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By Electronic Mail

Karyn A. Temple Claggett
Associate Register of Copyrights
and Director of Policy and International Affairs
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

RE: SIIA Comments on the Mass Digitization Pilot Program

The Software & Information Industry Association (“SIIA”) appreciates the opportunity to respond to the U.S. Copyright Office’s Request for Comments on its proposed *Mass Digitization Pilot Program* published in the Federal Register¹ on June 9, 2015. SIIA files the following comments on behalf of itself and its members.

SIIA is the principal trade association for the software and digital information industries. The more than 700 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society, including business, education, government, healthcare and consumers.² As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength – software alone contributes \$425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs.³

¹ 80 Fed. Reg. Notice 110 (June 9, 2015)

² A list of SIIA’s member companies may be found at: <http://www.sii.net/membership/memberlist.asp>.

³ Software & Information Industry Association, *The U.S. Software Industry: An Engine for Economic Growth and Employment*, Prepared for SIIA by Robert J. Shapiro, 2014 at <http://www.sii.net/Admin/FileManagement.aspx/LinkClick.aspx?fileticket=ffCbUo5PyEM%3d&portalid=0>.

SIIA members represent a wide range of business and consumer interests. They are copyright owners, users of the copyrighted works of others, as well as information aggregators that engage in mass digitization projects. As a result, SIIA and its members are extremely interested in working with the Copyright Office, Congress, the Administration and other interested parties to determine whether and how to implement the proposed mass digitization pilot program described in the Copyright Office's June 2015 report titled *Orphan Works and Mass Digitization*.⁴

GENERAL COMMENTS AND CONCERNS

The Federal Register notice sets forth numerous questions about implementation of the mass digitization pilot program. Before addressing those specific questions we would like to highlight our concerns about several other aspects of the proposed pilot program; many of which did not appear to be directly raised in either the Request for Comments or the *Orphan Works and Mass Digitization* Report.

We had difficulty answering the questions proposed by the Office because in many cases the answers to these questions depend on answers to questions in other sections of the Request for Comments or answers to questions that were not asked by the Office. The extended collective licensing (ECL) framework proposed by the Office is a very complex proposal, with lots of “moving pieces” that are interdependent upon one another. These questions and their answers cannot and should not be considered in a vacuum. We therefore strongly urge that the Copyright Office first consider the many different issues and factual circumstances that could arise in any given situation and develop a plan for how the ECL framework would handle these issues before going forward with any implementing legislation.

The ECL proposal represents a major shift in copyright policy. Throughout the entire history of copyright protection for literary works in the United States, the copyright system has generally been based on an “opt in” framework. This framework required that, before a copyright owner's work could be legally used by a third party, permission first be obtained from the copyright owner for any use that implicates one of that owner's exclusive rights (that is not explicitly exempted or limited under the Copyright Act). Now, for the first time, the Copyright Office is proposing an “opt out” system for literary works that would allow third parties to engage in certain uses of literary works without first seeking permission from copyright owners of literary works. While we are willing to consider this seismic shift in copyright policy in the interest of improving the copyright system, we do so with a great deal of apprehension. Accordingly, before taking action to implement any ECL proposal, we caution both the Copyright Office and Congress to first comprehensively, thoughtfully and meticulously consider the questions and concerns raised by stakeholders like SIIA and its publisher members to ensure that those concerns are adequately addressed before a pilot program is implemented.

Even after these issues are fully considered by the Office there will no doubt remain some level of ambiguity and potential disagreement as to how the pilot program will or should work in practice. To the extent these ambiguities and conflicts arise, we strongly urge the Office to

⁴ <http://copyright.gov/orphan/reports/orphan-works2015.pdf>

choose the more limited approach between the competing options. The program can always be expanded in the future. In fact, since at this stage, the program is being proposed as a pilot program it's likely that, if the pilot program is successful, there will be ample opportunity to expand the program in the future if necessary. On the other hand, if the program is too broad in its scope or application, it could cause irreparable harm to certain copyright owners. For example, if the pilot program allows for remote access of "in commerce" works and the security associated with such remote access proves to be ineffective, works included in a mass digitization process could be made widely available in ways that are unintended by the mass digitizer and cause significant damages to the market for the affected copyrighted works. This would not only harm the copyright owner but also, as word spread within the copyright community of these programmatic problems, it would likely reduce the confidence in the ECL program and lead to significant increases in copyright owner opt outs due to lack of trust in the program, thereby resulting in fewer successful mass digitization projects.

