

**MASS DIGITIZATION PILOT PROGRAM**  
**U.S. Copyright Office, Library of Congress, Docket No. 2015-3**

**Comments of the Center for Democracy & Technology**

**October 9, 2015**

The Center for Democracy & Technology thanks the Copyright Office for the opportunity to submit these comments as the Office considers the implementation of an extended collective licensing (ECL) pilot program for mass digitization. CDT is a non-profit public-policy organization dedicated to keeping the Internet innovative, open, and free. CDT works with a broad range of stakeholders to ensure that Internet policy continues to develop in ways that reflect core civil liberties values and promote innovation. On copyright matters, CDT seeks balanced policies that respect the rights of content creators without curtailing the Internet’s tremendous potential for fostering free expression and innovation. CDT submitted reply comments in this proceeding in March 2013,<sup>1</sup> participated in the March 2014 roundtables, and submitted additional comments in May 2014.<sup>2</sup>

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<sup>1</sup> Orphan Works and Mass Digitization Reply Comments of Center for Democracy & Technology, March 6, 2013, (“CDT Reply Comments”) available at <https://cdt.org/insight/orphan-works-and-mass-digitization-reply-comments/>.

<sup>2</sup> Orphan Works and Mass Digitization Additional Comments of Center for Democracy & Technology, May 16, 2014, (“CDT Additional Comments”) available at [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Center-for-Democracy-and-Technology\(CDT\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Center-for-Democracy-and-Technology(CDT).pdf).

## I. Introduction

CDT submits these comments in the hope that the Office might reconsider the purpose and scope of any legislatively implemented extended collective licensing (ECL) program. An ECL pilot project to permit commercial, non-transformative uses of works may be more likely to stimulate user-side interest and demand in such a project while allaying concerns that the project will impose a licensing regime on noncommercial uses already permitted by fair use or statutory exemptions. These comments also include observations and suggestions on other questions raised in the *Notice of Inquiry*<sup>3</sup> that the Office may wish to consider regardless of the scope of its proposed ECL pilot project.

## II. The Office Should Consider a Market-Based Focus on Commercial Uses for Extended Commercial Licensing

As CDT observed in its reply comments in the *Orphan Works and Mass Digitization* proceeding, orphan works and mass digitization raise distinct, if somewhat overlapping sets of issues. The orphan works problem involves the difficulty in identifying and locating the rightsholder for any specific work. By contrast, the obstacles for mass digitization projects have more to do with efficiency and scalability for projects not covered by existing limitations and exceptions.<sup>4</sup> In

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<sup>3</sup> *Mass Digitization Pilot Program; Request for Comments*, 80 Fed. Reg. 32614 (June 9, 2015) (“NOI”).

<sup>4</sup> CDT Reply Comments at 2.

later comments, as an example of a mass digitization project that goes beyond what fair use and other exceptions likely allow and presents scale-related obstacles that resemble the type of market failure normally associated with collective licensing solutions, CDT pointed to “the resale of commercially unavailable works.”<sup>5</sup>

The *Orphan Works and Mass Digitization Report*<sup>6</sup> similarly looks to ECL as a way of facilitating mass digitization by “creating a centralized, market-based mechanism for the clearance of rights and the compensation of copyright owners.”<sup>7</sup> And both the *Report* and the *NOI* seek to use an ECL framework to “facilitate lawful uses that are not otherwise possible” due to impracticality and the inapplicability of fair use or another exception.<sup>8</sup> However, the *NOI* proposed a pilot project limited to “nonprofit educational or research purposes.”<sup>9</sup> For two related reasons, nonprofit educational and research purposes may not be the ideal focus for a pilot ECL program. First, it is unclear how a program with that scope would be “market-based” given that the likely demand-side participants in that market have little apparent interest in participation. Second, there may be circumstances where digitizing and providing access to collections for nonprofit educational and research purposes may be covered by fair use or another statutory exception. In those

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<sup>5</sup> CDT Additional Comments at 3.

