonably required by the business. The fees collected under this license are distributed back to publishers, authors and other rightsholders according to a regular schedule. These allocations are based on licensee surveys and other data collection activities, which are agreed to by the licensees as a condition of the license. The scope of the license and the extent of its repertory (works available) are subject to constant review with users and rightsholders. It is no exaggeration to observe that the ACL is the most enduring and successful example anywhere of a repertory approach to voluntary collective licensing for text-based works.

- CCC has offered similar licenses to the above for the academic market, starting with licenses for photocopy coursepacks (1991) and extending to licenses for digital coursepacks (sometimes called "e-reserves") (1997) both in transactional form, and then CCC combined photocopy and digital rights into a repertory collective license in 2007; all of these licenses remain available to interested users.

- Most recently, CCC has begun to offer its RightFind™ XML for Mining licensing service, providing content and selected copyright rights in that content through normalized XML feeds of scientific and scholarly materials, constituting CCC's "repertory" for this service, to research organizations. The service enables the creation of a machine-readable corpus of articles that may be readily constructed (by the user) by searching across the copyrighted materials of multiple publishers. Use-cases for this license include mass digitization projects which analyze large data sets of scientific articles, collect financial trend data contained in reports, or conduct meta-analysis across studies in the social sciences. This service is a direct result of a consultation with users and rightsholders yielding a VCL acceptable to both groups; what XML for Mining illustrates in this context is the ability of CMOs to rapidly design and deploy a market solution for an emergent problem in rights and content normalization.

In addition to operating its own licensing services on both collective and centralized bases, CCC regularly distributes monies repatriated to U.S. rightsholders derived from copying activities in all five Nordic countries operating ECLs. CCC implements distribution directions received from the originating countries and makes substantial efforts to locate the applicable rightsholder identified from information either received from the ECL operator or statistically determined in other ways. This experience enables CCC to understand the benefits and challenges of the ECL system, including the extensive effort often required to explain those systems to authors and publishers to whom CCC distributes the royalties in the United States. One issue that occurs across all of CCC's systems and arises frequently in distributing ECL-sourced money from other countries is the allocation of a small amount of royalties (say, US$5 or US$10) to a rightsholder.[8]

[7] See an early court discussion of this CCC license (then called our Annual Authorizations Service or AAS license) in American Geophysical Union v. Texaco Inc., 802 F. Supp. 1 (S.D.N.Y. 1992), aff'd, 60 F.3d 913 (2nd Cir. 1994).
[8] As discussed further below, the average total cost to a business (such as CCC) of handling a payment in the United States (including recordkeeping and reconciliation) is on the order of US$12, and that assumes that the name and address of the payee are known at the time the payment process is initiated.

WHAT IS AN EXTENDED COLLECTIVE LICENSE?

As mentioned in the Copyright Office's Report, an Extended Collective License[9] is a licensing solution that can enable use of a large repertory of content in standardized ways.[10] ECLs, which were developed initially in the Nordic countries, combine aspects of voluntary licenses with compulsory/statutory licensing schemes. Although characterized slightly differently by the Copyright Office in its Report, an ECL is normally built on a VCL with its license scope agreed between a body of rightsholders (creators and/or intermediaries represented by a CMO) and one or more users of a particular right in a large number of copyrighted works. Assuming that the relevant legislature has enacted the appropriate legislation and the CMO complies with a set of administrative rules, the ECL then provides a statutory extension of the agreed-upon license to include the same right in all other copyrighted works of the same class, regardless of the fact that those additional works belong to rightsholders who have not (yet) chosen to participate in the license or, perhaps, even been identified.[11] The authorizing ECL statute provides a set of protections to rightsholders, whether "mandating" (electing to participate) or not, possibly the most important of which is the right to opt out of an individual ECL. Most ECL statutes provide incentives not to opt out and/or disincentives to do so, but rightsholders nevertheless retain the choice and the CMO is charged with administering those protections. The ability to "opt out" is one fundamental difference between an ECL and a traditional compulsory license.

