

AGENCE 'X'

October 4, 2015

Kevin Amer
Senior Counsel for Policy and International Affairs
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559-6000

Re: Docket Number 2015-3, Mass Digitization Pilot Program

Dear Mr. Amer:

As an author, I am concerned that the Mass Digitalization Pilot Program, as proposed, seems to miss a few salient elements of Berne Convention for the Protection of Literary and Artistic Works (1886; 1979). As this admirable and public-spirited program is aimed at not-for-profit institutions seeking to digitize collections, and the chief means of instilling uniformity and respect for copyright is the proposed CMO, it seems likely that few problems would arise. Yet the following issues seem worthy of consideration, as for-profit entities have already claimed some of the middle ground the legislation seeks to define:

1/ Most authors today do not retain their copyright and all benefits from the above licensing via CMO would go to publishers, further incentivizing the long-term corporate control of Intellectual Property. (Please note that the food chain for CMOs is most likely to include for-profit e-aggregators already well known for willfully violating the vagaries of the terms "orphaned works" and "derivative works".)

2/ Publishers today have already begun the licensing of works from their catalogues without the explicit permission of authors (usually resorting to vague language in their contracts regarding electronic distribution and marketing). Authors have generally lost all control over the electronic replication, dissemination, and licensing of their work, including data- and text-mining.

3/ Authors would be doubly imperiled by the Mass Digitalization of works given that the CMO and publisher agreement would further erode the definition of "Derivative Works" in the Berne Convention.

4/ Lastly, it is the Moral Rights of Authors that digitization directly impinges upon. The mass digitization of works would primarily erode the issue of the non-transferability of such rights (given that publishers have arrogated such rights to themselves). The primary concern, in the case of Moral Rights, is the optional and implicit right of authors to have no digital rights (the right to opt out of having one's work digitized).

Therefore, I would like to recommend that all of the above issues might be taken care of by the strengthening of the "opt-out" clause, which you have rightly included but vaguely defined – i.e., defined in terms of the copyright holder and not necessarily the author. As this clause has been generally justified in monetary terms, it need only be re-defined in moral terms (i.e., for the author, not for publishers) and backstopped by strict adherence to the Berne Convention. The main point of Moral Rights is that "copyright holder" does not always equal "the author".

All the best,



Gavin Keeney