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

Dear Mr. Amer:

Creative Commons (CC) and Creative Commons United States (CC USA) are pleased to submit comments responding to the Copyright Office's (Office) request for comments on its Mass Digitization Pilot Program. Creative Commons¹ is a 501(c)(3) nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright. Creative Commons provides free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry. CC USA² is the United States affiliate of Creative Commons, focusing on U.S.-specific issues and activities.

The Office should re-consider implementation of the pilot because fair use already covers many of the proposed uses, and many authors who “right to be read” are not well served by an ECL mechanism.

¹ <https://creativecommons.org>

² <http://us.creativecommons.org/>

We do not think that an extended collective licensing (ECL) mechanism should be created and implemented in the United States for mass digitization projects, either permanently or as a pilot. ECL is not needed because the fair use doctrine has actually been strengthened in the U.S. due to recent court cases that have increased the certainty with which a number of entities can engage in mass digitization.

The Office says it wishes “to garner experience with the kind of ECL experience that is either in place or being discussed in other countries.” But other countries that have adopted or are considering adoption of an ECL solution do not have a flexible and reliable exception or limitation on which those engaging in mass digitization can dependably rely. Creative Commons works with copyright scholars and cultural heritage professionals in countries that have already adopted ECLs—for example the Netherlands and Norway. Both of these countries are member states of the European Union, thus are subject to Directive 2001/29/EC of the European Parliament (InfoSoc Directive)³, which regulates aspects of copyright and related rights across the EU.

The InfoSoc Directive does not contain within its list of permissible exceptions an exception that would allow public cultural heritage institutions to make digital copies of works available online.⁴ Without being able to rely on an exception, the only other option for cultural heritage institutions in the Netherlands that do not want to infringe on the copyrights of rights holders who are not actively leveraging their exclusive rights is to explore extended collective licensing. From the perspective of EU-based cultural heritage institutions, the situation facing their U.S. counterparts is different as these institutions are likely to be able to rely on the fair use doctrine for many of the uses in

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

⁴ Directive 2012/28/EU of the European Parliament (Orphan Works Directive) has established such an exception and has made this exception conditional on a potential users carrying out a search for the rightsholder for each individual work. Such searches need to be carried out according to an unreasonably high standard (a diligent search undertaken in good faith). In addition, the exception established by the Orphan Works directive only applies to publications and audiovisual works and excludes important categories such as photography and figurative arts. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

question. From the EU perspective, ECL is a response to the inflexibility of the current EU copyright framework. ECL schemes have many drawbacks (such as the often low levels of representation among collecting societies, the existence of sectors without collective rights management, the difficulties of agreeing on remuneration, and the sometimes-opaque methods of distribution of licensing fees) that European cultural heritage institutions are willing to accept because they have no other option. U.S. institutions—such as university libraries—can rely on fair use.

In Norway, the ECL permits licensees to reproduce verbatim copies and to perform the work publicly for non-commercial purposes, but do not grant the right to create adaptations and derivative works. In practice, it means that users of ECLs (e.g., teachers, librarians, researchers, and curators) can use any work without needing to clear further rights. The licensing fees are not determined by counting actual use, but through a consensus-based model of "typical" use. The Norwegian system is perceived as being fair in rewarding creators, partly due to the fact that taxpayers collectively share the financial burden for ECL payments. Norway has determined that ECL is incompatible with Creative Commons licensing. This means that authors that publish works under a CC license are not eligible to receive any funds money collected through ECLs.

The ECL system as proposed would not work well to support mass digitization projects for several reasons. First, many authors are not primarily interested in financial rewards—for example those that write scholarly books. And if there is no expectation of revenues for the creator, paying a collective rights organization collect fees to use such works is inefficient and in opposition to the intentions of these authors.⁵ It brings

⁵ Jennifer Urban writes, “research libraries are replete with academic works created and published, not primarily to profit from copyright, but to share knowledge, find truth, and advance the scholar’s reputation and career.” Urban, Jennifer M., How Fair Use Can Help Solve the Orphan Works Problem (December 2012). Berkeley Technology Law Journal, Vol. 27, 2012; UC Berkeley Public Law Research Paper No. 2089526. Available at SSRN: <http://ssrn.com/abstract=2089526>

up the larger question of how such a collective management organization can properly represent the interests of these types of authors.