This generally-accepted description of an ECL, along with some well-known facts about the Nordic ECLs actually in operation, makes clear certain elements of how an ECL works. Specifically, ECLs are built on an existing collective license or license structure – which presupposes that interested rightsholders and users have already either built something like a VCL, or have agreed on terms for a VCL not yet in place, for a use-case that involves many rightsholders, many users and, in effect, a single use or type of use of many works for which individual price negotiations would not be practical. Thus, a repertory license – that is, a license involving many works and involving a single fee for a period of time but directed to a user who does not know in advance which of the many works she will actually use over the term of the license – is the ideal VCL circumstance on which to build an ECL.

Typically, a license for text-based uses under an ECL authorizes specified uses, commonly including internal photocopying and digital reproduction and distribution within a licensee, and

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[9] Copyright Office's 2015 Report at p. 82.

[10] See, e.g., Copyright Office's 2015 Report, p. 75: "to digitally reproduce and provide online access to a collection of works for certain purposes" and at p.94, where those purposes are enumerated out as "the creation of digital copies of works, the display of works through online access, and copying and printing by end-users."

[11] Daniel J. Gervais, "Application of an Extended Collective Licensing Regime in Canada; Principles and Issues Related to Implementation," a study prepared for the Department of Canadian Heritage (2003), accessed at http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf; Tarja Koskinen-Olsson, "Collective Management in the Nordic Countries", chapter 10 in Collective Management of Copyright and Related Rights (Kluwer Law Int'l, 2d ed. 2010, Daniel J. Gervais, editor).

sometimes digitization (that is, scanning), but might also include such uses as display to the public on a web site (if it can be accomplished in a manner which protects the rightsholders' principal distribution channels). The ECL encompasses all the works both in its mandated repertory and in the statutory extension thereof, granting the user unlimited access (within the terms of the license) to a complete range of works in exchange for the user accepting terms and conditions and the payment of a fee. In the Nordic countries, the applicable CMO is then responsible for distributing the pool of royalties collected from the entire class of participating users to the class of rightsholders, both mandating and non-mandating, according to some agreed-upon method. (It is our understanding that, in most Nordic ECLs, the distribution of royalties by the CMO goes to trade associations, unions and other organizations representing classes of domestic rightsholders, and not to the individual rightsholders themselves, with a portion calculated on the basis of "national treatment" and retained by the CMO for distribution not to individual foreign rightsholders but to similar organizations in other countries -- including CCC. Any further distribution to individual rightsholders is then determined by the trade association, union, organization or foreign CMO.)

THE ECL BUILDS ON THE VCL

Thus, the ECL model starts from the VCL model described above and adds several additional elements:

(7) Assuming that the CMO has received mandates from a significant number of relevant rightsholders for purposes of licensing a particular right or set of rights in those rightsholders' works, the authorizing statute empowers the CMO to represent all the works not only of mandating rightsholders but also of rightsholders from around the world who have not provided mandates (and any of whom may in fact have provided overlapping licenses on different terms).

(8) The authorizing statute creates a framework directing the CMO how to address the issue of distributing royalties to the non-mandating rightsholders brought in by the ECL (usually on equal terms with mandating rightsholders).

(9) The authorization (and internal CMO procedures) establish mechanisms by which rightsholders are protected against application of the ECL in undesired ways, including by each rightsholder receiving (i) the right to opt out of the ECL (on a work-by-work and/or an all-works basis) and (ii) the right to fair and equal treatment for those rightsholders who choose not to opt out (including addressing the embedded orphan works problem – that is, how to deal with the works of the unidentifiable or unlocatable rightsholder – in some fashion).

(10) The authorization includes some kind of continuing supervision by the government (including the establishment or endorsement of dispute resolution rules) to ensure that every party "plays by the rules."

THE COPYRIGHT OFFICE'S SPECIFIC QUESTIONS

After significant study, the Copyright Office has recommended that an ECL for text-based works (as well as two other ECLs) be piloted as a supplement to existing United States copyright law. As an organization devoted to "making copyright work," we welcome the proposal as an effort to evaluate new and alternative methods to ensuring that copyright does indeed "work" in the 21st century.

