October 8, 2015

Library of Congress
Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Via: http://copyright.gov/policy/massdigitization

RE: Mass Digitization Pilot Program

To the Librarian of Congress and the Register of Copyrights:

The Intellectual Property Owners Association ("IPO") respectfully submits these comments in connection with Request for Comments from the United States Copyright Office regarding the Mass Digitization Pilot Program from the June 9, 2015, Federal Register notice.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association, either through their companies or through other classes of membership.

IPO commends the Copyright Office and its staff for the thorough and insightful report, "Orphan Works and Mass Digitization" dated June 2015. This report provides a helpful history and analysis of how the issues have developed and what options meaningfully might guide a course of action for copyright owners, users, and intermediaries in a digital economy. IPO especially commends the Copyright Office and its staff for the depth of analysis both in trajectory of time (forward and backward) and in the complex layers of players, assets, and conditions that the proposed Pilot Program will involve. The delivery of content has a long history in analog form, and digital considerations have changed and will continue to change the publishing industries.

IPO supports the Copyright Office as the appropriate and legitimate agency for balancing the needs of copyright owners and users for works that are both in, and out of, commerce. The Copyright Office is a capable steward for all stakeholders (including but not limited to copyright claimants, publishers, academics, and the public interest) with respect to access and distribution issues.

IPO supports the inclusion of publishers in the continuing dialogue and discourse as this Pilot Program is envisioned, crafted, implemented, and revised over time. Publishers

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and other content providers, as well as the public, academics, and other stakeholders, need to be participants in the structuring and implementation of the Pilot.

IPO addresses the following issues set out in the Federal Register notice in turn below.

1. Examples of Projects.

a. Qualifying Collections:

IPO finds the initial three categories of works (literary, pictorial or graphic, and photographic) to be a useful selection of published copyrighted works to begin the Pilot extended collective licensing ('ECL') program. IPO notes that the proposal allows for publishers to elect to opt out of the Pilot; that the Pilot only applies to printed works not available in digital format; and that the Pilot focuses on 'out-of-commerce' works for non-profit (educational and research) purposes and not for direct or indirect profit. These limitations make sense for an initial effort aimed at determining whether to permit a mass digitization exception to the ordinary rule that permission be obtained before a user can exploit a copyrighted work.

b. Eligibility and Access:

IPO agrees with the initial considerations on limitations of eligibility as presented and is inclined to believe that eligibility and access should be for the general public. As is well stated repeatedly throughout the Report, the public benefit delivered by mass digitization projects is well appreciated and documented around the world, provided there is an effective right to opt out that is easy to implement for rightsholders. While the United States has little experience with collective rights management, several EU countries (France, Germany and the United Kingdom) have implemented ECLs in the last five years, and the public has benefited in each instance and jurisdiction. As is noted in the Report, reliance on fair use cannot provide the public benefits of mass digitization that the ECL model proposed by the Copyright Office promises. For example, full text access allowing the public to read entire works cannot be envisioned under fair use. IPO believes that eligibility and access should be balanced with the goals of allowing rightsholders to be compensated and supports the creation of a centralized, market-based mechanism for clearance of rights and the compensation of copyright owners (Report p. 6).

c. Security Requirements:

IPO believes that robust security is essential and supports the implementation of suitable security measures to control access to the collection and to prevent unauthorized reproduction, but believes it is premature to discuss the specifics of those security measures at this time. So dramatically are the technologies evolving that a review of the specific technologies might be more effectively evaluated and handled at a time closer to the implementation date.

2. Dispute Resolution Process (between Collective Management Organizations (CMOs) and prospective users)

In considering this question, as a threshold matter, we considered a complaint that has been raised by copyright owners in the context of performing rights organizations (PROs) for musical composition owners, namely, that the unavailability of injunctive relief by the PROs has caused years and years of delays in adjudicating rights in rate court between the PROs and users. If users can simply ask for a license and then exploit the works before a rate is agreed upon, there is no incentive for the user to reach a resolution until the PRO files a rate court proceeding. For the PRO, if the amounts to be collected are too small, there is no incentive for the PRO to spend the enormous sums of money and internal and external resources required to bring a rate court proceeding. So, as a threshold matter, the Committee would like to see a rule requiring the rate to be agreed between the users and the CMOs before the user can exploit the works. Doing so would severely cut down on the number of disputes.

