

**COMMENTS OF JANICE T. PILCH  
IN RESPONSE TO NOTICE OF INQUIRY CONCERNING  
MASS DIGITIZATION PILOT PROGRAM**

I am pleased to respond to the Notice of Inquiry of the United States Copyright Office, Library of Congress, on the Mass Digitization Pilot Program, published in the *Federal Register* on June 9, 2015 [Docket No. 2015-3]. I appreciate the opportunity to comment on this issue. These comments are offered in my personal capacity as Copyright and Licensing Librarian at Rutgers University Libraries.

As a librarian, I support broad access to creative and intellectual works that enrich the educational, social, and cultural landscape. I also respect the rights of copyright holders and the status of copyright as a human right under Article 27 of the United Nations *Universal Declaration of Human Rights*. I appreciate the proposal by the United States Copyright Office to develop a legal framework under extended collective licensing (ECL) intended to achieve an appropriate balance between facilitating mass digitization that serves the public interest and safeguarding the rights of copyright owners.

I support the effort to facilitate access to collections of published copyrighted literary works, pictorial or graphic works that are adjuncts to literary works, and photographs, for nonprofit educational or research purposes through an ECL system. Libraries, archives, and educational institutions and the public would benefit from reasonable licensing practices for creative works that are now gridlocked by lack of such mechanisms.

It is understood that the proposed ECL solution is intended to enable activity “for which there is broad agreement that no colorable fair use claim exists: providing digital access to copyrighted works in their entirety.”<sup>1</sup>

**Question 1. Examples of Projects.**

*a. Qualifying Collections*

*Within these categories, please describe or provide examples of the types of collections that you believe should be eligible for licensing under the ECL pilot.*

The most compelling example of a large digitization project for the ECL pilot is the collection of copyrighted materials in the HathiTrust Digital Library. Subject to the ability and willingness of the HathiTrust to participate in such a pilot project, a licensing solution would provide significant benefits for the nonprofit educational and research community and the public. It

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<sup>1</sup> United States Copyright Office, *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* (June 2015): 101, <http://www.copyright.gov/orphan/> (“2015 Report”).

would provide broad access to digital copies of works that are otherwise not available and not likely to be made publicly available in digital format in the foreseeable future. Rutgers University is a partner institution in the HathiTrust.

The United States Copyright Office report *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* of June 2015 (“2015 Report”) makes clear that fair use is not a viable solution for mass digitization of such a collection<sup>2</sup> and that an ECL framework affords the best possible solution.

I believe that the best examples of eligible collections for the pilot program are collections of published, copyrighted, out-of-commerce literary works. Furthermore, because the Hathi Trust collection consists of works that have already been digitized, a pilot using this material could proceed more quickly than a pilot using a collection in its early stages of technical development. This collection embodies the unresolved legal aspects of mass digitization that merit a solution. Finally, the HathiTrust collection is the most comprehensive collection of published, copyrighted, out-of-commerce literary works available and it seems incumbent on the library, copyright, and publisher communities to find a workable solution to its use.

Developing an ECL pilot for archival collections would be more complex and would require consideration of additional factors due to the nature of archival works and special collections. In some cases ECL might be appropriate for archival collections, for example in cases where a collection consisted of works owned by a single rightsholder. To come to terms with the range of considerations involving mass digitization and fair use for archival works would be a more complex undertaking.

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

Given the work entailed in developing an ECL framework, it would seem most advantageous to conduct the pilot program using a large collection that would yield significant results and benefits for society. Facilitating broad access to the copyrighted works in the HathiTrust collection would be a significant accomplishment. And as mentioned, it is the collection that continues to drive discussions on mass digitization.

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

*Should the program be limited to works published before a certain date? If so, what date would be advisable?*

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<sup>2</sup> “While courts have found some mass digitization projects to be protected by fair use in certain compelling but narrowly focused sets of circumstances, it is unlikely that fair use will ever yield the kind of broad use of full-text works that some would like to see in the online environment.” 2015 Report, 5.

I believe that the ECL pilot program should cover only out-of-commerce works and that any commercially available works should be excluded from the pilot. It would seem appropriate to include in the pilot program all literary works published from 1923 and not identified as being out of copyright.

*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? In addition, please describe any appropriate restrictions on methods of access. Should licensees be permitted to offer access to a collection remotely, or only through onsite computer terminals?*

The pilot program as outlined in the 2015 Report seems predicated on licensing agreements with eligible Section 108 libraries and archives as licensees that, “[u]pon obtaining a license, ... would be permitted to make the covered digital collection available online in accordance with any statutory use restrictions ... and subject to specified limitations on eligible end-users and methods of access”.<sup>3</sup> The 2015 Report indicates that the potential model of “Institutional Subscriptions” found in the Google Books settlement would allow eligible licensees to make the digitized works available to authorized users within their institutions.

If libraries and archives are able and willing to license the collections under ECL licensees, access should be limited to students, affiliates, and employees of the digitizing institution, as is common practice. It would be difficult and also unusual to justify a license to a library or archive that included the broad general public in its description of authorized users. If that were the case, only one library would need to pay for the license; the database would then serve the global public.