In that spirit, the remainder of this submission includes comments, based on our decades of experience in voluntary collective licensing (VCL) and our knowledge of CMOs operating ECLs in other countries. Should Congress opt to authorize an ECL pilot of the sort envisioned in the Request for Comments and the Copyright Office's 2015 Report, CCC stands ready to participate and cooperate with other participants, to any feasible degree.

(1) Examples of Projects

(a) Qualifying Collections

Should the pilot be limited to collections involving a minimum number of copyrighted works? If so, what should that threshold number be?

Yes, it makes sense, considering the effort involved in building an ECL, that some minimum threshold, presumably counted in at least the thousands, be established. By definition, an ECL is intended to address the issue of "too many works". How many works is "too many" will inevitably vary depending on the use(s) required. In instances where there are a more limited (even if large) number of works, voluntary licensing, on either an individual or a collective basis, better serves the purposes of copyright. Individual rightsholders commonly issue voluntary licenses for certain uses of dozens and even hundreds of works. CMOs, including CCC, routinely issue voluntary collective licenses that cover millions of works. An appropriate threshold for an ECL will thus depend on the nature of the use sought to be made as well as on the characterizations of the works proposed to be used. Further, any such standard for an ECL relating to mass digitization should take into account existing mass digitization projects, including preexisting projects whose materials may not be all in the public domain and which should therefore probably be brought within the scope of any proposed ECL.[12] However, it should be recalled that the costs of both administering (for the user) and licensing (for the CMO) a very large project collection – for example, one numbered in the millions of items – will require the expenditure of time and money in data management and royalty tasks that will necessarily increase in size, even if not in direct proportion to the number of items.[13]

[12] For more on this topic, see "Copyright and Mass Digitization," by Maurizio Borghi and Stavroula Karapapa (Oxford: Oxford University Press, 2013).

[13] It should be noted that one original effort that emulated an ECL was the Google Book Search project that became the subject of the suit titled Authors Guild v. Google, Inc., 05 CV 8136 (DC) (S.D.N.Y.). There, as part of a proposed amended settlement agreement that would have created a private imitation of an ECL, 93 U.S.P.Q.2d 1159 (S.D.N.Y. 2011), the proposed licensee (Google) agreed to pay nearly $35 million expressly to fund the basic set-up and initial operation of the Book Rights Registry, the entity that would have acted as the CMO. (That sum was part of a total settlement payment of $125 million to cover past infringements, attorneys' fees and other costs.) The

Should collections that include commercially available works be eligible for ECL, or should the program cover only out-of-commerce works?

The more works that are included, the more valuable an ECL is for users. Because any ECL is built on top of a VCL, some core group of rightsholders whose works would be involved, together with one or more likely interested users, will necessarily work through issues like this before receiving the government imprimatur of an ECL. The details of how in-commerce works should be addressed would be an element of the negotiation and of the terms and conditions of the applicable VCL. The reality of dissatisfied rightsholders' ability to opt out of whatever license is designed (and presumably replace it with a feasible voluntary pay-per-use opportunity) – as well as the reality of dissatisfied users simply declining a license – will create incentives on the part of the parties to the VCL negotiation to design accommodations that will be unique to the situation. Likewise, the reality of the CMO's costs associated with administration of too-complicated parameters or terms and conditions for the proposed license will also create incentives for successful compromises that will serve all genuinely interested parties, resulting in a VCL followed by an ECL that fits the needs of a particular market.

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

No. Simply put, for works still under copyright protection, there is no fixed date or timescale that would automatically bring them in or out of scope for an ECL, at least until the terms of the underlying VCL are determined. Further, adding a date limitation a priori to an ECL would amount to an additional burden on users, who would then be expected to make – sometimes difficult – assessments of date and provenance before they can evaluate whether the use they seek to make is within the scope of the license. And rightsholders and the CMO would face the same issues, and perhaps without the same access as the users to the copyrighted works in question.