A. The Success of the ECL Program Depends on an Effective and Easy Opt Out System

If the program is going to have any chance of success, the copyright owner community is going to need to have confidence in the "opt out" function. For that to happen, the "opt out" process must be transparent. It needs to be easy to access and understand for both large and small copyright owners. It is imperative that the program be implemented in a way that enables individual owners and right holders to easily and quickly opt out *at any time during the process and at any stage of a project*, whether that is at the beginning of the process when a Collective Management Organization (CMO) is first forming, when they first hear about a particular project, when the CMO and Mass Digitizer (MD) reach agreement, or after they have received a payment. It is essential that there not be any barriers that could hinder a copyright owner's ability to opt out. For example, there must not be any cost or penalty associated with opting out (even when a copyright owner has already opted in and subsequently changes its mind.) Failure to meet any of these criteria would be certain to spawn a level of distrust amongst rights holders which could lead to the ultimate demise of the program.

There is also a litany of unanswered questions about the "opt out" system that need to be answered before the program can move forward.

- How would the copyright owner find out about a particular mass digitization project in which his or her work might be used? Does the Copyright Office envision that the mass digitizer would need to "announce" the program and provide details? From the perspective of the mass digitizer, requiring an announcement could cause problems because many mass digitizers may not want to publicize their projects for fear that competitors would learn of it before they could get the project off the ground. On the other hand, it is optimal for all parties (CMO's, rights holders and MDs) if rights holders know about the project before it begins so they can decide early on in the process whether they want to participate or opt out of the project. It is also in the interest of the CMO and the MDs to know if rights holders want to opt out so they do not waste their time forming a CMO and negotiating an agreement that has insufficient rights holder participation to make the project worthwhile

- Consistent with the approach taken in the Copyright Act, which allows copyright owners to divide their rights, we urge that right holders be able to opt out for all or some works and all or some rights.
- How does the “opt out” system work when there are multiple rights holders in the United States? For example, if one publisher has the right to publish a hard cover version of the book and a different publisher has the right to publish the soft cover version of the same book do they both have the right to opt out? What happens if one of the rights holders opts out but the other does not? Consistent with our views above, we would urge that if any one rights holder opts out, the opt out applies to all rights holders who own rights to exploit the work in the United States.⁵
- Who can accept the opt outs? Does the rights holder have to opt out with the CMO or can the rights holder contact the mass digitizer to opt out? The mass digitizer may want to receive the opt outs in lieu of or in addition to the CMO so it knows how many and who has opted out and, if it wants to, reach a separate agreement with those who have opted out. Putting a burden on the rights holder to opt out twice is unnecessary. We recommend that the rights holder opt out to the CMO and the CMO be responsible for passing that on to the mass digitizer.

B. The Importance of the Opt In to the ECL Framework

Although the ECL framework is built on an “opt out” system, it’s important not to discount the importance of getting rights holders to “opt in” to the program. The first step in creating an ECL framework is getting a critical mass of rights holders to agree to be represented by a Voluntary Collective License (VCL) organization. There can be no ECL without first creating a VCL. No one – whether it’s a mass digitizer or any other potential licensee – will be willing to buy a license from a CMO unless the CMO can demonstrate that it represents a sufficient number of copyright owners, works and rights. In short, the CMO needs inventory. That inventory is created from rights holders willing to let the CMO license its works to mass digitizers. It is therefore essential that the ECL framework be established in a way that reduces the risks of rights holders and encourages their participation.

On the other hand, even if the CMO represents a sufficient number of rights holders, if there are no MDs or other potential licensees interested in licensing the CMO’s “inventory” of copyrighted works the ECL framework will also fail. The ECL framework can be created in a way that is broad or narrow, but if MDs and others are not willing to license the CMO’s inventory, then the entire framework will not work. Thus, for the ECL framework to be successful the CMO needs to represent a common set of rights that meets the needs of potential licensees.

⁵ Because the ECL framework will only allow a mass digitizer to digitize the work and (possibly) make it available in the United States due to the limited reach of U.S. law, a rights holder who *only* owns rights to exploit works outside the United States should not have the ability to opt out.

The Copyright Office report on the *Orphan Works and Mass Digitization* leaves a lot of implementation questions unanswered. How will the CMOs be formed? Like Ray Kinsella in *Field of Dreams*, are organizations expected to take a leap of faith and create CMOs in the hopes that they'll be contacted by mass digitizers sometime in the future? If that's the case, then how can a CMO determine the scope of their representation and whether that scope is commensurate with some potential future need of some prospective mass digitizer? If the CMO is not created first, then does a mass digitizer contact the Copyright Office about a project who then solicits for organizations to volunteer to be CMOs?