<sup>6</sup> *Orphan Works and Mass Digitization*, A Report of the Register of Copyrights, June 2015 (“*Report*”).

<sup>7</sup> *Report* at 6.

<sup>8</sup> *NOI* at 32614.

<sup>9</sup> *Id.*

circumstances, an ECL program may be viewed not only as unnecessary but also as an artificial constraint on the scope of those exceptions.

#### **A. An ECL Pilot Project Should Focus on Areas of Unmet Demand**

There is some tension between a market-based solution to mass digitization and a legislated one. However, if the Office wants to implement a licensing solution that resembles what would take place in the market but for impediments of scale and transaction costs, it would be best to first identify willing participants on both sides of the hypothetical market. The *NOI*'s proposed mass digitization license for “non-profit, educational and research uses without any purpose of direct or indirect commercial advantage”<sup>10</sup> does not appear to have garnered much interest among potential licensees and there is little evidence in the record to suggest such interest exists.

In earlier comments, CDT noted the absence of a clear support for an ECL framework for either orphan works or mass digitization at the Office’s roundtable on the subject.<sup>11</sup> The responses that the Office has already received from institutions representative of the intended licensees under the pilot program do not suggest there will be a great deal of uptake.<sup>12</sup> Considering the significant amount of work that the implementation of an ECL program would require from both

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<sup>10</sup> *Id.*

<sup>11</sup> CDT Additional Comments at 3.

<sup>12</sup> *See, e.g.*, Comments of the Society of American Archivists, *Mass Digitization Pilot Program*, Sept. 23, 2015, at 7 (expressing concern that the proposed ECL program, “if enacted, will have the effect of drastically reducing access to our cultural heritage for all”).

collective management organizations (“CMOs”) and licensees, it may be best to start with a pilot project in an area where there may be greater enthusiasm from potential licensees.

This point seems borne out by the experience of other countries that have put in place ECL frameworks. As the Office notes in the *Report*, no CMOs have sought to apply for the United Kingdom’s ECL provisions to date.<sup>13</sup> Of course, the UK regulations are barely one year old, but this may indicate the need to further study the experiences of other countries before implementing an ECL through domestic federal legislation. Experiences in Canada, Japan, and Korea similarly suggest that ECL programs may be of limited appeal.<sup>14</sup> The Nordic model may be somewhat difficult to replicate in the United States given the U.S.’s significantly larger collection of works and the likely difficulty faced in prevailing upon Congress to fully fund licensing fees to make the Library of Congress’s entire collection digital and available to U.S. citizens.<sup>15</sup>

By contrast, there is some precedent for interest in an ECL arrangement for commercial uses. Indeed, the Google Books settlement, even if flawed, was precisely such an arrangement. Amazon’s Look Inside the Book program may also signal

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<sup>13</sup> *Report* at 30.

<sup>14</sup> *Id.* at 30-33 (noting that only 300 licenses have been issued under Canada’s system, only 82 under Japan’s, and only ten under Korea’s).

<sup>15</sup> See Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, Colum. J.L. & Arts 697, 709 (2010) (explaining the Norwegian National Library’s ECL agreement with Kopinor).

further interest in pursuing an ECL agreement for commercial use.<sup>16</sup> Parties may be substantially more likely to undertake the effort and expense of a mass digitization effort and participating in an ECL program if they are able to monetize the works made available through such a program. The Office therefore may wish to reevaluate the scope of its pilot project.

### **B. ECL Programs Should Supplement Rather Than Displace Uses Pursuant to Fair Use or Other Exceptions**

Commercial uses are also less likely to impinge upon uses that are already lawful under fair use or another statutory exemption. As the *Report* notes, part of the Office’s inquiry into a potential ECL framework has been “the interplay between ECL and the existing exception for fair use and libraries under Sections 107 and 108.”<sup>17</sup> There is a detectable and understandable concern from academic and memory institutions that legislation implementing an ECL pilot project may directly or indirectly erase fair-use gains made in the *Authors Guild v. Google*<sup>18</sup> and *Authors Guild v. HathiTrust*<sup>19</sup> decisions, or narrow the scope of Section 108’s exception for certain reproductions by libraries and archives. While this certainly is not the Office’s intention, focusing on an ECL for commercial uses would allay this concern.