(b) Eligibility and Access

Please describe any appropriate limitations on the end-users who should be eligible to access a digital collection under a qualifying mass digitization project. For example, should access be limited to students, affiliates, and employees of the digitizing institution, or should ECL licensees be permitted to provide access to the general public? Should licensees be permitted to offer access to a collection remotely, or only through onsite computer terminals?

As suggested above, it is difficult to assess the reasonableness of such limitations without further information about the nature of the use proposed and the nature of (and any existing market for) the copyright rights in question. So, for example, opening the use of a large mass of works to the

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proposed settlement agreement made other arrangements as well to ensure continuing sources of funds not only as royalties for rightsholders but also as revenues to the CMO to cover expenses; whether those arrangements were sufficient to provide continuing funding was never determined because the settlement agreement was rejected by the district court on other grounds.

general public (and thereby likely eliminating any existing market for the use of the relevant works) would seem to go beyond what is necessary and prudent for the vast majority of rightsholders. On the other hand, it is possible that a narrowly limited scope of use – perhaps enforced with access/location controls or other forms of security – combined with exercise of the opt-out right by rightsholders of works with unique circumstances, could yield a license of value to the licensed users as well as the public; that will depend on what those closest to the question can agree upon. In short, eligibility and access are elements of the scope, and perhaps the price, of the license. At the point at which the representative rightsholders and users agree to the scope of the underlying VCL, that agreement will include an assessment of whether enough rights for users and enough royalties for rightsholders are included. For example, an ECL producing a "dark archive" (a digitized collection created primarily for purposes of preservation and not for active access) will likely have very different terms, a very different price and very different participation from an ECL intended to create an online facility available to all.

(c) Security Requirements

Please describe any specific technical measures that should be required as part of this obligation. In addition, the Office invites stakeholder views on the extent to which specific security requirements should be set forth by statute or defined through Copyright Office regulations.

CCC agrees with the Copyright Office about the almost certain need for security requirements to be an element of any ECL. Security will likely induce more rightsholders to be willing to participate and, most likely, will induce users to make more meaningful investments in the projects covered by the ECL (both as an inducement to rightsholder participation and as some protection against free riding by other users not subject to the license). That said, the appropriate amount of security will be a reflection of the scope of the license as worked out by the representative rightsholders and users, and the CMO as well if the license structure imposes security obligations on it, in the course of developing the underlying VCL; in the example noted before, the nature and amount (and probably the cost) of security for a dark archive is necessarily different from that required for a licensed use involving more broad access.

(2) Dispute Resolution Process

Should the legislation authorize informal mediation, with the CRB's role limited to that of a facilitator of negotiations? Or should the statute provide for binding arbitration?

Until ECLs are tested in the crucible of actual rightsholder-user negotiation, the most likely outcome is that, where there is no pre-existing VCL agreement between rightsholders and users, any ECL will not come into existence, meaning that the need for a special dispute resolution process will be low. Where there is a pre-existing VCL agreement, then the need for a special dispute resolution process (because resolution of major issues should have been part of the agreed terms) should likewise be low.

Thus, CCC believes that, at this early stage – before the viability of ECLs altogether has been shown – any decision in this regard can apply only to the pilot. For purposes of the pilot, any

process should be relatively light-touch so as to avoid sinking the experiment before it has a chance to start. Copyright Royalty Board proceedings tend to formality and length (for good and sufficient reasons arising from the core docket that the CRB addresses); however, neither of those attributes is likely to be conducive to successful experimentation. On that basis, either the CRB or, perhaps better, a more informal "hearing officer" within the Copyright Office could function as a mediator to push otherwise-interested parties to resolve whatever relatively straightforward dispute separates them. Any more complicated dispute is likely to indicate that the underlying VCL needs more work before an ECL can operate; in that case, the parties and the designated CMO should probably focus on another experiment more likely to succeed and prove the viability of the ECL model.