The scope of representation of the CMOs is also unclear from the report. Is the CMO's representation based on rights or subject matter or category of rights holders? Once a CMO is created, is the CMO qualified to represent its members on anything that touches on their interests or can CMOs split the right holders' interests. For example, if a publisher publishes both romance novels and text books does one CMO have the right to publish all that publisher's works (*i.e.*, romance novels and text books) or does one CMO have the right to license the romance novels and a different CMO have the right to license the text books?

Another good example of the confusion that could ensue comes from the world of test publishing. Test publishers come from a variety of places: some are education publishers who also publish text books and testing materials; some are software companies that make certification exams; some are governments that create and administer tests. Would a CMO for education publishers be able to license the mass digitization of tests or would there need to be a separate CMO just for publishers of test materials? Would the mass digitizer need to reach license agreements with multiple CMOs? These are important questions; the answers to which will likely determine the success or failure of the proposed ECL framework. We recommend that the publishers have the ability to deal with a single CMO to opt out, and if necessary, a coordination mechanism to provide for synchronization across multiple CMOs.

C. The Definition of “Mass Digitization”

The Copyright Office Report never clearly defines what would qualify as a “mass digitization” project. There are some who suggest that “mass digitization” should include new uses of works that are *already digitized*. SIIA strongly opposes any definition of mass digitization that includes works that are already in digital form. Mass digitization projects that fall within the proposed ECL pilot program should only include those projects that entail the transformation of literary works from traditional print to digital format. If a work is in both print *and* digital format the project should not be within the purview of the pilot program. In no instance should any mass digitization program include computer programs.

SIIA RESPONSES TO SPECIFIC QUESTIONS RAISED IN THE REQUEST FOR COMMENTS

A. QUALIFYING COLLECTIONS.

The Office has recommended that ECL be available for three categories of published copyrighted works: (1) Literary works; (2) pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works; and (3) photographs.

- (i) *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.*

We believe that all categories of collections should be eligible for licensing under the ECL pilot program because the ECL program cannot successfully launch unless a VCL is first created and it will be impossible to create a VCL for certain types of works and/or publishers who are unwilling to include their works or participate. For example, test publishers who retain a close hold on their testing materials are largely going to be unwilling to participate in a VCL. Therefore, establishing an ECL for testing materials will prove to be impossible and thus there will be no need to legislatively exclude these types of collections. It is also unnecessary to exclude categories of collections as long as publishers of categories of works (like test publishers) can opt out of participation.

The only exclusion that we believe is appropriate is not one that is based on categories. We believe that no ECL should be authorized that is exclusive to one author (*e.g.*, digitizing just the works of Dickens) or the works of one publisher, unless so chosen by a publisher. In these situations any mass digitizer or other potential licensee should go directly to the licensor to get permission.

- (ii) *Should the pilot be limited to collections involving a minimum number of copyrighted works?*

The test for determining whether a collection includes enough works to qualify for participation in the ECL pilot program should be:

Whether there are so many works in the collection that the time and resources needed to clear the rights for those works would not be cost effective relative to the project itself and would therefore threaten the creation of the collection.

We understand that this is a somewhat amorphous standard, but it is better than setting a specific minimum number because establishing a minimum number would be both arbitrary and likely vary significantly from case to case depending on the type of use and type of works involved.

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

The answer to this question largely depends on the type of use. If the digitization project is a dark archive, then including commercial and out-of-commerce works may be acceptable. On the other hand, if remote access to the digitized works is permitted by the MD, then the potential to significantly devalue the digitized works -- whether through piracy or competition with existing commercial offerings of the work -- is so significant that including in-commerce works would be unacceptable.

Therefore, the default should be that only out-of-commerce works are eligible for the ECL. Another potential solution might be to implement an “opt in” standard for in-commerce works and an “opt out” standard for out-of-commerce works.

Ultimately the problem with whatever standard is chosen here is that it is very difficult to draw the line between out-of-commerce works and in-commerce works. How and when does one determine whether a work is “out of commerce”? For example, a work that is considered to be in-commerce today may be out-of-commerce tomorrow and visa verse. At what point in time is a determination made and is this a one-time or a continual obligation to re-evaluate the determination at certain predetermined points in time?