This is not to say that commercial uses are beyond the reach of fair use, of course, even when they involve mass digitization. Indeed, the majority of cases

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<sup>16</sup> *Report* at 79 (explaining Amazon’s program).

<sup>17</sup> *Id.* at 83.

<sup>18</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>19</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

involving massive digital copying under fair use involve commercial enterprises.<sup>20</sup>

For example, in the recent dispute between the proprietors of commercial legal databases and lawyers purporting to represent the class of all lawyers whose briefs had been scanned, indexed and made available by those databases, the court found that the databases' use of the briefs was fair use notwithstanding the commercial nature of that use.<sup>21</sup>

That being said, education and research are expressly mentioned in Section 107 and arguably closer to the heart of fair use.<sup>22</sup> Further, noncommercial digitization projects are more likely to fall within the scope of Section 108 when carried out by libraries and archives, given their preservation mission. Focusing an ECL pilot project on mass digitization for a subset of non-transformative commercial uses would relieve concerns raised by that potential overlap while also giving rise to a concrete market-based incentive for a would-be digitizer to enter into an ECL arrangement. CDT therefore suggests the Office consider altering the focus of any pilot program or, in the alternative, further monitor the development of programs in other countries before implementing the one proposed in the *NOI*.

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<sup>20</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Fox News Network, LLC v. TVEyes, Inc.*, (S.D.N.Y. 2015).

<sup>21</sup> *White v. West Publishing Corp., et al.*, 1:12-cv-01340-JSR (S.D.N.Y. 2014)

<sup>22</sup> *Cambridge University Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014).

### III. Issues Raised in the *NOI*

The *NOI* raises a number of questions regarding issues essential to consider regardless of the purpose and scope of the ECL pilot project. CDT offers the following brief observations on those questions.

#### A. Examples of Projects

##### 1. Qualifying Collections

As stated in its additional comments in the *Mass Digitization* proceeding, CDT recommends starting with an ECL for out-of-print books.<sup>23</sup> This is a slightly narrower set of works than that proposed in the *NOI*, which includes literary works, pictorial and graphic works published as illustrations, diagrams, or similar adjuncts to literary works, and photographs.<sup>24</sup> The in-print/out-of-print distinction is administrable and the case for an ECL regime for out-of-print works is apparent as there is currently no widespread marketplace solution for facilitating digital access to out-of-print books. CDT would further limit the ECL pilot project to works that have been commercially published. Works that were either not previously published (such as letters), or published and circulated for noncommercial purposes (such as political pamphlets), should not be subject to the same licensing regime as works that once were, but no longer are, commercially published.

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<sup>23</sup> CDT Additional Comment at 3-4.

<sup>24</sup> *NOI* at 32614.

Including photographs in the pilot project may create difficulties for maintenance of a registry or for removing works from the ECL corpus when the rightsholder comes forward. Textual works are far easier to index, search, and, if necessary, remove from a database.

## **2. Eligibility and Access**

As stated above, CDT would recommend starting with commercial uses rather than noncommercial educational and research uses. But regardless of whether the use is commercial or noncommercial, limiting the individuals who may access a work pursuant to an ECL or restricting how and where they may access it would significantly limit the value (and therefore interest) in participation in an ECL regime and also risks covering a use that is covered by fair use or another statutory exemption. There is, for example, no detectable interest from academic institutions, libraries, or archives in an ECL that would permit only on-site access for patrons or students to digitized copies of works already in the entity's possession.