(3) Distributions of Royalties

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

Based on CCC's experience, the key steps towards efficient and reliable – and therefore timely – royalty distributions are: (1) identifying the nature of the use for which the royalties were collected, the works used and then the appropriate rightsholders; (2) determining whether the rightsholders are already known to the CMO doing the distribution and, if not, undertaking the process of locating them (which will likely also require the processing of additional tax documentation and/or withholding); (3) applying the agreed allocation rules; and then (4) making the distribution payments.

Each of these steps can involve little or much work, depending on the circumstances, but only when all are completed can a distribution go forward. Ordinarily in voluntary collective licensing, all four steps in an individual royalty distribution are based on information already available to the CMO; either the information arrived as part of the CMO establishment process (with works and rightsholders coming in through voluntary agreements and bringing with them contact and often tax information), the usage information being collected on an ongoing basis from participating users, and the allocation rules being established by the participating rightsholders.

Distributions under a new ECL could not occur until all of that information was available to the CMO. Presumably, the underlying VCL will have provided allocation rules acceptable to the participating rightsholders (and perhaps to the government too should it have participated in the development process in anticipation of the ECL); unfortunately, the other information will be harder to come by. By definition under an ECL, some substantial number of the works and rightsholders will be unknown to the CMO at the time of licensing, and identifying and locating the rightsholders for payment will be dependent both on user assistance and on the diligent search process mentioned below; also by definition under an ECL, neither the user assistance nor the diligent search process is likely to produce fast, complete and inexpensive information (or the ECL will have been largely unnecessary).

The above information is prefatory to answering the Office's question. That answer comes in two parts: that portion of the royalty pool to be divided among rightsholders who chose to

participate in the underlying VCL should be distributable within a reasonable time after the end of an accounting cycle, and that portion of the royalty pool to be divided among rightsholders who arrived as a result of the ECL may take some time longer because of the more involved process and the lack of information.

CCC has developed considerable expertise in this area. In addition to semi-annual administration of royalties for our VCLs, we regularly distribute royalties back to our participating rightsholders in our pay-per-use services (where we receive complete information on each use and have complete information on each participating rightsholder whose works may be used) on schedules that are quarterly and, in some cases, monthly. Part of our experience includes making distributions to rightsholders abroad, including through non-US CMOs with which we have created bilateral relationships, some as early as the early 1980s; the need to complete those distributions has necessitated the development of technology that allows us to handle multiple character sets (for the names of works and rightsholders) and multiple currencies.

An important consideration in any distribution model is efficiency. For example, according to a recent report published by the Bank of America, it costs an American business on average $12.00 to make, clear, account for and reconcile a payment (whether by check or otherwise)[14] and, presumably in that estimate (relating to the most common business experience), the business already knows the address and related particulars (including tax status) of the recipient. Among the obvious developments in this area has been the replacement of paper checks with electronic funds transfers and automated reconciliation, and CCC has joined the rest of American businesses in finding efficiencies and savings there; however, in the case of non-mandating rightsholders, it is most likely that paper checks – the most expensive form of payment, and therefore most of them involving processing costs in excess of that $12.00 average – will continue to be necessary. In a circumstance like a hypothetical mass digitization ECL issued to not-for-profit organizations (including, by definition, large numbers of works and rightsholders and likely limited incoming royalties, and therefore likely including large numbers of works and rightsholders to whom very small amounts will be due), that may mean that it will be many years until the system accrues enough royalties for some works and rightsholders to make it economically viable to pay out those royalties.

Of course, the Copyright Office may consider alternatives to accumulating small sums. One choice would be for the system to involve subsidies by way of grants from either the government or foundations. Another choice, and one that we understand has been adopted in connection with some Nordic ECLs (and with many other statutory license structures, particularly in Europe), is for the small amounts to be applied to the collective benefit of all rightsholders (for example, through copyright education of the public or through a welfare-benefits system for impoverished creators) rather than paying them out to individuals. Any such alternative, if deemed attractive and appropriate by the Copyright Office or Congress, will need to be made a part of any

[14] Estimate of $4-$20 attributed to Bank of America Merrill Lynch by Vipal Monga, "U.S. Companies Cling to Writing Paper Checks", Wall St. J., March 10, 2014, http://www.wsj.com/articles/SB10001424052702304732804579425233344430424 (sub. req'd).

authorizing legislation in order to reduce the need for negotiating the details of such a potentially-zero-sum set of transfers and to immunize the CMO against claims.

