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Kevin Amer  
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October 9, 2015

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

Dear Mr. Amer:

I am writing on behalf of Lancaster Theological Seminary. We are one of our nation's many libraries, archives, museums, historical societies, and other memory institutions that care about collecting, preserving, and making available cultural materials. We have a strong interest in digitizing our collections to provide better access to the public online.

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 might 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.

We also see no need for ECL because many of our digitization uses are already permissible under the doctrine of fair use. We have become increasingly comfortable relying on fair use as the case law over the past decade has become far clearer and more predictable. Further, fair use best practices documents have given us confidence that our own fair use judgments comport with

those of our broader community and legal scholars.<sup>1</sup> While fair use does not permit all mass digitization uses, the kinds of projects that we are most focused on—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—fit comfortably within existing law.

Our digital archive (<http://archive.lancasterseminary.edu>), includes works that are both in public domain and protected by copyright. Those protected by copyright are made available by permission from the copyright holders and we maintain a record of these permissions. Lancaster Theological Seminary has made every effort to respect and abide by U.S. Copyright law and international intellectual property laws in its digitization projects.

Preserving and promoting fair use is one the most important ways to facilitate digital access to our 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.

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
- 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,

Myka Kennedy Stephens  
Seminary Librarian  
Lancaster Theological Seminary

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<sup>1</sup> *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* (2014), <http://www.emsimpact.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>