How would the in-commerce/out-of-commerce standard apply to different editions of the same work? For example, if there are two different editions of a text books and the first edition is out of print, but second edition is in-commerce, what is the result? We strongly believe that so long as one edition of the work is in-commerce, then all prior editions should also be considered in commerce. Similarly, what would be the result if a book is out-of-commerce in one region of the world but not another. We urge that “in-commerce” should mean in commerce anyplace in the world. Since there may likely be different rights holders in different parts of the world, this approach has the added benefit of partially resolving the multiple rights holder problem as well.

How would print-on-demand works be considered under this standard? Would the MD have to determine whether a copy was ever “demanded”? And if so, how much time needs to pass after a demand to warrant the print-on-demand work to be considered to be out-of-commerce? The print-on-demand problem raises so many fact-sensitive and complex issue that we recommend that either (i) any work being offered as “print on demand” or its equivalent be defined as being in-commerce, or (ii) the license fee/royalty rate paid to the owner of a print demand work under the ECL program be not less than the print-on-demand fee/rate. Any other solution would cause a catastrophic failure in the market for on-demand works.

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

As long as the definition of “mass digitization” does not include works in digital form, there does not seem to be any reason to condition eligibility in the program to works published before or after a certain date. Since most new works will likely be available in digital form, excluding digital works from the reach of the program will naturally and effectively accomplish the same goal as limiting the program to works published before a certain date. This approach also

obviates the need to select a particular date, which would be inherently arbitrary and thus likely to engender complaints.

In addition to the non-digital works limitation, the program should also be limited to published works. As with the case for new works, limiting the program to published work creates a natural date limitation while having the additional benefit of providing the work's creator with time to publish the work and placing less stress on the out-of-commerce/in-commerce distinction (as discuss above).

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?

Questions relating to scope of access have less to do with what the law should or should not prescribe and more to do with the market for the work and the scope of the license to use the work. The amount a user is willing to pay for access, the type of access that is granted and the number and type of limitations a user is willing to agree to in a license with the copyright owner will largely dictate the level of access that the copyright owner is willing to allow. For example, it's reasonable to assume that: (i) the royalty paid to allow remote access would be more than a royalty to create a dark archive of the same works; (ii) the royalty paid to provide access to a defined group, such as students in Teacher A's Calculus class, using agreed-to security measures to enforce the limitation, would be less than that paid to provide access to anyone who accesses a library's website with the same works; or (iii) that an MD who agrees to fully indemnify copyright owners harmed by any breach in security when that MD provides remote access would pay less than an MD who refuses to provide such indemnity to these copyright owners. In sum, if the pilot program is implemented correctly, the market and license terms should effectively dictate answers to these access questions, without any need to specify limitations on types of users through the law or regulations.

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.

An essential part of this program must be a requirement that MDs use adequate and effective security measures to control access and protect against misuse and infringement of the copyright works in the collection. While it is essential that security be part of every single collection authorized under the program, it is neither possible nor advisable to attempt to codify any specific type of security measures that should be used into the law because: (i) technologies change so rapidly that codifying specific security requirements in the law could make the law outdated and ineffectual very quickly; and (ii) the type of security that would be necessary and appropriate will differ from case to case depending on the scope of the license and various other factors, such as how extensively the collection is being made available, who are the intended end-users; and what type of works are in the collection. The law should simply specify general requirements, purposes and goals of the security measures, but all other details should be left to regulations and specific agreements between the CMOs and MD on a case-by-case basis.

One element that should be included in any legal requirement to use security measures is a requirement that the MD immediately notify the copyright owner and the CMO if there is a breach of the security measure and that the MD immediately disable access to the collection, take action to promptly and effectively remedy the breach, and track down any works in the collection that were illegally accessed, copied and/or re-distributed.

D. DISPUTE RESOLUTION PROCESS

The Office has recommended that the ECL pilot provide for a dispute resolution process before the Copyright Royalty Board (CRB) when an authorized CMO and a prospective user are unable to agree to licensing terms. The Office is interested in receiving public comment on what form this process should take. Should the legislation authorize informal mediation, with the CRB's role limited to that of a facilitator of negotiations? Or should the statute provide for binding arbitration? Some foreign ECL laws provide voluntary procedures under which parties can agree to submit their dispute to a binding proceeding, but are not required to do so. Do those laws provide a workable dispute resolution model for a U.S. ECL program?