In the event the CMO and the user cannot agree on a rate (or an upfront fee for scanning the works in the first instance in cases where there would be no or only a small running royalty), the proceeding should be streamlined to avoid delay, and IPO believes this could be achieved within six months of an impasse in negotiations. An adjudicatory body should consist of one author's representative, one representative from the user community, and one neutral, government-employed arbitrator. Each discipline (i.e., written work, visual arts, etc.) should have its own panel. Appeals could be made to the D.C. District Court, if necessary from a constitutional standpoint.

In the streamlined proceedings, the burden should be on the user, not the CMO, to propose a rate to the panel adjudicating the matter, justified by the economic circumstances of the user. It would be required to submit the evidence it relies on in justifying its economic business model and the resulting royalty rate. Then the CMO could present why, from its perspective, the rate is too low and the economic model of the proposed user is not sustainable. It could present licenses concerning similar users, data concerning similar business models to the proposed users, and other economic data through expert declarations.

As an example of a potential process, IPO suggests that the user would file the petition upon its determination that it could not reach agreement with the CMO. The CMO then would submit its responsive papers (including expert declarations) within 60 days of the petition filed by the user. There then would be a hearing, at which the witnesses for both sides would be presented for cross examination and questioning by the panel. Post-hearing briefing could be done within 30-60 days of the hearing, and then a decision quickly rendered. There would not be any depositions, and document discovery would be limited to issues presented by the petition. IPO imagines a schedule something like the following:

Day 1: User submits petition

Day 10: CMO serves document requests based on the petition

Day 30: User produces documents requested

Day 60: CMO presents its response

Day 65: User serves document requests

Day 80: CMO produces documents

Day 90: Hearing

Day 120: Simultaneous opening briefs

Day 150: Simultaneous response briefs

Day 180: Decision

3. Distribution of royalties by CMOs.

One observation, from the way that royalties are distributed in the music industry, is that determining the amount of usage is an inexact science. Each PRO and SoundExchange has its own methodologies for surveying and estimating usage, and its own algorithms for then deciding who should receive royalties. Much of this issue for PROs relates to the problem of identifying performances. In contrast, however, the use of printed materials in the Pilot Program appears to be a much more manageable exercise, capable of close to exacting measures for identifying what works were actually used.

So, the first aspect of a good distribution system is a requirement for users to report usage accurately to the CMOs. This may require synchronization of user and CMO databases, so some technical requirements would need to be agreed upon, with the supervision of the Copyright Office.

Second, the PROs and SoundExchange typically report and pay royalties on a quarterly or half-year basis. For payments made for initial scanning, the payments should be made within 60 days of the receipt of the monies by the CMO. As for running royalties, IPO believes that quarterly reporting is fairer to copyright owners than longer periods. However, often the PROs and SoundExchange are several quarters behind when comparing the sales/uses reported on the statements and the payments, so there should be some penalty to the CMO for making late payments.

4. Diligent Search requirements for CMOs.

The diligent search requirements should have strength in two respects.

First, the things the CMO (and perhaps also the users) should have to do in order for a search for non-member rightsholders to be considered "diligent" should be significant – more than just consulting a free government database or two in an online search. When considering a similar issue in connection with the 2008 Orphan Works legislation, IPO proposed to Congress that "diligent search" be defined as follows:

> "A reasonably diligent search includes the use of generally available resource materials of any kind, including but not limited to inquiries to database providers, whether or not a charge or subscription fee is imposed for the search, and the scope of such a search is consistent with the nature and value of the work. A reasonably diligent search includes steps that are

> reasonable under the circumstances to communicate with the publisher of the work to locate the owner of the work."

This definition might be adapted for the purpose of a particular CMO to require even more specific actions depending on the circumstances.

Second, the penalties for non-compliance should be significant enough to incentivize both the CMOs and the users to actually perform a diligent search. Otherwise, the requirement would become meaningless.

5. Other Issues.

The Report and request for comments do not address how disputes should be handled between copyright owners and CMOs, such as the amount of royalties owed, whether the CMO disregarded an opt-out request, whether a diligent search was undertaken, or whether the CMO took instruction from a disputed owner. IPO believes that streamlined procedures for such disputes should also be part of the Pilot Program.

We thank you for considering IPO's comments and would welcome any further dialogue or opportunity to provide additional information to assist your efforts on this important issue.

Sincerely,

Herbert C. Wamsley
Executive Director