RESPONSE TO THE U.S. COPYRIGHT OFFICE'S NOTICE OF INQUIRY ON A MASS DIGITIZATION PILOT PROGRAM

The Library Copyright Alliance (LCA) consists of three major library associations — the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries. These three associations collectively represent over 350,000 information professionals and more than 100,000 libraries of all kinds throughout the United States. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend more than $4 billion annually acquiring books and other information resources. LCA welcomes the opportunity to respond to the U.S. Copyright Office's Notice of Inquiry on a Mass Digitization Pilot Program.

From the June 9, 2015 notice of inquiry, it is clear that the Copyright Office has already decided to proceed with a pilot program for mass digitization, including the drafting of legislation that would establish an extended collective licensing (ECL) framework to enable the mass digitization. In its notice of inquiry, the Copyright Office requested comment on specific topics "regarding the practical operation of such a system," including examples of "projects that might be appropriate for licensing under the Office's proposed ECL framework;" the form of a dispute resolution process between the collective management organization (CMO) and a prospective licensee; the appropriate timeframe for the distribution of royalties; and actions the CMO should take to diligently search for rights holders for whom royalties may have been collected.

We urge the Copyright Office to reconsider its decision to proceed with this pilot program because the program is both impractical and reflects inappropriate policy choices.

I. The Impracticability of the Pilot Program

The program is impractical in several respects. First, during the Copyright Office roundtables, there was little support for an ECL approach for the mass digitization of books. The three entities with large databases of digitized books—Google, the HathiTrust Digital Library, and the Internet Archive—have not, to our knowledge, indicated that they would be interested in participating in an ECL system. And even if they, or other entities, had some theoretical interest, it is hard to imagine how the pilot program could get off the ground.

The Google Books Settlement (GBS) provides the model for the Copyright Office's pilot program with respect to books.[1] The CMO would play the role of the settlement's Book Rights Registry (BRR), and the CMO's licensees would provide to libraries what tRle Į ʈ c ʈ ҽ l t ˜

Database.[2] Under the Copyright Office's proposal, legislation would replace a class action settlement as the mechanism under which the CMO could authorize the licensees to provide the institutional subscriptions.

The Copyright Office, however, overlooks several features of GBS that

Google books to scan).[7] For example, Google agreed to provide the University of Michigan with a free institutional subscription for up to 60,000 students.[8]

5) Google also agreed to provide free public access terminals to each public library and not-for-profit higher education institution, from which users could access the full text of the books in the Institutional Subscription Database.[9]

Thus, the settlement contemplated that Google would provide public libraries and higher education institutions with a free institutional subscription from a terminal on the library premises; and that it would provide its partner libraries with potentially deep discounts on institutional subscriptions that would allow all their faculty and students remote, simultaneous full text access. In other words, Google would subsidize the institutional subscription market. Google likely hoped to recoup these subsidies with profits from the Preview service, where Google would display advertising across from the responses to the search queries; and the Consumer Purchase of individual books.

Further, Google agreed to pay $34.5 million for the Registry's start-up costs, as well as at least $45 million in license fees to be distributed to rights holders. Accordingly, even if Google Books failed to generate significant revenue, Google was required to pay almost $80 million to the Registry and the rights holders.

By contrast, the institutional subscribers would bear the entire cost of the Copyright Office's proposal. There would be no Google to subsidize libraries' purchase of institutional subscriptions or to pay the CMO's start-up costs. There also would be no

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[7] Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J.

alternative sources of revenue such as Preview advertising or Consumer Purchase. To be sure, some European countries have established ECL-based mass digitization programs for books in their national languages, but these programs are on a much smaller scale than would be required in the United States for English language books.[10] Moreover, these ECL-based projects have required significant government expenditure. It simply is inconceivable that the federal or state governments would come up with the appropriations necessary to support an ECL-based mass digitization program for books.[11]

Further compounding the cost of supporting an ECL system is the expense of participating in the legislative process that would be necessary to establish an ECL. The parties spent three years negotiating the GBS, and the resulting agreement was over 200 pages long, including the appendices and attachments. Google agreed to pay the plaintiffs' attorneys $45 million for their efforts.[12] Google likely spent millions of dollars on the fees of its lawyers. Although the Copyright Office would assemble the first draft of ECL legislation, using GBS as a template, many entities--including publishers, libraries, technology companies, and authors' groups--would feel compelled to participate in the legislative process because of its potential precedential value, even if

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[10] If an ECL system similar to Norway's were implemented in the United States for books published in the United States, the annual license fees would exceed $6 billion. Peter Hirtle, *Norway, Extended Collective Licensing, and Orphan Works*, LibraryLaw

they did not anticipate that the ECL ultimately would succeed. The discussions would be contentious and protracted, and easily could last more than five years—the duration the Copyright Office recommends for the ECL regime before it sunsets.

Finally, the Copyright Office does not appear to appreciate the enormous complexity that would be involved in the distribution of royalties. It states that the "CMO enormous

Under the Copyright Office proposal, full-text access to literary works would be limited to commercially unavailable works.[24] As a practical matter, this means books for which there no longer is a market and from which the rights holders no longer derive any royalties. Mass digitization presents the technological means for creating a new market for these books, once Congress amends the Copyright Act to eliminate the barrier posed by the cost of clearing the rights in these books. If Congress established a system that enabled third parties to profit from this new market, for example by selling ebooks, Congress as a matter of equity could require that the rights holders receive some compensation from these sales. This is so even though the new market does not harm the rights holders by diminishing the sales in any existing market.

However, the equity argument for rights holder compensation is much weaker when Congress dedicates the new market to nonprofit educational or research uses. The rights holders would have already exhausted the intended markets for the books. Any additional compensation they would receive from the new market would be a windfall profit to them at public expense.

Moreover, given the orphan works issue identified above, as well as CMOs' long history of corruption, mismanagement, confiscation of funds, and lack of transparency,[25] there is a high probability that much of the revenue collected would not actually reach the rights holders. To its credit, the Copyright Office recognized this concern when it

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[24] The Mass Digitization Reports suggests that the class of eligible works could be limited to those published before a certain date as a way of avoiding resolution of questions about works' commercial availability. *See* Mass Digitization Report at 87.
[25] *See* Jonathan Band and Brandon Butler, *Some Cautionary Tales About Collective Licensing*, 21 Mich. St. Int't L. Rev. 687 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

recommended that a CMO administering an ECL should be required by regulation "to demonstrate its adherence to transparency, accounting, and good-governance standards."[26] But regulation is effective only if it is enforced by a governmental body, which in turn requires significant resources. Further, regulation will not reduce the cost of identifying and locating the copyright owners of orphan works.

Accordingly, sensible public policy would favor an exception permitting free access to digitized, commercially unavailable books for nonprofit educational and research purposes. Congress has adopted other specific exceptions for nonprofit uses as it has sought to achieve a balance in Title 17 among the interests of the diverse stakeholders in the copyright system. *See, e.g.*, 17 U.S.C. §§ 108, 109(b)(2), 110(1), 110(2), 110(3), 110(4), 110(6), 110(8), 110(9), 112(b), 112(c), 112(d), 121, and 1201(d).