Our only views on the dispute resolution process are that it needs to be both fast and cheap. If the cost of the process itself exceeds the cost of the project then this pilot program will be ineffective and unused. Any dispute resolution process should also not affect the opt-out process. In other words, only the CMO should be bound by the DRP, not the publisher. If the rights holder is not happy with the results of the DRP, then the rights holder should be able to opt out at any time.

E. DISTRIBUTION OF ROYALTIES

To ensure that rightsholders receive compensation within a reasonable time, the Office has recommended that the legislation or regulations establish a specific period within which a CMO must distribute royalties to rightsholders whom it has identified and located. Both the United Kingdom's ECL regulations and the European Union's February 2014 Directive on collective rights management generally require that such payments be made no later than nine months

from the end of the financial year in which the royalties were collected. 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 manner and timing of royalty distributions should be flexible and based on the facts in each particular instance. One of the primary factors that should be used to determine when and how royalties are distributed is how much money the CMO is distributing. Obviously, a CMO cannot afford to send a \$5 check every month. It would be more cost effective for the CMO to allow the money to accumulate over time and distribute a larger check to the copyright owner at a later date. Nor can the CMO afford the expense associated with tracking down a copyright owner to distribute a \$5 check to them. Thus, if the cost of locating the copyright owner would exceed the amount of money being distributed to that person the CMO should have no obligation to track down the copyright owner until such time as it becomes financial feasible.

F. DILIGENT SEARCH

The Office has recommended that a CMO be required to conduct diligent searches for nonmember rightsholders for whom it has collected royalties. 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?

We strongly agree that the CMO should be required to do a diligent search for non-member copyright owners whose works are part of the collection. This diligent search standard should be relatively high (likely higher than any proposed standard for orphan works) because the CMO has a built-in incentive not to find the copyright owner since presumably the CMO gets to retain any money owed to a copyright owner who cannot be located. On the other hand, the diligent search standard should not be so high so as to exceed the amount of money attempting to be distributed by the CMO.

The responsibility to conduct a diligent search should not be placed solely on the CMO. Collections created under the pilot program are a collaborative effort between the CMO and the MD. There may be many instances where the MD has better and more accurate information about the identity and/or whereabouts of the copyright owner. Accordingly, the MD should be required to assist and cooperate with the CMO in identifying and locating copyright owners whose works form part of their collections.

G. OTHER ISSUES

Please comment on any additional issues that the Copyright Office may wish to consider in developing draft ECL legislation.

One issue that did not seem to be discussed in the Copyright Office proposal is the penalty that would be imposed on a CMO that uses the works for something that is not a non-profit educational or research purpose or for a use that has commercial advantage. Is the only remedy a copyright infringement lawsuit? Would the Copyright Office disqualify the CMO from further participating in the program, and if so, what is the process for doing so and who decides whether the scope of the program is exceeded by the CMO?

We had many additional questions about the CMO authorization process:

- The CMO must get authorization from Copyright Office. How long does that authorization last? We recommend that the method for reauthorizing CMOs be modeled after UK law whereby there is a presumption that the CMO authorization is renewable and the CMO must seek renewal and get re-approved every few years.
- Can the CMO's authorization be revoked, and if so, under what conditions and how?
- What standard will the Copyright Office use to evaluate CMOs?
- Can there be an unlimited number of CMOs or would the number of CMOs be limited per category of work or by some other means?
- Is there a fee that the CMO pays the Copyright Office? Is that an annual fee or only paid as part of the authorization and re-authorization process?
- How does the Copyright Office plan on monitoring CMOs searching for non-member copyright owners and for distribution of payments? What is the penalty for not meeting either standard? We urge the Copyright Office to take a strict oversight approach to these two issues.
- Are CMOs required to identify themselves and provide their contact information in a manner that allows others to easily identify, locate and contact them?

Perhaps the biggest issue of all the issues that were not asked is international accessibility. Since the pilot program must be restricted to the United States, how does the MD ensure that the collection is only accessible in the United States -- especially where the works are being made accessible over the Internet? Given the U.S. courts recent history on cases involving the first sale defense (see *John Wiley v Kirtsaeng*) we have significant concerns that this program can be effectively contained to the United States.

CONCLUSION

We would like to thank the Copyright Office for giving us the opportunity to participate in this process and to submit these comments. Any questions or requests for additional information about these comments can be directed to Mark MacCarthy, SIIA's Senior Vice President for Public Policy at (202) 789-4471 or mmacCarthy@siia.net.