SOCIETY OF American Archivists

September 23, 2015

Copyright Office
Library of Congress
Washington, DC 20024

Re: **Mass Digitization Pilot Program: Request for Comments (Docket No. 2015-03)**

The Society of American Archivists (SAA) welcomes the opportunity to comment on the U.S. Copyright Office's proposed limited pilot program that would establish an extended collective licensing (ECL) scheme for certain mass digitization activities that are currently beyond the reach of the Copyright Act.

SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,200 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

One can best understand current culture through deep access to the records of the past. Archives provide a critical link between people and their cultural, political, and scientific history. For more than two decades SAA has promoted the use of digital technologies to make the riches found in archives more widely accessible, knowing that when records are made available online, people use them to hold governments accountable and to advance our society by providing the raw material for new works.

Unfortunately copyright law has too often served as an impediment to archival efforts to make the records of the past broadly available. Research shows that uncertainty about the legality of posting content online has had a chilling effect on archivists' willingness to do so. In a recent study, archivists reported that copyright was a matter of concern when selecting material for digitizing.[1] Half of respondents interviewed would remove material from consideration for digitization if the material required identifying, locating, and

[1] Jean Dryden, "The Role of Copyright in Selection for Digitization," *The American Archivist,* April 2014, Vol. 77, p.68.

17 NORTH STATE STREET, SUITE 1425 | CHICAGO, IL 60602-4061 USA
TEL 312.606.0722 | TOLL-FREE 866.SAA.7858 | FAX 312.606.0728 | WEB www.archivists.org

contacting copyright holders.[2]

In the current environment, copyright law is hampering the open distribution of important cultural resources. SAA has welcomed the Copyright Office's attempts to find an equitable solution. However, from an archival perspective, extended collective licensing is not a viable solution. For the vast bulk of what is in archives—mostly unpublished or rare materials for which copyright claimants do not exist—ECL would be unhelpful, irrelevant, unduly burdensome, and a disservice to the communities that archives serve.

Responses to the specific questions posed in the Notice of Inquiry follow.

1. Examples of Projects

A. Qualifying Collections

There are a number of difficulties in the proposed ECL scheme that would severely limit its usefulness. First, it is restricted to published copyrighted works. Archives almost always consist of a combination of published and unpublished material. The papers of a senator, for example, will consist primarily of unpublished correspond-ence, photographs, speeches, email, and video. But the archive will also likely include drafts of speeches that were subsequently published in the *Congressional Record* or a local magazine; copies of newspaper articles clipped by office staff; and manuscript letters that may have been published in a collection of the senator's correspondence. Furthermore, there is no easy way to physically or intellectually distinguish published and unpublished items. ECL cannot resolve one of the greatest uncertainties faced by archivists, that is, knowing what constitutes publication under the 1909 Act.[3] Are printed union newsletters found in a labor archives "published"? Without extensive discovery and a court's ruling, it is impossible to know if the newsletters constitute general or limited publications under the 1909 Act. Did distribution of microfilms constitute publication of doctoral dissertations? A recent article suggests that it did, injecting many dissertations into the public domain. But others have argued that the tradition of treating dissertations as unpublished until they are revised and published by a scholarly or trade press still holds.[4]

The problem of knowing what constitutes publication is particularly acute when dealing with photographs. Archival photographic collections are almost always a mix of an immense number of unpublished photographs and a small number of photographs that *may* have been published. Although photographs may have crop marks or other indications of possible publication, there is no sure way to confirm that the photograph *was* ever

---

[2] Ibid. p. 72.

[3] Recent research has borne out the problem. Deborah R. Gerhardt, "Copyright Publication: An Empirical Study," *Notre Dame Law Review*, Vol. 87, No. 1, 2011. Available at SSRN: http://ssrn.com/abstract=2016033).

[4] Melissa Levine and Gail Clement, "Copyright and Publication Status of Pre-1978 Dissertations: A Content Analysis Approach," portal: Libraries and the Academy, Vol, 11, No. 3, July 2011, pp. 813-829. Available at http://hdl.handle.net/2027.42/100239.

published. Furthermore, there is no way of knowing whether another copy was printed from a negative and subsequently printed. The fear that works that appear to be unpublished and may have entered the public domain are actually registered and are thus eligible for statutory damages is what chills archivists who might otherwise want to make the material accessible online.

In short, SAA agrees with the Copyright Office that archives represent a sea of possible rights and that "the administrative costs associated with managing such a vast universe of rights would likely outweigh any benefit a CMO could realize from doing so under an ECL scheme."[5] It is very difficult to imagine archives that could ever qualify under the proposed pilot. An ECL program would do nothing to assist archivists in providing broad access to their collections. A different solution is needed. And if a non-ECL solution would work for archives, one wonders if it would also work better for published literary works than would the proposed ECL pilot.