Second, for an ECL scheme to be maximally useful, it would need to license orphan works alongside all other works. But this is not clearly considered as a part of the ECL pilot, likely because it would be improper to collect fees for use of works that are orphaned because the payments cannot be distributed to the owners because by definition the owners cannot be found. Recent scholarship suggests that the very nature of a work being an orphan would likely weigh in favor of fair use anyway, thus negating the necessity for an ECL arrangement.⁶

An ECL would be more powerful if it could do more, but the Office has chosen to favor a pilot program that would “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.”⁷ By limiting the proposed ECL scope to non-commercial uses, the Office inadvertently makes a stronger case that the activities of digitizers and users will be considered a fair use and that the ECL is not needed in the first place. Fair use might not permit all mass digitization uses, but the kinds of projects that the majority of libraries are focused on are digitization for non-commercial research uses of their collections. Much of the content (typically scholarly works) of these collections was not created with copyright in mind, and usually never commercially exploited. For example, most scholars often write for free, normally as a part of their promotion and tenure process, even if the research articles they produce and publish are sold by commercial journals. The works are commercially exploited by a publisher, but not generally by the authors themselves. This could lead to conflicts over who should receive the proceeds from the ECL pilot (if this is not contemplated in publishing contracts).

⁶ Urban, at 1395.

⁷ <https://federalregister.gov/a/2015-14116>

The Office’s proposed pilot seems to rely on the premise that there would be more mass digitization projects if only there was a solution like ECL. However, we know of mass digitization projects that already work smoothly under the current law without ECL, including Wikimedia Commons and the Internet Archive. The Office should take a closer look at these types of mass digitization projects to understand more about the potential obstacles they face.

It is encouraging that the Office has proposed a “fair use savings clause” — writing, “nothing in the [ECL] statute is intended to affect the scope of fair use.” This is a welcome mention, but if a ECL mechanism is adopted users may not rely on fair use and simply access the materials under the conditions of the ECL scheme. Adopting an ECL system undermines fair use because digitizers and users will be reluctant to rely on it. Instead, they’ll ask, “why bother with the risk when all we have to do is pay a small fee?” While at first an ECL may seem like an efficient process to provide access to the content users need, it could have negative downstream consequences within this and related areas if fair use is abandoned for only licensed uses. In addition, simply including a statement to the effect nothing is “intended to affect” the scope of fair use likely does not preclude licensors from conditioning access and use on terms that require the licensee to abandon any reliance on fair use.

If the Office ultimately pursues an ECL pilot, it should affirmatively exclude works that are publicly licensed and allow other authors who wish to be excluded to apply a Creative Commons license to their work.

If the U.S. adopts an ECL pilot, doing so even temporarily creates longer-term problems. For example, it will create silos of incompatibly licensed content, whereby none of the materials digitized in compliance with the ECL could be shared via the largest mass digitization projects already well established, such as the Google Book project.

If, despite these issues, the Office wishes to move forward with the development of an ECL, the pilot ought to be implemented in a way that increases access while supporting the intentions of authors.

The universe of CC licensors is not a stakeholder group that has indicated a willingness to negotiate mass digitization licenses because they've already affirmatively and permanently opted to publicly license their works for at least non-commercial purposes. If an ECL scheme implemented, all CC licensed works, as well as collections consisting predominantly of works in the public domain, should be automatically opted out of the ECL because permission has been already granted for the subset of uses the pilot will be limited to ("the licensed works to be used only for nonprofit educational or research purposes and without any purpose of direct or indirect commercial advantage"), or no permission is needed because more liberal rights have already been granted under the license.

In addition, during the opt-out stage, the pilot should permit authors to apply a CC license that aligns with the license granted by the ECL. Doing so would have several benefits, as Creative Commons licenses have become the global standard for content licensing and are easily recognizable and understood. The CC licenses are implemented using a 3-layer system: a deed that provides an easy-to-understand summary of the permissions and conditions of the license, the legal code that makes the license globally effective and enforceable, and machine-readable metadata that permits search engines to index content available under a particular license.

We agree with many of the libraries that if the Copyright Office is serious about helping to increase legal mass digitization of our shared cultural heritage, it should instead focus on: 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,

Creative Commons

Creative Commons United States