## **3. Security Requirements**

CDT recommends against prescribing any specific security measures as a requirement for licensees under an ECL pilot program. Mandating specific security measures could hamper licensees' ability to make their digital collections available, limiting the desirability and effectiveness of licensing as a means to improve access. Also, as some have cautioned with respect to the TEACH Act's requirements,

“technological controls have the potential for limiting otherwise fair uses of educational materials.”<sup>25</sup> Because the propriety and reasonableness of any security measure may depend on the entity involved, it may be preferable to leave any security requirements as a matter to be negotiated between CMOs and licensees.

#### 4. Diligent Search and Distribution of Royalties<sup>26</sup>

CDT agrees that CMOs should maintain publicly available lists of information on licensed works for which one or more rightsholder has not been identified or located as part of their diligent search obligations. Because of the potential conflict of interest for CMOs with respect to license fees for works whose authors cannot be identified or located, CDT also agrees that CMOs should not be allowed to indefinitely retain undistributed royalties. CDT takes no position on the appropriate timing of royalties distribution but wishes to emphasize the importance of transparency in a CMO’s assessment of administration fees against the amounts collected from licensees and determination of how to disburse royalties when it is unable to locate a rightsholder. The *Report* contemplates multiple points at which a CMO may extract costs and fees from licensing revenues, but gives little guidance as to how it should dispense revenues when the owner of a work cannot be found.<sup>27</sup> Particularly, if there is only a single annual audit, as the *Report* suggests,<sup>28</sup> it is

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<sup>25</sup> “The TEACH Act: Higher Education Challenges for Compliance,” EDUCAUSE Research Bulletin 2004:13 (June 22, 2004) at 9, available at <http://net.educause.edu/ir/library/pdf/erb0413.pdf>.

<sup>26</sup> CDT takes no position on the appropriate dispute resolution mechanism.

<sup>27</sup> *Report* at 98-100.

<sup>28</sup> *Id.* at 92-93.

essential that the pilot program allow for a thorough examination of a CMO's records to determine whether it is carrying out its statutorily mandated purpose.

## **5. Other Issues**

### **a. Administration of Opt-outs**

It is unclear what steps are required by both CMOs and licensees when rightsholders come forward to remove works from a corpus subject to an ECL agreement. Does the rightsholder have to notify the CMO, the licensee, or both? How long does the CMO have to update its list of works and notify licensees? Once notified, how long does a licensee have to discontinue any licensed use of a work? CDT believes that clear answers to these questions are necessary and further notes that the answers may depend on the type of works at issue. Photographs may prove particularly challenging due to the relative difficulty of identifying and indexing photographs compared to literary works. If the owner of a photograph comes forward to opt-out of an ECL regime, the CMO and the licensee may struggle to determine which photograph is no longer subject to the ECL and therefore must be removed from any licensed digitized collection.

## b. Sunset

The *Report* proposed that any legislation authorizing an ECL program include a five-year sunset.<sup>29</sup> CDT suggests reconsidering the sunset. It may take considerable time to go through the administrative steps of establishing a qualified CMO and concluding licensing negotiations. Moreover, mass digitization projects are costly and take time. It is unclear that any commercial or noncommercial entity would undertake a mass digitization effort without assurance that use of a digitized collection pursuant to an ECL agreement could continue beyond the five-year window. As recent experience has shown, even when there is general consensus that a statutory copyright license should be renewed, that renewal is not guaranteed.<sup>30</sup> The Office may therefore wish to consider allowing some uses of works pursuant to the license to continue after sunset, a sunset longer than five years, or doing away with the sunset entirely.

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<sup>29</sup> *Report* at 102.

<sup>30</sup> See Marcia S. Smith, “Senate Adjourns Without Passing Satellite TV Extension,” SpacePolicyOnline.com, Feb. 26, 2010, *available at* <http://www.spacepolicyonline.com/news/senate-adjourns-without-passing-satellite-tv-extension>.

#### IV. Conclusion

CDT appreciates the Office's genuine interest in facilitating the use and enjoyment of works through mass digitization projects and the opportunity to comment on the Office's proposal.

Respectfully submitted,

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