There is only one class of material for which the proposed ECL pilot might be appropriate: Currently published works that are commercially available and for which other possible approaches (such as fair use) are unavailable. However, the stipulation in the pilot program limiting access to non-profit research and educational uses suggests that many of these works can be used under the fair use umbrella. SAA can conceive that collective licensing of in-commerce works might be more efficient than negotiating with a number of individual publishers. Out-of-commerce and orphan materials, however, are better handled through other, less expensive, means. It makes little sense, and would be a huge waste of institutional resources, to pay license fees for works that even the rights holders feel are of little or no commercial value.

B. Eligibility and Access

The basis of copyright since its beginnings in the Statute of Anne and the Copyright Act of 1790 has been to promote the "Encouragement of Learning," and Article 27 of the Universal Declaration of Human Rights dictates that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits." Reflecting those ideals, archival ethics demand equal access to archives. The great promise of digital technologies is in their ability to fulfill those principles, to turn cultural properties from scarce into unlimited goods, with almost no cost of distribution. Consequently, SAA cannot support proposed solutions that limit rather than expand access to our cultural heritage.

SAA generally has difficulty envisioning an ECL regime that can coexist with archival ethics and principles. Any such regime would, by default, have to allow the widest possible distribution of the licensed works, whereas likely proposals would seem to prioritize the greatest possible monetization. Restrictions on eligibility and access would defeat the purpose of ECL, which presumably is to allow uses of works that would not otherwise be

[5] U.S. Copyright Office, *Orphan Works and Mass Digitization,"* p. 84.

fair. Mass digitization projects undertaken under an ECL regime, especially if those projects were going to be funded through public grant funding agencies, would have to allow for mass consumption of the digitized works. In addition to furthering the objectives of copyright (because it would allow the greatest possible dissemination of knowledge), it is the only way that SAA can conceive an ECL regime being useful. The proposed pilot program falls very far from these requirements, as does every existing ECL program of which we are aware.

The notice of inquiry (NOI) asks whether remote access to a licensed collection should be allowed, or only access through onsite computer terminals. It has been archivists' experience that the "on-premises" restrictions found in 17 U.S.C. § 108(b) and (c) and the related display provision in 17 U.S.C. § 109(c) have proven to be operationally of little value. The same is likely to be true for an ECL license. At a minimum, any license must allow remote access to a designated user community.

C. Security Requirements

The NOI requests responses to the idea that licensees of an ECL license should "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 work." To the best of SAA's knowledge, such measures do not exist. Similar language is found in 17 U.S.C. § 110(2).

Uncertainty about that language and the multiple and complex obligations it may place on users is often cited as one of the reasons why the TEACH Act has been of little practical value in higher education.[6]|

Furthermore, it is SAA's position that unauthorized downstream uses of archival materials are, and should remain, strictly the legal and ethical liability of the user and not the archives.

2. Dispute Resolution Process

The NOI requests public comment on how a dispute resolution process regarding pricing should occur and cites the example of European countries that have implemented an ECL regime, but neglects to mention the most important feature of the ECL practice in those

---

[6] Brandon Butler testified at a recent DMCA hearing that, "I know from talking with university professors and librarians and the Copyright Council and university counsels' offices that 110(2) is generally considered to be difficult to comply with… So, my understanding is that 110(2) is just sort of a dead letter already for mainstream college and universities." Hearing: Library of Congress Sixth Triennial 1201 Rulemaking 05-27-2015, 98-99, http://copyright.gov/1201/2015/hearing-transcripts/1201-Rulemaking-Public-Roundtable-05-27-2015.pdf. See also Christine Fruin, "Struggles and Solutions for Streaming Video in the Online Classroom," *American Journal of Distance Education*, 26:4 (2012): 249-259, http://www.tandfonline.com/doi/abs/10.1080/08923647.2012.728078 (paywall), manuscript freely available at http://ufdc.ufl.edu/l/IR00001365/00001.

countries: That it is the national government, normally through the auspices of the national library, that pays the costs associated with the ECL. In the absence of a national license, U.S. archives are unlikely to want, or even be financially able, to purchase for their user communities a license for digital access to that portion of archival holdings consisting of material that has already been purchased in print form and converted into digital form at the archives' expense.

SAA believes that the payment of a license fee should be the responsibility of the Library of Congress and that the license fee, under which all U.S. archivists would operate, should be set by legislation.

Archivists' experience in dealing with rights owners is that most donors are eager to see their published and unpublished papers digitized and accessible on the web with absolutely no thought of remuneration. Indeed, many manuscript donors generously underwrite the substantial cost of digitization, motivated solely by the desire to make important historical sources globally accessible. ECL falsely presumes that most creators wish to monetize their works. The ECL proposal would give rights owners, who may overvalue the worth of their intellectual property, undue negotiating power. Instead, legislation should make it clear that part of the price of securing the monopoly grant of copyright is the provision of a non-exclusive license at a fee set legislatively and paid by the Library of Congress.

