

## Comments on Mass Digitization Pilot Program

Getty Images

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### BACKGROUND

Getty Images is a leading creator and distributor of still imagery and video content. Getty Images represents more than 150,000 individual contributors (photographers, illustrators, and videographers), and owns or represents more than 80,000,000 unique visual works. Our award-winning imagery can be seen at [www.gettyimages.com](http://www.gettyimages.com), as well as our other websites, including [www.istockphoto.com](http://www.istockphoto.com), [www.wireimage.com](http://www.wireimage.com) and [www.thinkstock.com](http://www.thinkstock.com).

### VIEWS ON EXTENDED COLLECTIVE LICENSING IN GENERAL

First, it is not at all clear that the Copyright Office's proposal for a pilot program on extended collective licensing ("ECL") is necessary, let alone well-advised. With all due respect, ECL appears to be a solution in need of a problem. Of the few scenarios in which mass digitization has occurred in recent years (for example, the Google books case and HathiTrust), the courts were adequately able to apply the Copyright Act and find that mass digitization was permitted as a fair use. Thus, when the Notice of Inquiry ("NOI") posits that the pilot program is aimed at "certain mass digitization activities that are currently beyond the reach of the Copyright Act," it is not clear what, if any, activities those are.

Simply because some copyright users might find it more convenient to digitize copyrighted works in bulk does not give reason to disenfranchise copyright owners from their long-held rights to control how, when, where and by whom their works are used. Because copyright is an exclusive right, the ECL proposal represents a major departure from fundamental copyright principles. Unless specifically authorized by a copyright exception or limitation, a copyright owner's work cannot be used without the owner's consent. However, the ECL proposal flips this principle on its head and introduces an opt-out approach, giving third parties the legal authority to engage in certain uses without first seeking permission from the copyright owner. We firmly and fundamentally object to any program, pilot or otherwise, that compromises a copyright owner's rights on an opt-out basis. The pilot is described in the Notice of Inquiry as intended to be "voluntary." To be truly voluntary, any ECL program should be limited to copyright owners who choose to participate on an opt-in basis.

At this early stage, there are too many unanswered questions for us to support the pilot program. We are interested in working with the Copyright Office as it continues to investigate whether there is a need for such a program, and if so, how it might be structured so as to respect both the public benefits of mass digitization projects and the well-established rights of copyright owners.

## RESPONSES TO SPECIFIC QUESTIONS

### 1. Examples of Projects

Getty Images is not aware of any mass digitization projects that are currently beyond the reach of the Copyright Act and that would require ECL. To the extent the Copyright Office receives other comments that do identify such projects, it is imperative that these be limited to projects that are conducted by nonprofit organizations for educational or research purposes, and only in cases where existing license markets do not exist. Corporate entities should not be entitled to avail themselves of ECL, even if the project itself does not generate revenue, and public/private partnerships should also be excluded.

#### a. Qualifying Collections

There is already an established, functioning, commercial market for the licensing of photographs and other images, including vectors and illustrations. We recommend that any copyrighted work that is available for licensing be excluded from the categories of works in the ECL pilot. In addition, any work that has already been digitized should be excluded. There is no need for a statutory right to digitize works that have already been digitized.

#### b. Eligibility and Access

Who should have access to digitized copyrighted works will depend on the nature of the intended educational or research use. Regardless of whether access is limited to internal users or publicly available, security measures such as those described below should be implemented to protect the copyrighted works.

#### c. Security Requirements

In order to prevent unauthorized access or use of copyrighted works, images should be stored and displayed in the smallest size and lowest resolution possible, and right-click functionality (which normally allows images to be copied and/or downloaded) should be disabled. Because these technical restrictions may need to change as technology changes, specific security requirements are better handled by regulation than by statute.

### 2. Dispute Resolution Process

For an ECL scheme to truly be voluntary, binding arbitration should not be mandatory. Legislation that authorizes voluntary procedures under which parties can agree to submit their dispute to a binding proceeding, but are not required to do so, is the most appropriate dispute resolution process.

### 3. Distribution of Royalties

Royalties should be distributed in the shortest time frame practicable. Just as important, there needs to be an audit right for copyright owners to ensure proper accounting and payments, and royalty statements should be transparent and include a description of the work used and the nature of the use.

### 4. Diligent Search

In addition to maintaining a publicly available list of information on all licensed works for which rightsholders had not been identified or located, CMOs should be required to work proactively with artist organizations to help notify artists who have unclaimed royalties.

### 5. Other Issues

Two other issues not addressed in the notice of inquiry raise significant logistical challenges:

- How will the pilot program deal with works of non-US owners when there currently is no international network of ECL bodies? This creates a risk that any online use by an ECL licensee would leave the licensee vulnerable to copyright infringement action outside of the US.
- If images are included in a pilot program, how would funds be distributed when there is such a large number of disparate, often unidentifiable, copyright owners and there is no existing collecting society for photographers in the US that could claim to be representative of all photographers in the US?

The issues described within our comments are important to photographers and the photo industry. Getty Images appreciates the Copyright Office's inquiry on mass digitization pilot program and looks forward to providing additional comment on any other issues raised.