

LIBRARY OF CONGRESS

United States Copyright Office

[Docket No. 2015-3]

Mass Digitization Pilot Program; Request for Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office is developing a limited pilot program and corresponding draft legislation that would establish a legal framework known as extended collective licensing for certain mass digitization activities that are currently beyond the reach of the Copyright Act. This request provides the opportunity for interested parties to submit specific recommendations regarding the operational aspects of the pilot program, within the parameters and legal framework described in the Office's *Orphan Works and Mass Digitization* report.

DATES: Comments must be received no later than 5:00 p.m. EDT on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESS: All comments should be submitted electronically. To submit comments, please visit <http://copyright.gov/policy/massdigitization>. The website interface requires commenting parties to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: a Portable Document File (PDF) format that contains searchable, accessible

text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's website exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-1027 for special instructions.

FOR FURTHER INFORMATION CONTACT: Kevin Amer, Senior Counsel for Policy and International Affairs, by telephone at 202-707-1027 or by email at kamer@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Copyright Office has completed a multi-year study on the issues of orphan works and mass digitization, respectively, and has published a report detailing its findings and recommendations.¹ In the report, the Office proposes separate legislative solutions for each issue. With respect to orphan works, the Office has proposed, with certain conditions, a limitation on liability for good faith users, improving upon its 2006 Orphan Works Report as well as the Shawn Bentley Orphan Works Act passed by the Senate in 2008.² With respect to mass digitization, the Office has concluded that the addition of extended collective licensing (ECL) in U.S. law would help to facilitate the work of those who wish to digitize and provide full access to certain collections of books, photographs, or other materials for nonprofit educational or research purposes. An ECL framework can facilitate lawful uses that are not otherwise possible

¹ See U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015), available at <http://www.copyright.gov/orphan>.

² See *id.*, Appendix A.

(*e.g.*, because they are beyond the reach of case-by-case licensing or the application of fair use or both). The Office's full analysis can be found at <http://copyright.gov/orphan/>.

If Congress were to establish a limited and voluntary pilot program at this time, it would help the United States copyright community to garner experience with the kind of ECL experience that is either in place or being discussed in other countries. The pilot program would permit users to obtain licenses under specified conditions. Under the proposed framework, a collective management organization (CMO) representing copyright owners in a particular category of works would be permitted to seek authorization from the Register of Copyrights to issue licenses on behalf of both members and non-members of the CMO for certain mass digitization activities. To qualify for licensing authority, a CMO would be required to submit an application to the Office providing evidence of its representativeness in the relevant field, the consent of its membership to the ECL proposal, and its adherence to sufficient standards of transparency, accountability, and good governance. Once authorized, a CMO would be entitled to negotiate royalty rates and terms with users seeking to digitally reproduce and provide online access to a collection or body of copyrighted works for the benefit of the public, a community, or other specified users. Because the pilot is a limited project, such uses at this early juncture could be made only for nonprofit educational and research purposes and without any purpose of direct or indirect commercial advantage. The CMO would be required to collect and distribute royalties to rightsholders within a prescribed period and to conduct diligent searches for non-members for whom it had collected payments. Copyright owners would have the right to limit the grant of licenses with respect to their works or to opt out of the system altogether.

To assist it in developing specific legislation within these general parameters, the Office invites public comment on the topics below regarding the practical operation of such a system. The Office will then seek to facilitate further discussion through stakeholder meetings and, if necessary, additional requests for written comment. Based on this input, the Office will draft a formal legislative proposal for Congress's consideration.

II. Request for Comment

1. Examples of Projects. Comments are invited regarding examples of large digitization projects that may be appropriate for licensing under the Office's proposed ECL framework. The Office is particularly interested in the views of prospective users who may be interested in digitizing and offering access to a specific collection or body of works. The Office believes that information about the types of mass digitization projects that users have the desire and capacity to undertake will provide a useful starting point for stakeholder dialogue on various elements of the ECL pilot. Other interested members of the public, however, are also invited to submit their views. Specifically, commenters should address the following issues:

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

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?

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.

2. 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.³ Do those laws provide a workable dispute resolution model for a U.S.

ECL program?

3. *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.⁴ In the United States, there is some industry precedent for distributions by CMOs on a quarterly basis.⁵ What would be an appropriate timeframe for required distributions under a U.S.

ECL program?

4. *Diligent Search.* The Office has recommended that a CMO be required to conduct diligent searches for non-member rightsholders for whom it has collected royalties. The Office believes that this obligation should include, but not be limited to, maintaining a publicly

³ See LOV 1961-05-12 nr 02: Lov om opphavsrett til åndsverk m.v. (åndsverkloven) [Act No. 2 of May 12, 1961 Relating to Copyright in Literary, Scientific and Artistic Works], as amended on Dec. 22, 2006, § 38 (Nor.), translated at http://www.wipo.int/wipolex/en/text.jsp?file_id=248181 (unofficial translation), last amended by LOV-2014-06-13 nr 22 [Act No. 22 of June 13, 2014] (translation unavailable); LAG OM MEDLING I VISSA UPPHOVS RÄTTSTVISTER (Svensk författningssamling [SFS] 1980:612) [Act on Mediation in Certain Copyright Disputes] (1995) art. 5 (Swed.), translated at http://www.wipo.int/wipolex/en/text.jsp?file_id=241666 (unofficial translation), as amended by LAG, May 26, 2005 (2005:361), translated at http://www.wipo.int/wipolex/en/text.jsp?file_id=129617 (unofficial translation), last amended by LAG, June 27, 2013 (2013:690) (translation unavailable).

⁴ Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, S.I. 2014/2588, art. 18, ¶ 3 (U.K.) ("U.K. ECL Regulations"); Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, art. 13(1), 2014 O.J. (L 84) 72, 87, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>.

⁵ See, e.g., Copyright Clearance Center, Royalty Payment Schedule (2014), available at <http://www.copyright.com/wp-content/uploads/2015/03/Royaltypaymentschedule.pdf>; General FAQ, SOUNDEXCHANGE, <http://www.soundexchange.com/about/general-faq/>.

available list of information on all licensed works for which one or more rightsholders have not been identified or located.⁶ What additional actions should be required as part of a CMO's diligent search obligation?

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

Dated: June 4, 2015.

Karyn A. Temple Claggett,
Associate Register of Copyrights and
Director of Policy and International Affairs.

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⁶ Cf. U.K. ECL Regulations, S.I. 2014/2588, art. 18, ¶ 5; Directive 2014/26/EU art. 13(3).