3. Distribution of Royalties

The Copyright Office is right to be concerned with how quickly royalties would be distributed to rights holders because Collective Management Organizations (CMOs) have "a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, [CMOs] have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system."[7]

Another serious issue: What happens to royalties for works whose rights holders cannot be located? It makes little sense to collect license fees for works that a) were never of commercial interest in the first place or b) whose rights holders have lost interest in them. SAA generally opposes ECL because of the nature of the materials in our collections: Often there is little chance of a rights holder ever being identified, let alone showing interest in monetizing her works. The result is that archives would have to commit significant funding to an escrow fund that would, for the most part, only increase in size.

Aside from being an appalling waste of scarce taxpayer and private funds (both in the actual costs of lost funds that bear no fruit and in the lost opportunities from the other uses to which the funds could have been put), the large and growing fund creates extremely

---

[7] Jonathan Band and Brandon Butler, "Some Cautionary Tales About Collective Licensing," *Michigan State International Law Review*, Vol. 21:3, 2013; American University, WCL Research Paper No. 2014-17. Available at SSRN: http://ssrn.com/abstract=2412799).

enticing opportunities for corruption. If an ECL program must be implemented, it should be limited to works that are currently being exploited commercially. No license fees should be collected for works unless the rights owner steps forward and requests them first. And given that this could be a huge economic windfall for the CMOs (if the examples of the Scandinavian countries hold), regulations should ensure that no employee of the Copyright Office can leave for a lucrative position in a CMO. The potential for conflict of interest is too great.

4. Diligent Search

Research has revealed that the cost of the investigation required to identify and locate rights holders of potentially orphan works is inordinately high. What constitutes a "good faith, reasonably diligent" search? The heterogeneous nature of archival holdings means that there is no single strategy to identify or locate rights holders. Similarly the multitude of potential rights holders in any printed book (primary authors; authors of inserts, forewords, and other component parts; rights owners of photographs and other illustrations, etc.) makes the search for all potential rights owners an expensive nightmare. It makes little sense to spend millions trying to identify and locate the few owners of rights who wish to be compensated for non-commercial, educational uses. Instead it should be incumbent on the rights holders of works licensed under an ECL to register their ownership in a copyright registry. A "diligent search" would consist simply of an automated search of the registry. A registry-based ECL would place the administrative costs of an ECL where they belong: On those few who wish to profit from the exploitation of their work.

5. Other Issues

As noted earlier, SAA was disappointed that the solution proposed by the Copyright Office to the mass digitization and orphan works problem is not applicable to the great volume of copyrighted work found in the nation's archives. The first question the Office should ask, therefore, is whether there is an approach that would make all works protected by copyright available. The ECL is not that approach.

Furthermore, the limited temporal nature of the project is a cause for concern. No archives will go through the elaborate and expensive procedures envisioned by the Copyright Office during this pilot implementation if, after five years, their efforts would have to be removed from the web.

It is not acceptable to imply, as the *Orphan Works and Mass Digitization* report does on p. 85, that the reproduction and distribution of unpublished works for research purposes is in conflict with the right of authors to first commercialize their works. It presents an absurd absolutist application of the so-called "right of first publication" that is not sustained by any careful reading of the Act itself or of relevant court cases. One need only note the explicit inclusion of unpublished works in 17. U.S.C. § 107 and the limited distribution of

unpublished material authorized in 17 U.S.C. § 108(b) to realize that scholarly distribution can occur without impinging on any so-called right of first publication. For example, in testimony before the House in 1966, Register of Copyrights Abraham L. Kaminstein noted that the "proposal that libraries, archives, and other repositories be permitted to duplicate manuscripts for the preservation of their own collections and for research use in other archival institutions struck me as reasonable and worthy of adoption."[8] There was no suggestion that research use in other archival institutions (with subsequent copying by researchers) would impinge on any rights of the copyright owner. This interpretation also flies in the face of more than a century and a half of American archival practice and is an attack on the modern world's need for and use of archives.

Archives would welcome a way to simplify legal provision of digital access to material found in their repository if:

- The ECL were mandatory and automatic for all works (in contrast to the reproduction rights organizations in this country);

- License fees were charged only for those works whose rights owners had registered with a CMO; and

- The license fees were paid for by the federal government, as is the case in almost every other country that has an ECL.

Conclusion

SAA believes that the ECL regime proposed by the Copyright Office, if enacted, will have the effect of drastically reducing access to our cultural heritage for all. SAA's principal objections to ECL stem from the onerous burden it places on archives, which is unreasonable in light of the ease with which works can be registered, as well as from the chilling effect the ECL would have on the teaching, learning, and enjoyment of our history.

Sincerely,

Dennis Meissner
President, 2015 – 2016

[8] United States. Congress. House. Committee on the Judiciary. Copyright law revision. Hearings before Subcommittee no. 3 of the Committee on the Judiciary, House of Representatives, Eighty-ninth Congress, first session. (Washington: Government Printing Office, 1966): 1867.