(4) Diligent search

The Office has recommended that a CMO be required to conduct diligent searches for nonmember rightsholders for whom it has collected royalties. The Office believes that this obligation should include, but not be limited to, maintaining a publicly available list of information on all licensed works for which one or more rightsholders have not been identified or located. What additional actions should be required as part of a CMO's diligent search obligation?

A reasonably diligent search for works and rightsholders under authorization seems a reasonable requirement to include in the structure of the ECL, but the obligation to conduct diligent searches must belong not only to the CMO but also to licensees and prospective licensees who are benefiting from the license and who are almost certainly far closer to the works used than the CMO or anyone else. The extent and nature of those searches will be different – for example, the licensee or prospective licensee may have to provide thorough metadata regarding the works proposed to be used, including data about rightsholders that it can readily acquire, while the CMO may have to locate the rightsholder and/or validate rightsholder-work connections. It is also reasonable to expect that the licensee will have a continuing obligation to deliver back into the CMO-administered system any work- or rightsholder-related information that comes to its attention as a result of the use (especially where the use may involve public or Internet display). The Copyright Office anticipates that the CMO will maintain publicly-available, Internet-accessible records of this type of information; the cost of such maintenance (including the attendant security and privacy obligations) will be a necessary component of the CMO's budget.

The degree and effort necessary for a search to qualify as reasonably diligent – that is, the amount of "diligence" that is "due" – might also vary based on the relative scope and size of the associated project. While we would not expect that the time invested in search would present an undue roadblock to prospective users, neither can it be expected that the system (that is, all other users and rightsholders) will absorb an individual user's costs. The CMO should be able to allocate funds collected pursuant to the ECL towards cost-recovery from staff time necessary to perform this search work, as well as towards supporting database development activities, and other attendant overhead.

(5) Other Issues

Please comment on any additional issues that the Copyright Office may wish to consider in developing draft ECL legislation.

A number of other issues are worth noting at this time, although further discussion of the precise parameters of any legislation developed by the Copyright Office and/or Congress and the precise scope of any individual proposed ECL will likely identify additional issues.

(a) We agree with the Office in its Report that any implementing legislation should be clear that the status of projects and uses (and VCLs) outside any ECL are unchanged. Fair use and the use of public domain works would be unaffected; in addition, because as an efficiency mechanism some such uses and some such works may be caught up in an ECL because of the inevitable lack of full information, that fact should not derogate from the ECL or from the CMO's good faith in administering it.

(b) It seems appropriate that any authorizing legislation should clarify distinctions in any ECL between the role of user (the entity doing mass digitization) and the role of CMO (the entity administering a license for mass digitization on behalf of both voluntarily-participating and ECL-included rightsholders) and the inappropriateness of any one entity occupying both roles in any individual instance.

(c) As noted above, CCC also offers pay-per-use or transactional licensing as a supplement to its repertory licensing services for a large swath of uses and use types. This provides centralized licensing that serves the interests of both rightsholders and users, both participating voluntarily, for uses that do not necessarily need the benefit of a collective license (including uses that are "primary", such as print-on-demand, rather than "secondary", such as photocopying). Based on our experience, it may be useful for the Copyright Office to consider adding a pay-per-use supplement to any proposed ECL structure.

CONCLUSION

CCC welcomes this initiative in support of copyright, and looks forward to both participating in further discussion of these important issues and to assisting the Copyright Office in its analysis and working with other participants. Should Congress opt to authorize a pilot ECL structure, we would certainly make our expertise available to assist in the design and development of the necessary systems in consultation with the Copyright Office, and, based on our experience with collective and transactional licensing, work towards creating and delivering an efficient mechanism for handling mass digitization under U.S. copyright law in a manner that meets the needs of users, authors, other creators, publishers and other interested parties.

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