The key here is in the ability and willingness of Section 108 eligible institutions to sustain subscription costs for use of the content under ECL. The question arises as to whether many libraries would be able to fund the cost of licenses. An additional question arises as to whether in principle most research libraries would be willing to accept an ECL system for these works. The views of some members of the library community, who believe that fair use provides an appropriate solution, are addressed in the 2015 Report.<sup>4</sup> Some library representatives, along with related public interest organizations, continue to advocate heavily for exercising fair use for mass digitization and may not wish to pay for use of these works. The Copyright Office

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<sup>3</sup> 2015 Report, 89.

<sup>4</sup> “The Office is not persuaded that fair use has achieved the predictability and stability that these commenters ascribe to it.... Thus, as a means of providing a coherent and reliable set of standards to govern the broad variety of digitization activities throughout the marketplace, fair use appears ill-suited.” 2015 Report, 76-77.

might need to clarify whether there would be a market among libraries and archives for such a digitized collection under ECL.

Alternatively the general public could be served through individual licenses provided by the CMO. It might even be possible to establish a centralized print-on-demand program for books in the HathiTrust collection of copyrighted works. Many members of the public might enjoy a print copy at a reasonable price. The easy availability of a license or print book at a reasonable cost would benefit the user public directly.

Licensees should be permitted to offer access to an ECL-licensed collection remotely. Restricting access to onsite computer terminals is no longer considered viable in many institutions that promote online learning and that serve users whose expectations for library service include remote access.

### *c. Security Requirements*

*The Office has recommended that CMOs and users be required to include, as part of any ECL license, terms requiring the user to implement and reasonably maintain adequate digital security measures to control access to the collection, and to prevent unauthorized reproduction, distribution, or display of the licensed works. 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.*

For the ECL system to be functional, a robust security system needs to be in place. Security for such a valuable collection of digital works is a primary consideration. Some libraries are better equipped to provide such a system than others. For this reason, among others, the HathiTrust was developed. The idea of maintaining a centralized repository for any large mass digitization effort is critical to providing the highest level of security possible.

Related to the issue of security requirements is the issue of security once the files reach the end user. The Copyright Office may wish to reconsider the matter of notice and takedown and the safe harbor provisions that limit the liability of Internet services providers. Notice and takedown procedures are difficult for the ordinary rightsholder and they are often ineffective. Rutgers University Libraries stated in earlier comments to the Copyright Office that they find the enforcement provisions in the law currently to be ineffective. "Safe harbor provisions introduced the Digital Millennium Copyright Act allow any entity to infringe repeatedly with no recourse for the rightsholder other than costly litigation.... In an environment where competition with free, unlawful access is allowed to flourish, copyright law is not effectively protecting works."<sup>5</sup>

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<sup>5</sup> Comments of Rutgers University Libraries in Response to Notice of Inquiry Concerning Copyright Protection for Certain Visual Works (July 23, 2015), 2, <http://copyright.gov/policy/visualworks/comments/>.

I encourage the Copyright Office to consider the extent to which lack of enforcement of copyright in the current law compromises file security. The safe harbor provisions of the DMCA make serial infringement, that harms the interests of creative people and other rightsholders, too easy. Amending the notice and takedown and safe harbor provisions of the DMCA would create a level playing field where all stakeholders could benefit from the commercial Internet. It would not disadvantage those engaged in lawful exchange of works online.

**Question 3.** *Distribution of Royalties.*

*In the United States, there is some industry precedent for distributions by CMOs on a quarterly basis.... What would be an appropriate timeframe for required distributions under a U.S. ECL program?*

The suggestion for distributions by CMOs on a quarterly basis seems reasonable.

**Question 4.** *Diligent Search.*

*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?*

I agree on the importance of maintaining a publicly available list of information on all licensed works for which one or more rightsholders have not been identified or located. I also believe that it would be reasonable to attach to each work, such as in a rights statement, relevant information on the current copyright holder, so that anyone using the work would know who held the copyright, following the practice of some music licensing organizations. In other words, this information should not be available only to the CMO.

To the extent that ECL involves photographs or other materials closely associated with individual creators, I do not think that creators should be burdened with costly copyright registration procedures to facilitate diligent searches. The task of identifying rightholders should not be made more laborious, complex, or expensive for the creative community. The function of registration as a prerequisite to a successful diligent search is a challenge that should be shared by government, the technology sector, digitizing entities, and content creators.

**Question 5.** *Other Issues.*

*The coexistence of fair use and extended collective licensing.* In the landscape of mass digitization, fair use and licensing mechanisms compete. The competition plays out when libraries and archives make decisions on whether to digitize copyrighted works, either by relying on fair use when the fair use argument is sufficiently supported and when the perceived risk of a legal challenge is low enough to justify this approach, or under Section 108, or by seeking permissions. As a general practice, U.S. libraries and archives have not relied heavily on

licensing practices because structures are not in place and also because reliance on fair use has been easy and cost-free.

It is an understatement to say that most people and institutions would not choose to provide compensation to a rightsholder, or to operate under an ECL system, unless that were the only option reasonably available. For that reason I think that the collection of copyrighted works in the HathiTrust collection is a good candidate for the pilot project. But also for that reason, ECL may prove difficult to implement broadly if library organizations and individual libraries and archives continue to oppose the idea of paying rightsholders either under the belief that information should be free or because they lack the resources to fund ECL licenses.

I fully support the aims of the ECL pilot program. In many digitization scenarios, ECL presents the most reasonable way to facilitate public availability of digitized copyrighted works, and I wish for it to succeed for all of society.

Respectfully submitted on October 9, 2015 by:



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